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An update to credit and loan contracts.

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The holidays are now upon us, and with the rush of consumer spending, mailboxes will soon be filled with offers for credit, low-interest holiday loans and new banking arrangements to help free up cash or credit for the holidays. But what's in the fine print of many of those agreements continues to surprise many consumers and even some of the lawyers who would represent them.

The new name of the game is arbitration, which is private dispute resolution by a neutral third party. And it is popular.

A recent study by the Consumer Financial Protection Bureau (CFPB), the federal agency tasked with "empowering consumers to take control over their economic lives," found that more than 50 percent of the market for consumer credit cards had arbitration agreements, and almost 100 percent of storefront payday lending contracts in the market require binding predispute arbitration. For consumer checking accounts, more than 40 percent of the market contractually requires its customers to take their disputes to binding arbitration.

But the same study found that most consumers don't know their credit cards have a binding arbitration agreement and that it is not a primary concern for consumers in deciding which credit cards to obtain.

Though it has not mattered much to consumers, it does matter to lawyers. Almost all arbitration agreements in consumer products also have what is known as a class-action waiver clause, meaning the consumer agrees to proceed to arbitration individually and gives up any right to represent or be a member of a class action — in arbitration or in court. This means that consumers simply will not bring some low-value claims — in arbitration or in court — because they are not economically rational to pursue. Imagine a claim for $50 in excessive fees against a credit card company. What rational attorney would take that case unless hundreds of claims could be filed?

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This is not to say that consumer arbitration is fundamentally flawed. It is not. Some "consumer- friendly" arbitration agreements provide free arbitration procedures to the consumer. They say they offer faster resolution without expensive discovery or court costs. That may be true and, if so, could be a viable method of consumer dispute resolution in this age of mounting court costs, expert fees and e-discovery costs. But the problem is there is no uniformity, even within the consumer financial products industry, requiring the business to front the costs of arbitration, or offer attorney's fees for meritorious claims. A little regulation in this area could have fostered a new field of dispute resolution that was both advantageous to the consumer and avoided the class action that the financial industry sought to avoid through these clauses.

A little regulation in this area could have fostered a new field of dispute resolution that was both advantageous to the consumer and avoided the class action that the financial industry sought to avoid through these clauses. But the CFPB has introduced a game-changer, although it is one that will not have an effect on the consumer this holiday season. The CFPB recently announced that it will propose a rule banning the class-action waiver in all consumer financial products arbitration agreements. This means a company can contractually require arbitration, but it cannot force the consumer to waive the right to participate in a class. The result will almost surely be that financial companies will stop offering arbitration as an alternative to litigation.

The proposal will be a drastic measure and one not entirely in accord with Congressional intent or U.S. Supreme Court rulings. Congress enacted the Federal Arbitration Act in 1925, placing arbitration agreements on equal footing as other contracts. Legislation has repeatedly been introduced seeking to exclude all consumer claims from the protection of the FAA, but it has not passed. Then in 2011, the Supreme Court in AT&T Mobility LLC v. Concepcion gave the thumbs up to binding consumer arbitration agreements with class waivers when it held that the FAA pre-empted California state law, which judicially held many such agreements unconscionable, or so unfair as to be unenforceable.

The Court's decision was based on the principle that class arbitration is inconsistent with the goals of arbitration. In that case, Justice Antonin Scalia remarked that under the business-funded arbitration agreement, the district court had found that the consumers were actually better off under the arbitration agreement than as participants in a class.

The CFPB's proposed rule will be welcome news to many consumer-rights attorneys, who have found attempts to adjudicate small value claims on behalf of a class thwarted by the arbitration agreement with class waiver. But nothing will change anytime soon.

The CFPB's proposal must go through the rule-making process, which includes a review by the Small Business Review Panel. And the Consumer Financial Protection Act requires that any limits on arbitration apply to customer agreements entered into at least 180 days from the effective date of the final rule. This means any rule, if it survives the rule-making process, is unlikely to have effect before 2017. And any arbitration agreement imposed on consumers before that date will be effective.

So what we may see instead this holiday season and into the new year is a rush for the consumer financial industry, whether credit card or payday lender, to implement the arbitration agreement and class waiver in their consumer agreements before this sea change in the law can take effect.

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