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Contract and Choice

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Contract and Choice

Peter B. Rutledge* and Christopher R. Drahozal**

Abstract: This Article 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 sort 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 proposed Arbitration Fairness Act pending in Congress as well as the work of the newly-minted and controversial Consumer Financial Protection Bureau (“CFPB”). Our findings suggest that the Arbitration Fairness Act may be based on faulty empirical premises and that the blanket prohibition contained in the Act may be overbroad. Our findings also provide a model that the CFPB might follow in conducting its statutorily-required study of the use of arbitration clauses in consumer financial services contracts.

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.1

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 the

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**John M. Rounds Professor of Law, University of Kansas School of Law. Professor Drahozal is serving as a Special Advisor to the Consumer Financial Protection Bureau on its study of arbitration clauses in consumer financial services contracts. This Article was written by Professor Drahozal in his personal capacity. The views in this Article are his own, not those of the Consumer Financial Protection Bureau or the United States. We appreciate helpful comments from workshop participants at Vanderbilt University Law School and from participants at the AALS Works-In-Progress Conference at Creighton University School of Law. Thanks also to Annie Booton for her excellent research assistance.

1 See infra text accompanying notes 2-18.
savings clause to 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. Some courts find sufficient procedural unconscionability from the fact that an arbitration clause is in a standard form consumer contract, without regard to actual market conditions; others require consideration of whether the consumer had “meaningful choice” when entering into the contract.

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. 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” or “incentive” formula; other arbitration clauses lack such features. California’s rule was a blunt tool, amounting to a per se invalidation of class waivers in arbitration clauses; by contrast, other states employ more nuanced unconscionability tests to class waivers. Other features of arbitration clauses such as discovery and remedy limits also have been subject to attack in litigation and academic criticism. Indeed, before *Concepcion*
even hit the United States reports, several lower courts invalidated arbitration clauses in consumer contracts, assuring continued battles over the decision’s sweep.\(^{10}\)

In the legislative sphere, Congress has considered a variety of bills that, to various degrees, would invalidate predispute arbitration agreements in consumer contracts.\(^{11}\) As with 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.\(^{12}\) 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 residential mortgage loans.\(^{13}\) Previously, Congress enacted a little-known law that prohibited the use of arbitration clauses in consumer credit agreements with members of the armed forces.\(^{14}\) 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.\(^{15}\)

Finally, in the regulatory sphere, interested parties eagerly await proposed rules from the newly created Consumer Financial Protection Bureau (“CFPB”). The legislation creating the CFPB vested it with authority to issue rules regulating the use of arbitration clauses in consumer financial services contracts, including credit card agreements.\(^{16}\) Before the CFPB can regulate, however, the CFPB must study and report to Congress on the use of predispute arbitration clauses in such contracts.\(^{17}\) The study has not yet been done, and it is too early to know what the rules will look like, although the CFPB has requested and received public comment “to help identify the appropriate scope of the Study, as well as appropriate methods and sources of data for conducting the Study.”\(^{18}\)


\(^{17}\) Id. § 5518(a).

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 provision.19 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 that all (or most) contracts for a particular consumer good contain that provision. For example, in one case recently considered by 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.20 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.21 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.22 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, including class arbitration waivers, remedy

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20 Pendergast v. Sprint Solutions, Inc., 592 F.3d 1119, 1135 (11th Cir. 2010).
21 The Florida Supreme Court recently declined to answer the question certified to it by the United States Court of Appeals for the Eleventh Circuit on the ground that the Supreme Court’s decision in Concepcion obviated the certification and declined jurisdiction. See Pendergast v. Sprint Nextel Corp., 2012 WL 2948594 (Fla. July 17, 2012). The Eleventh Circuit recently held that the arbitration clause was enforceable, despite the class waiver, under Concepcion. See Pendergast v. Sprint Nextel, 691 F.3d 1224 (11th Cir. 2012). In the interest of complete disclosure, it should be noted here that one of the authors, Professor Rutledge, filed in the Florida Supreme Court a brief amicus curiae in the Pendergast matter on behalf of an industry association.
22 Lisa B. Bingham, Designing Justice: Legal Institutions and Other Systems for Managing Conflict, 24 OHO ST. J. ON 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).
limitations, among others. 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. 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.

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 forty-eight percent of the outstanding credit card loans in the industry are held by firms using arbitration clauses (down from ninety-five percent as of December 31, 2009, as a result of a civil settlement under which several banks agreed to suspend their use of such clauses). Many consumers who wish to avoid arbitration clauses in their credit card agreements likely have 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 the Concepcion decision. (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 ninety-five percent of arbitration clauses in our sample employ class waivers; when measured not by firms but instead by loan volume, the figure jumps to over ninety-nine percent.

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

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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 provide a possible model for the CFPB to use as it conducts its broader statutorily-mandated study of the use of arbitration clauses in consumer financial services contracts.

This Article 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 1980s and 1990s. One line of decisions stretched the Federal Arbitration Act into state court proceedings and limited the ability of states to refuse enforcement of arbitration clauses under their consumer protection laws. The Court held in Southland Corp. v. Keating that section 2 of the Federal Arbitration Act (setting forth a substantive standard governing the enforceability of domestic arbitration agreements) applied in state court.24 It subsequently held in Allied-Bruce Terminix Cos. v. 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 narrower conception of Congress’s commerce power that prevailed at

the time of the FAA’s enactment in 1925. A second line of decisions interred the nonarbitrability doctrine and required Congress to speak clearly if it wished to declare a class of claims nonarbitrable. Decisions such as *Shearson/American Express v. McMahon* and *Rodrigues de Quijas v. Shearson/American Express* accomplished this result in the securities context, and subsequent decisions like *Gilmer v. Interstate/Johnson Lane Corp.* set forth a framework that governed federal statutory claims generally. These lines of decisions made possible the widespread use of arbitration clauses in consumer contracts and spawned several eras of academic literature on the topic.

Early scholarship on arbitration clauses in consumer contracts was decidedly not empirical. For example, one early critic could confidently declare that

\[\text{by requiring customers and employees, through standardized contracts across entire markets, to agree in advance to submit all potential violations of common-law and statutory rights to arbitration—where defense costs and judgments will on the whole be less than under a regime of judicial enforcement—corporate defendants have begun to deregulate themselves.}\]

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 they may 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).

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29 To state the obvious, our focus here is on domestic practice in the United States. As we have each noted elsewhere, practices in Europe and the rest of the world are quite different. *See Rutledge & Howard, supra* note 11, at 30; Christopher R. Drahozal & Raymond J. Friel, *A Comparative View of Consumer Arbitration*, 71 ARB. 131 (2005).
31 Schwartz, *supra* note 30, 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 David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012).
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 contacted companies and requested copies of their arbitration agreements. Amy Schmitz’s research into the credit card and cellular telephone industries made an important contribution in this regard. 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 to this literature was the path-breaking 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. This permitted some more robust, albeit tentative, conclusions such as their finding that 35.4% 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 samples, 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.


33 Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 *Law & Contemp. Probs.* 55, 62, 64 (2004) (finding arbitration agreements in 69.2% of consumer contracts in the financial services industry, although the sample size was relatively small).

34 *Id.* at 62.
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. 35 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. 36 Eisenberg and his co-authors concluded, in relevant part, that over seventy-five percent of financial services and telecommunications companies utilized arbitration clauses in their consumer agreements. 37 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 path-breaking, Eisenberg et al. ’s research is not foolproof. Elsewhere, one of us has explained the limited explanatory value of some of their findings. 38 Moreover, 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 et al. draw their data from contracts attached to SEC filings, they necessarily miss 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 seeks to avoid the shortcomings in Eisenberg et al.’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


37 Eisenberg et al., Arbitration’s Summer Soldiers, supra note 36.

38 Christopher R. Drahozal & Stephen J. Ware, Why Do Businesses Use (or Not Use) Arbitration Clauses?, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010).
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.39 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 Accountability, Responsibility, 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,40 which, in turn, was to “establish and maintain on its publicly available Internet site a central repository of the consumer credit card agreements received from creditors.”41 Our sample consists of 293 credit card agreements submitted by issuers to the Federal Reserve as of December 31, 2009 and 2010, and made available via the Internet.42 We

39 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 59–64, is an “intra-contract” study because it looks at the use of arbitration to resolve different types of disputes within the same contract). See Drahozal & Wittrock, Flight from Arbitration, supra note 35.
41 Id. (codified at 15 U.S.C. § 1632(d)(3)). At the time we collected the data, the credit card agreements were available on a web page maintained by the Federal Reserve. 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. Credit Card Agreement Database, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/credit-cards/agreements/ (last visited Feb. 11, 2012).
42 The starting point for the sample is the sample used in Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 22, at 551-52 (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 also excluded five issuers for which credit card agreements were no longer 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. The one exception is HSBC, which settled an antitrust suit by agreeing not to use arbitration clauses in its credit card agreements for three-and-one-half years. See infra text accompanying notes 53–54. The standard HSBC credit card agreements 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.
collected the arbitration clauses, if any, from the credit card agreements and classified the provisions of the clauses as described throughout this part.\footnote{Issuers were only required to update their filing if they amended the credit card agreement during the quarter. 12 C.F.R. § 226.53(c)(3) (2011). Accordingly, when the most recent filing available was for December 31, 2009, we also used that filing for December 31, 2010.} 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.\footnote{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 (2006), available at http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2006/DG192006April10.pdf (describing the “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.} 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 forty-seven issuers that included arbitration clauses in their credit card agreements as of that date.\footnote{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.} When we examine the change in the terms of arbitration clauses between 2009 and 2010, we limit the sample to the thirty-nine 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, included an arbitration clause. Most often, commentators (accurately) stated that most credit card agreements included arbitration clauses.\footnote{See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(3) (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 (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”); Yuki Noguchi, Credit Card Arbitration Trumps Lawsuits, Court Says, NPR.COM (Jan. 11, 2012), http://www.npr.org/2012/01/11/144990644/credit-card-arbitration-trumps-lawsuits-court-says (“To get a credit card, a consumer generally must sign a detailed agreement.”)} Less often
(and less accurately), commentators sometimes stated that most credit card issuers included arbitration clauses in their credit card agreements. The limited empirical evidence in support of those statements focused on the very largest credit card issuers,\textsuperscript{48} 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 Part, we provide a broader view of trends in the use of arbitration clauses in credit card agreements.\textsuperscript{49} 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 extent to which credit card agreements permit consumers to opt out of the arbitration clause. Our data, although the most recent data available at the time of this writing, predate the Supreme Court's 2011 decision in Concepcion, so that we do not 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.\textsuperscript{50} A minority of very large issuers used arbitration clauses; the majority of much smaller issuers did not.

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\textsuperscript{48} E.g., Eisenberg et al., Arbitration's Summer Soldiers, supra note 36, at 881–82; PUBLIC CITIZEN, supra note 46, at 5–9.

\textsuperscript{49} Prior to enactment of the Credit CARD Act of 2009, see supra text accompanying notes 40–41, credit card agreements were difficult for researchers to obtain. See, e.g., Schmitz, Legislating in the Light, supra note 32, at 145 ("[I]t was notably difficult to obtain copies of consumer credit contracts in order to analyze their inclusion of arbitration clauses. . . . [Credit card issuers] rarely include or make available their full form contract terms."); Demaine & Hensler, supra note 33, at 60 ("[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 46, 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.").

\textsuperscript{50} Based on the sample used in Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 22, at 551–52, 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
<p>| Table 1. Use of Arbitration Clauses in Credit Card Agreements (2009 &amp; 2010) |
|--------------------------------------------------|------------------|------------------|</p>
<table>
<thead>
<tr>
<th>Contracts as of 12/31/09</th>
<th>Contracts as of 12/31/10</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Arbitration Clause</td>
<td>(82.6%)</td>
</tr>
<tr>
<td>242</td>
<td>4.9%</td>
</tr>
<tr>
<td>(250)</td>
<td>(85.3%)</td>
</tr>
<tr>
<td>52.0%</td>
<td></td>
</tr>
<tr>
<td>Arbitration Clause</td>
<td>(17.4%)</td>
</tr>
<tr>
<td>51</td>
<td>95.1%</td>
</tr>
<tr>
<td>(43)</td>
<td>(14.7%)</td>
</tr>
<tr>
<td>48.0%</td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>(100.0%)</td>
</tr>
<tr>
<td>293</td>
<td>100.0%</td>
</tr>
<tr>
<td>(293)</td>
<td>(100.0%)</td>
</tr>
<tr>
<td>100.0%</td>
<td></td>
</tr>
</tbody>
</table>

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 (NAF) settled a consumer fraud lawsuit with the Minnesota Attorney General by agreeing to stop administering new consumer arbitration cases. Prior to the settlement, the NAF had the largest caseload of consumer arbitrations (almost all debt collection arbitrations) in the United States. 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. Bank of America, Capital One, Chase, and HSBC were the settling defendants; other large issuers—Citibank and Discover 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.


Bank (with American Express and Wells Fargo alleged to be co-conspirators but not named as defendants)—remained in the case and continue to use arbitration clauses.\(^54\)

Table 1 illustrates the effect of those two events on the use of arbitration clauses in credit card agreements.\(^55\) The percentage of issuers using arbitration clauses declined from 17.4% on December 31, 2009, to 15.0% on December 31, 2010.\(^56\) More dramatically, the percentage of credit card loans subject to arbitration clauses declined from 95.1% to only 48.0%.\(^57\) In the aggregate, eight fewer issuers used arbitration clauses at the end of 2010 than at the end of 2009.


\(^{55}\) 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, 11:29 PM), 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; Ravi Panchal, BofA Reaches Settlement in Cardholders Arbitration Case, SNL BANK WEEKLY SOUTHERN EDITION, Dec. 21, 2009; Pankti Mehta, Capital One Agrees to Drop Arbitration Clause from Credit Card Agreements, SNL BANK WEEKLY SOUTHERN EDITION, Dec. 28, 2009; HSBC Settles Suit over Arbitration, BOSTON GLOBE, Jan. 5, 2010, at 10.

\(^{56}\) The sample used in preparing Table 1 does not include 39 issuers for which no agreements as of December 31, 2009 were available, and two issuers for which such agreements were not available by our cut-off date for collecting that data. See Drahozal & Rutledge, Arbitration Clause in Credit Card Agreements, supra note 22, at 552 n.76. 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.

\(^{57}\) 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 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 underestimate 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?scc=4XK1WAC1215EZZZZZZWW&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.
Ten issuers switched away from arbitration (including the four settling issuers), while two switched to arbitration.\textsuperscript{58}

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.\textsuperscript{59} 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.”\textsuperscript{60}

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.\textsuperscript{61} In credit card agreements, carve-outs are somewhat less common.\textsuperscript{62}

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, thirty-two (of forty-seven, or 68.1\%) excluded small claims from arbitration. Most of the agreements that did not exclude small claims were from small issuers (the fifteen issuers not including a small claims carve-out comprised only 1.6\% of credit card loans outstanding, while the thirty-two 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 (twenty-one of forty-seven, 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 (seven of forty-seven, or 14.9\% of issuers; 31.5\% of credit card loans outstanding) limited

\textsuperscript{58} 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 an arbitration clause 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 included arbitration clauses.

\textsuperscript{59} See, e.g., Drahozal & Wittrock, Flight from Arbitration, supra note 35, at 113–14.

\textsuperscript{60} Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000); see Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 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. Ct. 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 Court, 116 Cal. Rptr. 2d 671, 677–78 (Cal. Ct. 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); O’Hara O’Connor et al., supra note 35.

\textsuperscript{61} E.g., Drahozal & Wittrock, Flight from Arbitration, supra note 35, at 113–14.

\textsuperscript{62} As an extreme example, one (but only one) small issuer in our sample (of forty-seven, 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.
the exclusion to consumer claims. The remaining four carve-outs (8.5% of issuers; less than 1.5% of credit card loans outstanding) used dollar cut-offs (ranging from $5,000 to $25,000) and usually applied to both consumer and issuer claims.

Table 2. Small Claims Carve-Outs (2010)

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

Relatedly, five issuers (of forty-seven, 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 forty-seven, 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. 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 forty-seven, 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 forty-seven, or 25.5%; 11.2% of credit card loans outstanding) excluded repossession and other self-help remedies, while six issuers (of forty-seven, or 12.8%; 3.6% of credit card loans outstanding) excluded claims in bankruptcy.

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63 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. Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 22, at 545 n.48.

64 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.
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. As can be seen in Table 3, most arbitration agreements in our sample (thirty-five of forty-seven, or 74.5% of issuers; 76.3% of credit card loans outstanding) do not include an opt-out provision. For those that do, the amount of time in which the cardholder can exercise the right to opt out varies from thirty days (the most common—seven of forty-seven, or 14.9% of issuers; 17.4% of credit card loans outstanding) to sixty days (four of forty-seven, or 8.5% of issuers; 6.2% of credit card loans outstanding).

<table>
<thead>
<tr>
<th>Right to Opt Out — within 30 days</th>
<th>Number of Clauses</th>
<th>% of credit card loans outstanding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to Opt Out — within 45 days</td>
<td>1</td>
<td>0.2%</td>
</tr>
<tr>
<td>Right to Opt Out — within 60 days</td>
<td>4</td>
<td>6.2%</td>
</tr>
<tr>
<td>No Right to Opt Out</td>
<td>35</td>
<td>76.3%</td>
</tr>
</tbody>
</table>

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65 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”). But see. Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1106 (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).

66 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 cards.

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,\(^{67}\) discovery tends to be more limited;\(^ {68}\) and courts do not review awards on the merits but rather only on the limited grounds set out in the governing arbitration statute.\(^ {69}\)

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 (forty-five of forty-seven, 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.\(^ {70}\) The majority of the clauses also notified cardholders that both the availability of discovery (twenty-eight of forty-seven, or 60.0%; 41.6% of credit card loans outstanding) and the right to appeal (twenty-nine of forty-seven, or 61.7%; 53.5% of credit card loans outstanding) were more limited in arbitration than in court. (An additional five clauses (of forty-seven, 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, forty-three clauses (of forty-seven, 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.

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\(^{68}\) See, e.g., 3 MACNEIL, supra note 3, § 34.1, at 34:2 (“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).


\(^{70}\) One other clause (of forty-seven, or 2.1%; 0.1% of credit card loans outstanding) informed parties generally that they were waiving their right to litigate in court, without being more specific.
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. 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 as such by courts under the FAA.

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. 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 its scope, 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 the Court deferred 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. Following Volt, numerous lower courts construed general choice-of-law clauses as incorporating state arbitration law. Given how frequently parties include choice-of-law clauses in their contracts, the result was to restrict the scope of FAA preemption substantially. 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 “meaning ‘New York decisional law, including that State’s allocation of power between courts and arbitrators, notwithstanding otherwise-applicable federal law.’” 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.’”

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 forty-seven, 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

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71 Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 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.”).
73 489 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. at 468.
arbitration proceeding. By contrast, forty-three issuers (of forty-seven, 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.\footnote{77}

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>
<thead>
<tr>
<th>Table 4. Governing Arbitration Law (2010)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Provision</td>
</tr>
<tr>
<td>FAA</td>
</tr>
<tr>
<td>FAA and not state law</td>
</tr>
<tr>
<td>FAA and state law if applicable</td>
</tr>
<tr>
<td>FAA and state law</td>
</tr>
<tr>
<td>State law</td>
</tr>
<tr>
<td>No provision</td>
</tr>
</tbody>
</table>

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.\footnote{78}

Table 5 lists the arbitration providers specified in the arbitration clauses in our sample as of December 31, 2009 and 2010.\footnote{79} The AAA is named as the exclusive provider in sixteen (of

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\footnote{77} The other three issuers, also very small, had no provision on the applicable arbitration law in their arbitration clause.


\footnote{79} In reporting the arbitration providers specified in credit card arbitration agreements as of December 31, 2009, Drahozal and Rutledge 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. Drahozal & Rutledge, Contract and Procedure, supra note 22, at 1126 Tbl. 3. Even so, the results are broadly consistent with those reported here using a narrower sample.
thirty-nine, 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 sixteen (of thirty-nine, or 41.0%; 82.3% of credit card loans outstanding). Two clauses (of thirty-nine, or 5.1%; 0.1% of credit card loans outstanding) name JAMS as the exclusive provider, and another seventeen (of thirty-nine, or 43.6%; 82.3% of credit card loans outstanding) list it as one of two or three permissible providers. Two (of thirty-nine, 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. One clause (of thirty-nine, or 2.6%; 0.0% of credit card loans outstanding) gives the parties a choice between JAMS and National Arbitration and Mediation, a less well known provider, and another clause (one of thirty-nine, 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.”

The data illustrates how credit card issuers responded to the National Arbitration Forum’s ceasing all administration of new consumer arbitrations in July 2009. 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. By December 31, 2010, all of those issuers (with

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 (fifteen clauses, 81.7% of credit card loans outstanding); AAA, NAF, JAMS (two clauses; 0.5%); AAA (twenty-one clauses, 16.3%); AAA or NAF (one clause, 0.0%); JAMS (two clauses, 0.1%); JAMS or NAF (one clause, 0.0%); JAMS or NAMS (1 clause, 0.0%); NAF (three clauses, 0.1%); a national organization with significant experience in consumer and financial disputes (one clause, 1.2%).

Two small issuers incorporated the AAA rules into their arbitration clause but did not specify 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.

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 & Assoc., 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 v. Tijerina, 2010 U.S. App. LEXIS 17872, at **4–5 (5th Cir. Aug. 25, 2010) (unpublished opinion) (holding that because designation of NAF as the sole arbitration forum “is an integral part of the agreement to arbitrate,” “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).


See supra text accompanying notes 51–52.

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 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.
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 another provider continues to be 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 the issuer’s arbitration clauses exceed the benefits, or that the provision for some other reason is “sticky.”

<table>
<thead>
<tr>
<th>Provider(s)</th>
<th>Contracts as of 12/31/09</th>
<th>Contracts as of 12/31/10</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Clauses</td>
<td>% of credit card loans outstanding</td>
</tr>
<tr>
<td>AAA or JAMS</td>
<td>8 (20.5%)</td>
<td>30.6%</td>
</tr>
<tr>
<td>AAA NAF JAMS</td>
<td>3 (7.7%)</td>
<td>0.5%</td>
</tr>
<tr>
<td>AAA</td>
<td>15 (38.5%)</td>
<td>20.3%</td>
</tr>
<tr>
<td>AAA or NAF</td>
<td>6 (15.4%)</td>
<td>47.6%</td>
</tr>
<tr>
<td>JAMS</td>
<td>1 (2.6%)</td>
<td>0.1%</td>
</tr>
<tr>
<td>JAMS or NAF</td>
<td>1 (2.6%)</td>
<td>0.0%</td>
</tr>
<tr>
<td>JAMS or NAMS*</td>
<td>1 (2.6%)</td>
<td>0.0%</td>
</tr>
<tr>
<td>NAF</td>
<td>4 (10.3%)</td>
<td>0.8%</td>
</tr>
<tr>
<td>Nat’l org. w/ significant experience in consumer &amp; financial disputes</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

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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. 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. And, as the discussion that follows suggests, the substantial majority of the clauses we studied appear to comply with those standards.

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. The so-called “delegation clause” in Rent-A-Center provided that:

[T]he 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.

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

89 South Carolina Federal Credit Union, Credit Card Agreement and Disclosures ¶ 34 (Sept. 30, 2010) (copy on file with authors).
90 See American Arbitration Association, Rules Updates, Consumer Arbitrations: Notice to Consumers and Businesses 8 (2007) (copy on file with author); JAMS, Minimum Standards of Procedural Fairness, supra note 88, 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.”).
91 Compare Tables 7–9 infra with Drahozal & Zyontz, supra note 78, at 320–21.
92 130 S. Ct. 2772, 2779 (2010).
93 Id. at 2775.
94 Id. at 2778.
95 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”).
must be directed specifically to that clause, not the contract as a whole or the arbitration clause as a whole. 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. So defined, as of December 31, 2010, twenty (of thirty-nine, or 51.3%) clauses included a delegation clause; and 52.6% of credit card loans outstanding in the sample were subject to a delegation clause.

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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 provision of the arbitration provision is unconscionable"); see also Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 480–81 (Cal. Ct. 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 Cal., Inc., 67 Cal. Rptr. 3d 120, 125 (Cal. Ct. 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.").

The one exception is for the question 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 . . ., we address only the former.").

Because none of the delegation clauses in our sample is 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, 652 F.3d 982, 988 (9th Cir. 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).

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 22, 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 (four of forty-seven (8.5%) clauses; 29.1% of credit card loans outstanding); class exception (fifteen of forty-seven (31.9%) clauses; 12.8% of credit card loans outstanding); delegation (twenty-four of forty-seven (51.1%) clauses; 52.7% of credit card loans outstanding); and none (four of forty-seven (8.5%) clauses, 5.4% of credit card loans outstanding).
Table 6. Delegation Clauses (2009 & 2010)

<table>
<thead>
<tr>
<th>Type of Clause</th>
<th>Contracts as of 12/31/09</th>
<th>Contracts as of 12/31/10</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Clauses</td>
<td>% of credit card loans outstanding</td>
</tr>
<tr>
<td>Anti-Delegation</td>
<td>3 (7.7%)</td>
<td>12.5%</td>
</tr>
<tr>
<td>Class Exception</td>
<td>11 (38.2%)</td>
<td>26.5%</td>
</tr>
<tr>
<td>Delegation</td>
<td>22 (56.4%)</td>
<td>60.8%</td>
</tr>
<tr>
<td>None</td>
<td>3 (7.7%)</td>
<td>0.2%</td>
</tr>
</tbody>
</table>

Although not as common as delegation clauses, twelve (of thirty-nine, 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 SA v. AnimalFeeds Int'l*100) AAA arbitrators almost unanimously construed arbitration clauses as permitting class arbitration, even though almost no clauses expressly permit arbitration on a class basis.101

Four issuers (out of thirty-nine, 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 give 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*,102 these clauses effectively include delegation clauses, although not by express language.103

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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100 130 S. Ct. 1758 (2010).
101 Drahozal & Rutledge, *Contract and Procedure*, supra note 22, at 1141, 1157-58 (noting that AAA arbitrators continue to construe arbitration clauses to permit class arbitration, although at a lower rate following *Stolt-Nielsen*).
102 See, e.g., Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 10–12 (1st Cir. 2009); Fallo v. High-Tech Institute, 559 F.3d 874, 877–78 (8th Cir. 2009); 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 Sec. 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 § 4-14 cmt. e & reporter’s note e (Tentative Draft No. 2, 2012).*
103 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. No issuers in our sample added delegation clauses to their arbitration clauses after Rent-A-Center.

Again, these are early results. The Supreme Court issued the Rent-A-Center decision on June 21, 2010, just six months prior to the 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, it may be 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. 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.” The Supreme Court likewise referred to the provision in its opinion, characterizing the district court’s decision 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.”

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),

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104 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.

105 See supra text accompanying notes 51–52.


108 Concepcion, 131 S. Ct. at 1753.
the arbitrator shall award you at least $5,100 (plus any fees and costs to which you are entitled).  109
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.  110  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.  111  This section examines the use of some of those provisions in credit card agreements.  112  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 several types of provisions identified by courts and commentators as unfair or at least potentially unfair: clauses resulting in biased decision makers; class 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).  113

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110  We discuss the legal significance of this type of provision infra Part III.
111  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 (2005) (listing types of provisions held unconscionable by California courts); Sternlight, Panacea or Corporate Tool?, supra note 30, at 638 (“[T]he 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 to appeal.”).  But see Drahozal, supra note 78, at 756-64 (arguing that “unfair” provisions might make consumers and employees better off, or at least are not unambiguously unfair).
112  Some provisions alleged to be unfair (e.g., delegation clauses and exclusions from arbitration) have already been discussed.  See supra text accompanying notes 59-64, 92–106. Others (e.g., provisions allocating arbitration costs and providing for arbitral appeals panels) are addressed in subsequent sections.  See infra text accompanying notes 120–135.
113  See infra text accompanying notes 131–141.
The only type of provision in this list of “unfair” provisions that is common in credit card agreements is a class arbitration waiver, the provision at issue in Concepcion. Of the arbitration clauses in the sample, forty-four of forty-seven clauses (or 93.6%) (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, the vast majority of arbitration clauses in the sample would preclude cardholders from obtaining class relief.

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 forty-seven, 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—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:

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Table 7. Selected “Unfair” Provisions (2010)

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

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114 See supra text accompanying note 70.
Twenty-five of the clauses (of forty-seven, or 53.2%; 44.4% of credit card loans outstanding) contained no provision requiring particular qualifications for arbitrators. Of the twenty-two clauses that did set out some sort of required qualifications: one (of forty-seven, or 2.1%; 0.0% of credit card loans outstanding) required expertise in the subject matter of the dispute; one (of forty-seven, 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 twenty (of forty-seven, 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 (one clause provided that “registered arbitrator” was an option as well).

Although the substantial majority of arbitration clauses included class arbitration waivers, two (of forty-seven, or 4.3%; 0.1% of credit card loans outstanding) contained no provision on the issue and one (of forty-seven, 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 (twenty-one of forty-seven, 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.115

Two clauses (of forty-seven, 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.116

Ten clauses (of forty-seven, 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 forty-seven, 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.117 On the other hand, given that arbitration clauses have been criticized as denying consumers remedies that would be available to them in court,118 these provisions also might be seen as protecting 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 forty-seven, 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.

115 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.”).


118 E.g., Carrington & Haagen, supra note 30, at 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.”).
• Six clauses (of forty-seven, 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. Typically, when a party files a claim in arbitration, it must pay at least some of the administrative fees upfront and put down a deposit to cover expected arbitrator’s fees. 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. For all claims, providers may waive their fees in the event of hardship. Nonetheless, a number of court decisions have invalidated arbitration agreements on the ground that they imposed excessive costs on consumers.

Almost all of the arbitration clauses in our sample selected either the AAA or JAMS as the arbitration provider. 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 clauses in our sample address arbitration costs to some degree, but the details of the provisions vary, as can be seen in Table 8.

Only one clause in the sample (of forty-seven, 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 (one of forty-seven, 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. 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

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119 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 for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees, 5 J. AM. ARB. 251, 285 (2006).
121 Id. at 740–42; see, e.g., JAMS, Minimum Standards of Procedural Fairness, supra note 88, ¶ 7.
122 Drahozal, supra note 121, at 752–57.
123 See supra text accompanying notes 79–80.
124 Five clauses (of forty-seven, or 10.6%; 0.1% of credit card loans outstanding) contained no provision on arbitration costs, and one clause (of forty-seven, or 2.1%; 5.7% of credit card loans outstanding) stated that costs were addressed in the provider rules.
125 In addition, every credit card agreement in the sample but one (forty-six of forty-seven, or 97.9%; 98.8% of credit card loans outstanding) permitted the issuer to recover its costs, typically including attorneys’ fees, for 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.
127 Four clauses in the sample (of forty-seven, or 8.5%; 38.7% of credit card loans outstanding) provided for the issuer to pay for one hearing day, while one clause (of forty-seven, or 2.1%; 0.0% of credit card loans outstanding) provided for the issuer to pay for two hearing days.
less because such provisions would impose higher costs on consumers than provided under the AAA’s consumer arbitration fee structure.\footnote{Drahozal & Zyontz, supra note 78, at 313.}

A handful of clauses capped the fees for which the cardholder is responsible—at a fixed dollar amount (three of forty-seven, or 6.4% of clauses; 1.4% of credit card loans outstanding); at the amount of court filing fees (one of forty-seven, or 2.1% of clauses; 13.4% of credit card loans outstanding); or for small claims (two of forty-seven, 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 forty-seven, 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 (eight of forty-seven, or 17.0%; 60.2% of credit card loans outstanding); would consider advancing the fees in good faith (four of forty-seven, or 8.5%; 13.5% of credit card loans outstanding); or simply would consider advancing the fees (ten of forty-seven, or 21.3%; 4.1% of credit card loans outstanding). Finally, just under half the clauses (twenty of forty-seven, 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 (three of forty-seven, or 6.4% of clauses; 38.8% of credit card loans outstanding).

<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>Type of Provision</strong></td>
</tr>
<tr>
<td><strong>CAP ON ARBITRATION FEES?</strong></td>
</tr>
<tr>
<td>Issuer pays fees</td>
</tr>
<tr>
<td>Issuer pays fees on good faith request</td>
</tr>
<tr>
<td>Capped at court fees</td>
</tr>
<tr>
<td>Capped at $50/$125</td>
</tr>
<tr>
<td>Capped for small claims</td>
</tr>
<tr>
<td>No provision</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
</tr>
</tbody>
</table>

| **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\footnote{One other clause provided that the issuer would pay either if necessary for the arbitration clause to be enforced or if the cardholder made a good faith request. The latter provision is the basis for its classification in Table 8.} | 1 (2.1%) | 1.8% |
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.\footnote{Drahozal & Zyontz, supra note 78, at 313.}

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 forty-seven, or 34.0%; 57.9% of credit card loans outstanding) provided expressly for a single arbitrator, and twenty more (of forty-seven, 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 forty-seven, 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 forty-seven, 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)

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

7. Appeals and court review

As noted above, a common characteristic of arbitration is that court review of awards is limited. However, parties can set up an arbitral appeals process if they wish, appointing a panel of arbitrators to review the decision of the initial decision maker. 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).

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) specified an arbitral appeals panel.

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131 See supra text accompanying note 69.
132 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/.
   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.
loans outstanding) did not set up an arbitral appeals process (although, of course, the award remains subject to review under section 10 of the FAA). 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, apparently 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 forty-seven 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 forty-seven, 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 forty-seven, 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 above134 because consumers are relatively less likely than businesses to be subject to such 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 Supreme Court held that parties cannot expand the scope of federal court review by contract, refusing to enforce a provision in the arbitration agreement that stated: “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.”135

<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Upon request</td>
</tr>
<tr>
<td>---------------------</td>
</tr>
<tr>
<td>9</td>
</tr>
<tr>
<td>Claim over $50,000</td>
</tr>
<tr>
<td>Claim over $100,000</td>
</tr>
<tr>
<td>Award over $100,000</td>
</tr>
<tr>
<td>Award over $200,000</td>
</tr>
<tr>
<td>If right to appeal under FAA</td>
</tr>
<tr>
<td>No provision</td>
</tr>
</tbody>
</table>

134 See supra text accompanying note 134.
One clause in the sample might run afoul of *Hall Street*. The USAA Bank Credit Card Arbitration Addendum (one of forty-seven, 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.”  

The standard of review echoes the “manifest disregard of the law” vacatur ground, which is of uncertain validity under the FAA. 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. 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 arbitrators fail to comply with those provisions (i.e., make an error of law or decide without substantial evidence support). By contrast, some federal courts have rejected this mechanism for obtaining court review of arbitral awards as an attempt to evade *Hall Street*, even though its use long pre-dates that case. 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 (thirty-five of forty-seven, 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 forty-seven, 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 forty-seven, 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.

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137  See supra note 69.
138  The provision might still have effect if the vacatur action is brought in state court instead of in federal court. See infra text accompanying note 140.
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.”142 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.143

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.144 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 filed145), the contracts in the sample were ones that were out of the ordinary course of business for the companies, the sorts of contracts one would least expect to include arbitration clauses.146

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,147 no statute requires issuers to make business credit card and deposit account agreements available online. Some issuers do, but many do not. Accordingly, our sample is both limited in size and nonrandom. 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.148 But, even so, we do not compare businesses of

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142 Eisenberg, Miller, & Sherwin, supra note 36, at 876.
143 Id. at 883 Table 2.
144 Some of the business contracts included in their sample, such as licensing agreements, included arbitration clauses at a higher rate. Id. at 878.
145 Drahozal & Ware, supra note 38, at 458–59.
146 Id. at 463–67.
147 See supra text accompanying notes 40–42.
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. 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.

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.\textsuperscript{149} We focused on those issuers 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 copies of their business credit card agreements available online. An additional eight of the issuers provided disclosure statements for business credit card agreements. However, as discussed earlier,\textsuperscript{150} 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.\textsuperscript{151} Two of the sixteen issuers were among the settling defendants in \textit{Ross v. Bank of America}, and so have agreed to remove arbitration clauses from their consumer and small business credit card agreements.\textsuperscript{152} 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.

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\textsuperscript{149} 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.

\textsuperscript{150} See supra note 57.

\textsuperscript{151} We report only the number of agreements because we do not have data on business (as distinct from consumer) credit card loans outstanding.

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

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

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.\(^{153}\) 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 websites 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.\(^{154}\) 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.\(^{155}\) Accordingly, our sample includes fifteen issuers for which we have consumer and business deposit account agreements.

Table 12 summarizes our findings. Nine (of fifteen, or 60.0%) of the financial institutions in the sample used arbitration clauses in both their consumer and their business account

\(^{153}\) 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.\(^ {154}\) Although we do not include Citibank in the sample because a copy of its business deposit account agreement was not available online, 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).

\(^{155}\) See Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 22, at 553 (describing when commonly owned issuers were consolidated in defining the sample).
Conversely, four (of fifteen, 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. Of the remaining two issuers, one—Bank of America—used arbitration for business disputes and not for consumer disputes. 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. Unlike its settlement in Ross, which applied to both consumer and small business credit card agreements, 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. 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.

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

<table>
<thead>
<tr>
<th>Description</th>
<th>Number of Financial Institutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Both agreements contain an arbitration clause</td>
<td>9 (60.0%)</td>
</tr>
<tr>
<td>Neither agreement contains an arbitration clause</td>
<td>4 (26.7%)</td>
</tr>
<tr>
<td>Arbitration clause in business agreement; jury trial waiver in consumer agreement</td>
<td>1 (6.7%)</td>
</tr>
<tr>
<td>Jury trial waiver in business agreement; arbitration clause in consumer agreement (claims under $75,000)</td>
<td>1 (6.7%)</td>
</tr>
</tbody>
</table>

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

157 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 differently.

158 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”).

159 See Chu, supra note 50 (“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).

160 See supra text accompanying notes 53–54.

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

162 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.
Overall, subject to the limitations described above, 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 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 understated 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 pre-dispute 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 sizeable proportion 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 (at least as to credit card agreements) in holding in Mastrobuono and Preston v. Ferrer that a general choice-of-law clause does not incorporate state arbitration law by reference into the contract.

- Essentially all of the arbitration clauses in the sample provide for either the AAA or JAMS to administer arbitrations arising under the credit card agreement. A handful have a vestigial reference to the National Arbitration Forum. As of the end of December 2010,

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163 See supra text accompanying notes 148–49.
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.\(^{164}\)

- 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 biased 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, specifying a potentially distant forum for the hearing, or limiting 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 agreements 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 of other types of consumer contracts. 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 that conclusion 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.\(^{165}\) Moreover, like the AT&T Mobility clause in *Concepcion*, many clauses in our database contained some form of a small-claims carve out that

\(^{164}\) The latter possibility would not, of course, apply to provisions that expressly delegate authority to the courts. We explore the possible explanations for this inertia in a subsequent paper. See Drahozal & Rutledge, *Sticky Arbitration Clauses* (unpublished manuscript).

\(^{165}\) As we have explained elsewhere, higher risk consumers will likely have fewer such options. Drahozal & Rutledge, *Arbitration Clauses in Credit Card Agreements*, supra note 22, at 564.
mitigate 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, Concepcion 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.166

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. Our argument also assumes that consumers actually become aware of reward payments and other incentives designed to ensure that arbitration clauses, coupled with class waivers, do not discourage the pursuit of valid small-stakes claims.167 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.168 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 or restricting the use of arbitration agreements in specialized contracts such as automobile dealer agreements, consumer financial agreements with military personnel, poultry wholesale contracts, employment agreements with defense contractors and, most recently, residential mortgage loans. 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.

Many of these laws and bills rest on a series of empirical premises about the use of arbitration clauses. For example, the current version of the Arbitration Fairness Act finds that

168 Schmitz, Legislating in the Light, supra note 32.
“Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration.” 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 not necessarily permeate entire industries (at least judged by the credit card industry as examined here). Even firms that utilize such clauses do not employ a “one size fits all” approach. Instead, the clauses 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.

Moreover, the results of our study suggest that a blanket prohibition on the use of arbitration clauses in consumer contracts is difficult to justify. Our study demonstrates that the contracting practices within the credit card industry vary widely. Some segments of the industry, especially credit unions, do not use arbitration agreements at all. Moreover, among those industry participants employing such agreements, practices vary widely. 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.

Our conclusion here 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 with 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—derived from cases like Mitsubishi, Gilmer, and Green Tree—allows 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), 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 “vindication of statutory rights” defense but, instead, merely to explain why, at a conceptual level, that model provides a superior, and more nuanced, method of regulating arbitration agreements as compared to the blunt, empirically dubious approach typified by recent legislative enactments and pending bills.

Likewise, our research does not necessarily disprove the case for targeted regulation. It may well be appropriate for Congress 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

170 We explore this phenomenon in greater detail in a separate paper. See Drahozal & Rutledge, Arbitration Clauses in Credit Card Agreements, supra note 22.
171 See, e.g., In re Am. Express Merchants’ Litig., 667 F.3d 204, 214 (2d Cir. 2012).
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 legislative 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 legislative oversight. Ultimately, if Congress wishes to regulate arbitration agreements in credit cards in a manner that stops short of outright prohibition, a more complete empirical case is needed.

Third, our research provides a possible model for the CFPB to follow in conducting its study of the use of arbitration clauses in consumer financial services contracts. 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 (and other consumer financial services) agreements. Before it can adopt those regulations, however, it must study the use of pre-dispute arbitration clauses in such contracts, and the “findings in such rule shall be consistent with the study.” The CFPB has stated that its obligation to study the use of arbitration clauses includes “a study of the prevalence of such agreements,” possibly including “the prevalence of particular terms in pre-dispute arbitration agreements” and “how the prevalence of pre-dispute arbitration agreements and the prevalence of particular terms within them have changed over time.” This Article presents data on precisely those questions for credit card agreements, one of the types of contracts subject to the CFPB’s jurisdiction, and hence provides a model that can be updated and extended for the Bureau’s study.

Finally, our findings speak to the academic research in this area, especially the path-breaking 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 may not be 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, just as they do in their business-to-business arrangements. 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.

IV. CONCLUSION

This Article 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

172 For discussion of these protocols, see, e.g., Peter B. Rutledge, Arbitration and the Constitution (forthcoming 2012); Drahozal & Zyontz, supra note 78.
174 CFPB Request for Information, supra note 18, at 4.
provisions that have sparked so much controversy among academic skeptics and consumer 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 who are considering prohibition or regulation of arbitration clauses in these contexts.