本報告は、本学法学部の夏期集中授業のために来日中のリチャード・M・アルダーマン教授（ヒューストン大学）に依頼した研究報告（タイトルは "Post-Recession Consumer Law in the United States"）に基づき、後日、同教授にご執筆いただいたものである。ちなみに、本研究報告は、財団法人升本学術育成会の平成23年度研究助成対象プロジェクト「民事紛争解決制度改革の行方―東アジアおよび欧米との比較法的考察―」の一環として行われた。

なお、上記研究プロジェクトの国際的性格を伝えることを狙いとして、英文のまま掲載させていただいた（文責：プロジェクト代表・小林　学）。

【報告】

Consumer Law in the United States

Richard M. Alderman

Introduction

Consumer law and consumer rights in the United States have undergone dramatic change in the last decade, especially following the 2007-08 recession, and continue to evolve. Whether this evolution results in greater or lesser consumer rights remains to be seen. As the political system in the United States becomes more conservative, the likelihood of greater rights for consumers, however, seems to lessen. This article reviews some of the most recent changes in American consumer law dealing with the regulation of consumer credit, credit cards, class actions, and arbitration.

Consumer Financial Protection Bureau

The 2007-08 recession in the United States was fueled largely by reckless

consumer lending practices, primarily by mortgage institutions and often to subprime[1] borrowers, and the issuance of mortgage-backed securities. These securities had financial risk that was difficult, if not impossible, to measure, and they were traded worldwide. When the housing bubble burst, consumer default escalated into a worldwide recession. Adding fuel to the fire was excessive, expensive credit card debt.

Perhaps the most talked about reform that arose after the recession was a new federal agency, designed to deal exclusively with consumer credit problems. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank),[2] in response to the financial problems that were perceived to have produced the 2008 recession. Among other things, Dodd-Frank established the Consumer Financial Protection Bureau [CFPB].

Until the creation of the CFPB, no one agency at the federal level had oversight of consumer credit issues. The CFPB consolidates consumer-protection powers that had been spread across seven different agencies. As became clear in 2007-08, none of those seven agencies were really looking out for consumers.

In September 2010, Elizabeth Warren[3] was named as Assistant to the President and Special Advisor to the Secretary of the Treasury and charged with establishing the Bureau, which officially began operations in July of 2011.[4] In January, 2012, President Bush appointed Richard Cordary as the need of the Bureau. The central mission of the CFPB is to make markets for consumer financial products and services work for Americans — whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products. The CFPB is authorized to protect consumers by carrying out federal consumer financial laws. Among other things, the Bureau will investigate the consumer credit market, receive consumer complaints, educate consumers and enact rules for the enforcement of financial protection laws.

Although the CFPB appears to be a big step forward for consumers, and a major change in the approach taken by the federal government with respect to consumer protection, the election of a republican congress poses a serious threat to the

continuing effectiveness of the Bureau. For example, largely because of opposition from the business community that she was too "pro-consumer," Professor Warren was not named as Director of the Bureau. Instead, President Obama nominated former Ohio Attorney General Richard Cordray. The Senate must now approve his nomination. The Senate Banking Committee has held a confirmation hearing but GOP senators have vowed to block any nominee until a board, instead of a single director, leads the bureau.[5] Congress is also threatening to not approve the Bureau's budget.[6]

The creation of the CFPB is an important step toward major consumer credit reform in the United States. It was hoped that the Bureau would regulate abusive practices, develop educational programs and simplify consumer credit agreements to enable consumers to understand the consequence of their financial decisions and avoid excessive, high priced debt. The Bureau clearly has the potential to improve the consumer credit marketplace, making it fairer and more transparent for consumers. Unfortunately, a now pro-business Congress may enact substantial changes that will have the effect of eliminating this much-needed reform.

Credit Card Reform

Americans love their credit and debit cards. In 2006, there were 1.5 billion credit cards in the United States, and 80% of Americans also have at least one debit card.[7] And these cards do not come free. Credit card interest rates run as high as 79.9%[8] and fees for going over the limit, paying late, bouncing a check, creating an overdraft, or even getting a copy of your statement, can often run as high as $40. Banks earn tens of billions of dollars in just the fees they impose on consumers, not to mention interest, and the retail fees imposed on the merchant.[9] In the decade that ended December 31, 2007, credit card issuers earned more than $50 billion.[10] Total credit card debt in the U.S. today is almost $800 billion, the average household owes almost $16,000 in credit card debt, and total consumer debt is $2.43 trillion.[11]

Following the recession of 2007-08, it became clear that many Americans

were over their heads in debt, and unable to pay what they owed. Much of that debt revolved around loans secured by mortgages, but an equally large sum was owed to credit card companies. While some of the large credit card balances can be blamed on simple over-spending, many consumers were lured into over use of credit cards through low "teaser rates" that often quickly resulted in extremely high future interest rates. Excessive fees resulting from abusive billing practices, and unconscionably high service fees further burdened consumers already hard pressed to meet their monthly payments.

In 2009, Congress dealt with some of these problems, enacting the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (Credit CARD Act or the Act).[12] The Act was intended as general consumer credit reform legislation geared toward assisting those in debt and stopping abusive tactics of the credit card industry.[13] While the CARD Act does eliminate some of the more serious problems resulting from misleading advertising and abusive billing practices, it does not regulate the amount charged for interest or fees, and does not apply to "business" cards. Here are some of the major provisions of the CARD Act.

- **Card Issuers must send notice when they plan to increase your rate or make other significant changes**
- **Issuers must disclose how long it will take to pay off your balance if you pay only the minimum**
- **Issuers generally may not impose an interest rate increase for the first year**
- **Increased rates apply only to new charges**
- **Restrictions on over-the-limit transactions that require you "opt-in" to such fees**
- **Fees on high-fee cards (subprime) are capped at 25% of the initial credit limit**
- **Issuer must establish standard payment dates and times and must send the bill 21 days before it is due**
- **Payments must be directed to highest interest balances first**
- **No two-cycle (double-cycle) billing**

- **Underage consumers must have a source of income or get a co-signer**
- **Imposes new rules for gift cards, eliminating most fees and requires the car be valid for at least five years**

Although the CARD Act requires some major changes in the way credit and debt card companies conduct business, it remains to be seen whether consumers will take advantage of the new information available and the benefits afforded them. So far, it looks like some of the Act's provisions are having no real effect. This may be attributable to the fact that most of the Act's provisions are designed to control procedures, not mandate results. For example, the provisions regarding underage consumers were designed to stop college students from obtaining and using credit cards when they did not have the means to repay. The Wall Street Journal reports that less aggressive marketing continues, and that loopholes in the Act allow most college students to continue to easily get a credit card.[14] The Act's requirement that consumers "opt-in" to be required to pay overdraft fees was expected to result in far fewer consumer being charged excessive fees. In fact, most consumers choose to opt-in to the fees, which the Consumer Federation reports, now average $35, notwithstanding the fact that the average overdraft is only about $20. At many banks, a consumer could easily be hit with $2-300 in fees for just one day's overdrafts.[15] Perhaps what is really needed is an effective consumer financial education program that gives consumers the information and training they need to make proper financial choices. It is doubtful that any consumer who really understood a situation would agree to pay $35 for the right to withdraw $10 from his or her ATM machine.

Consumer Class Actions

The class action device is a way in which a representative party may sue on behalf of a "class" of others similarly situated. The person who files the suit, called the class representative, acts on behalf of the class. If the lawsuit is successful, all members of the class share in the recovery. On the other hand, if the defendant

prevails, all members of the class are bound by that decision and could not file a subsequent lawsuit. Class actions are particularly useful when there are a large number of individuals who have each lost a small amount of money to the same defendant. For example, a class action would be appropriate if a credit card company wrongfully imposed a $10 surcharge on all of its customers, a telephone provider double billed every customer a monthly fee of $27, or a tire manufacturer sold millions of tires that were defective.

The purpose of the class action is to join many similar small claims into one lawsuit so the matter can be settled more efficiently and inexpensively. A class action also provides the financial incentive for an attorney to represent the group, when representation of an individual would not be economically feasible. On the other hand, class actions have been criticized because class members often receive little or no benefit from class actions. In some cases, there are large fees for the attorneys, while class members are left with coupons or other awards of little or no value.[16] Additionally, the potential for a very large judgment may scare a defendant into settling an unfounded class action lawsuit, rather than run the risk of financial ruin in the event it lost.[17]

Class actions may be filed in state or federal court. In the United States federal courts, Rule 23 of the Federal Rules of Civil Procedure governs class actions. Nationwide classes are possible, but such suits must have a commonality of issues across state lines. Many class actions consist of smaller groups, for example, everyone located in a particular state or number of states.

The procedure for filing a class action is to file suit with one or several named plaintiffs, or class representatives, on behalf of a proposed class. The proposed class must consist of a group of individuals that have suffered a common injury or injuries. Typically these cases result from an action on the part of a business or a particular product defect or policy that applied to all proposed class members in a typical manner. After the complaint is filed, the plaintiff must file a motion to have the class "certified." In some cases, class certification may require discovery in order to determine its size and whether the proposed class meets the standard for

class certification.

Under Rule 23, which has also been incorporated into state law by a majority of states, the class action must have certain definite characteristics:

- the class must be so large as to make individual suits impractical [numerosity]
- there must be legal or factual claims in common [commonality]
- the claims or defenses must be typical of the plaintiffs or defendants [typicality],

  and
- the representative parties must adequately protect the interests of the class [adequacy of representation].[18]

These four requirements are often summarized as CANT: commonality, adequacy, numerosity, and typicality. The party seeking certification usually must also show that common issues between the class and the defendants will predominate the proceedings, as opposed to individual fact-specific conflicts between class members and the defendants, and that the class action, instead of individual litigation, is a superior vehicle for resolution of the disputes at hand.

Upon the motion to certify the class, the defendants may object to whether the case should be handled as a class action, to whether the named plaintiffs are sufficiently representative of the class, and to their relationship with the law firm or firms handling the case. The court will also examine the ability of the firm to prosecute the claim for the plaintiffs, and their resources for dealing with class actions. Due process requires in most cases that notice describing the class action be sent, published, or broadcast to class members. As part of this notice procedure, there may have to be several notices. First, a notice giving class members the opportunity to opt out of the class, i.e., if individuals wish to proceed with their own litigation they are entitled to do so, only to the extent that they give timely notice to the class counsel or the court that they are opting out.[19] Second, if there is a settlement proposal, the court will usually direct the class counsel to send a settlement notice to all the members of the certified class, informing them of the details of the proposed settlement.

As noted above, the class action device has come under attack, and today, it has become harder than in the past to certify a class action proceeding. This is due in part to the interpretation of the commonality requirement. If there are separate fact issues for class members, courts generally do not certify the class. For example, statutory or common law claims that require reliance generally are inappropriate for class treatment because it would be necessary to show that each individual member of the class relied. In a recent United States Supreme Court case,[20] the Court reversed a class certification finding that the commonality requirement was not met. The court noted that commonality "requires a plaintiff to show that 'there are questions of law or fact common to the class.'" It continued by stating that although that language seems to set an easy standard to met, that is not the case.

> Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." This does not mean merely that they have all suffered a violation of the same pro-vision of law.... Their claims must depend upon a common contention -- for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

While the class action device continues to be a sword in the consumer attorney's arsenal, its blade is becoming less sharp.[21]

Consumer Arbitration

For some time now, Alternative Dispute Resolution has been a major topic of discussion in the United States. Traditional litigation, involving lengthy and expensive jury trials, was clogging our legal system. The U.S. needed alternatives to settle disputes more efficiently and with less cost. The answer to this problem was Alternative Dispute Resolution, commonly referred to as "ADR." In particular, we began to look at mediation and arbitration.

Mediation is a non-binding proceeding whereby a mediator works with the parties to try and find an acceptable means of settlement. Trained mediators work with the litigants to reach a common ground. If the parties agree, they enter into a binding contract settling the dispute. If they cannot agree, the proceeding continues through the courts. Arbitration, on the other hand, is a binding process, whereby an arbitrator conducts a hearing and renders a final, binding and generally non-appealable decision. Arbitration has been heralded as a panacea for the ills of the American judicial system. It has been widely touted as a voluntary system of alternative dispute resolution, which is more efficient, less expensive, and more flexible than our clogged and congested courts. The use of an alternative forum to hear consumer disputes would seem to be the best of both worlds; prompt resolution for consumers, and less expense for business.

Arbitration is generally viewed by the courts reviewing it as nothing more than a voluntary forum selection clause, simply moving a dispute to a more convenient, efficient, and less expensive forum.[22] In theory, arbitration does not change the law; it simply provides an alternative method of enforcement. Recently, American courts, particularly the Supreme Court, have embraced arbitration clauses with open arms, uniformly adopting a pro-arbitration stance.[23] The support shown by the United States Supreme Court has been well documented,[24] and is demonstrated by the Courts recent decision in *Buckeye Check Cashing, Inc. v. Cardegna*.[25]

Cardegna involved the question of whether an arbitration clause in an illegal and void payday loan agreement was enforceable against a consumer. The Supreme Court of Florida held that the arbitration clause was not enforceable, and the illegality of the contract was an issue for the courts. The United States Supreme Court disagreed. It noted three propositions for determining the validity of an arbitration clause:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as

well as federal courts.[26]

Applying these rules, the Court held that the issue of whether the contract was illegal was to be decided by the arbitrator, pursuant to the contract's arbitration provision. An arbitration clause, even if contained in an otherwise unenforceable contract, is nonetheless enforceable.

The Dangers of Mandatory Consumer Arbitration

Today, a large percentage of consumer contracts include a binding, mandatory arbitration clause. The effect of such a provision is to deny the consumer the right to go to court. Instead, an arbitrator or panel of arbitrators will hear the consumer' s claim. There is no jury, no appeal, and generally no written opinion. Arbitration precludes litigation, and precludes judicial opinions.

As a country with a common law tradition, the United States relies on the courts to develop much of its legal doctrine. For example, both tort and contract theories have been used as methods of providing consumer redress. The development of traditional contract and tort theories to deal with consumer issues demonstrates the application of our common law tradition. More recently, American courts have found less need for major doctrinal pronouncement, and a much greater demand for review of more specific scenarios. Today, courts are often called on to deal with individual claims of overreaching, and must regularly deal with the application of traditional principles to newly developed technology, such as the internet.[27]

The courts also provide a significant "gap-filling" role, dealing with transactions that either slip through the cracks of legislation or simply were not dealt with. One of the most significant roles of the common law is maintaining consistency between similar rights in the absence of legislative action. For example, the Uniform Commercial Code comprehensively governs contracts for the sale of goods. Until the enactment of Article 2A, lease agreements were treated in a similar manner by common law analogy to Article 2.[28] Today, Article 2 and 2A of the Uniform Commercial Code comprehensively regulate the creation of warranties, as well as disclaimers and damage limitations, in the sale or lease of goods. There is no similar

statute, however, governing service contracts. Analogous law in the area of service contracts, therefore, is left to common law development by the courts.[29] The state of Texas provides a good example of how this area of law has been developed and demonstrates the importance of the courts to the creation of consumer rights.

Until 1987, the Texas Supreme Court had not recognized an implied warranty in a service contract. In *Melody Home Manufacturing Co. v. Barnes*,[30] the court noted that the United States had shifted from goods to a service oriented economy. Based on a "public policy mandate," the court imposed a warranty of good and workmanlike performance in any contract to repair or modify existing tangible goods or chattels. The court also defined the warranty as "the quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[31]

As with the development of any judicially created rule, *Melody Home* has been refined, modified, expanded and limited in the twenty-four years since it was decided. The Texas Supreme Court has cited the opinion no less than a dozen times, initially broadening its scope and recently sharply limiting it. For example, after some question,[32] the Texas Supreme Court held the warranty does not apply to professionals,[33] and recently the court excluded certain "incidental services."[34] Meanwhile, more than 150 other Texas courts have cited *Melody Home* in their opinions. This is the life of the common law — a deliberate process of molding doctrine to the times. It is also a process that probably would not have occurred if the problem that gave rise to the decision in *Melody Home* arose today. *Melody Home* involved a manufactured home. The likelihood is that today, the contract in *Melody Home* would have contained a clause mandating arbitration — precluding a court from considering any of the legal issues involved.

The Real Problem

Under current American law, it appears inevitable that consumer arbitration will eventually replace a substantial percent of litigation.[35] As businesses become

unsatisfied with the decisions of the courts, they can simply "opt-out" of the civil justice system and get a different result. For example, an article discussing damages for mental anguish in Alabama suggests that the current Alabama rule is an improper extension of the law, resulting in overly generous damage awards in cases involving the sale of automobiles and homes.[36] The authors provide strong support for the argument that the Alabama courts should review and modify this rule. The authors, however, may never see their article considered by the courts. The Alabama courts may never have the opportunity to modify the law in a way consistent with the premise of the article. Why? Because auto dealers and homebuilders have taken matters into their own hands and "opted out" of the civil justice system. They have found a way to avoid the laws of Alabama, and achieve the results they want. As the authors of the article note:

> The auto and home industries, fearing catastrophic verdicts before Alabama juries, now require customers, nearly across-the-board, to enter into pre-dispute binding arbitration agreements as a condition of doing business. These industries have effectively divorced themselves from the Alabama civil justice system in hopes of obtaining fairer and more just awards before arbitrators.[37]

As this excerpt indicates, American businesses dissatisfied with the civil justice system may privatize the dispute resolution process through arbitration, thereby controlling outcome as well as forum.

As consumer dispute resolution is privatized, the development and application of consumer law in America gradually will be skewed toward those who control the process. For example, in most arbitrations, arbitrators are selected through a process that enables either side to eliminate potential arbitrators. In commercial arbitrations, arbitrators must be concerned with fairness because either party may exercise its pre-emptive strike against that arbitrator in a future dispute. An arbitrator who rules "unreasonably" in favor of one party or the other will soon be without work. The fact that both sides to the dispute will have the right in the future to again select an arbitrator helps ensure fairness. Common sense tells us that one of the reasons an arbitrator must be fair and impartial is that an arbitrator will not be inclined to rule

in a manner one side finds offensive, and which may adversely affect his or her future selection.

This concept works well in commercial arbitrations, but not in the consumer context. Unlike commercial arbitration, where each party has the same potential to be involved in future disputes and exercise equal influence over the selection process, in consumer arbitration one party is involved in multiple arbitrations, while the other is a one-shot player. For example, a bank or credit card company may be involved in hundreds or even thousands of arbitrations a year. The consumer is generally involved in one. Arbitrators, consciously or unconsciously, are probably aware of the fact that a few adverse decisions could preclude him or her from selection in the future. Consumers are not repeat players, and they lack the ability to obtain information from others regarding arbitration decisions because such decisions generally are not published. A system of private justice will always favor those who control access and the purse strings.

Even assuming an arbitrator is committed to impartially following the law; he or she still cannot create or shape it. Therein lies perhaps the most serious problem with increased use of consumer arbitration. The interpretation of our statutes, the development of the common law, and the courts' ability to continually establish and refine legal rights depends upon litigants, cases, public written opinions, and appeals regarding questions of law. Arbitration eliminates litigation, preventing our appellate courts from playing the role they were designed to play in the American justice system.

Unlike court opinions, most of which are published, most decisions of arbitrators are secret, and are often not even accompanied by a written opinion. Even when published and made available to the public, the decision of one arbitrator or panel of arbitrators is in no way binding on any other arbitrator or panel. In fact, arbitrators generally are not compelled to follow the law, and their decisions are not appealable. Arbitration precedent and stare decisis do not exist. Arbitrators can interpret the law, but the interpretation of one arbitrator is not binding upon another. Consequently, arbitration lacks the ability to formulate policy, impose consistency,

or change existing law. Most would argue, and I concur, that this is the way it should be. Arbitrators are not elected judges; they do nothing more than decide the single dispute before them. The problem, however, is that our beliefs regarding the value of arbitration are based on the underlying assumption that arbitration is an "alternate" method of dispute resolution. In other words, we assume that many disputes will remain within our civil justice system and our courts will continue to actively mold the common law.

But in fact, the vast majority of consumer disputes may not enter the civil justice system. Mandatory arbitration precludes judicial analysis, which could have the effect of "freezing" the law, because courts would not have the opportunity to review decisions to modify or reverse them. Assuming a "freeze," however, ignores an important fact: arbitration in consumer contracts is imposed almost as a matter of right by businesses. American consumers have no choice but to agree, businesses have the choice to leave out an arbitration provision whenever they wish to pursue litigation, or to waive arbitration, and proceed to court. Through the sophisticated use and enforcement of mandatory arbitration provisions, businesses may engage in a form of selective creation of the common law. That is, selecting which disputes, if any, our courts will be allowed to deal with. In other words, consumer arbitration may "freeze" the development of the common law, or even worse, it may allow business to control common law development to accommodate its needs.

As I have noted elsewhere,[38] the only way to prevent the continued growth of arbitration and the degeneration of consumers' rights in the United States is through a change in federal law, namely amending the Federal Arbitration Act. Current law assumes the validity of arbitration provisions and makes it extremely difficult to avoid enforcement. Exceptions to the current law, designed to ensure arbitration agreements are voluntary and consumers are provided a meaningful choice, must be enacted. The simplest change is to preclude pre-dispute arbitration clauses in consumer contracts, while permitting parties to agree to arbitration after a dispute has arisen and other alternatives have been considered.[39] The law must ensure that American consumers retain the right to resolve disputes through the civil justice

system, and that the common law tradition continues to be a viable part of the American system of justice.

On May 12, 2011, a bill to enact the Arbitration Fairness Act[40] was filed in Congress. The Act prohibits the use of pre-dispute binding arbitration clauses in consumer and employment contracts. If enacted, it will restore the consumers' right to sue and ensure that American courts continue to play a significant role in the development of consumer rights. In light of the current division within Congress, it is unlikely however, that this legislation will be enacted any time soon.[41]

Class Actions and Arbitration—Bye-Bye Class Actions

In *AT&T Mobility LLC v. Concepcion*,[42] the United States Supreme Court held by a vote of 5-4 that arbitration agreements may prohibit a person from filing or joining a class action. The case involved an arbitration agreement entered into by Vincent and Liza Concepcion as part of the sale and servicing of cellular telephones with AT&T Mobility LLC (AT&T). The contract provided for arbitration of all disputes between the parties and required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[43]

The Ninth Circuit[44] found the provision unconscionable under California law, as announced by the California Supreme Court in *Discover Bank v. Superior Court*.[45] The Ninth Circuit also held that the "*Discover Bank* rule" was not pre-empted by the FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that "class proceedings will reduce the efficiency and expeditiousness of arbitration" and noted that "*Discover Bank* placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration." The Supreme Court reversed, holding that "because it 'stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' California's *Discover Bank* rule is preempted by the FAA."[46]

The Supreme Court noted that although section 2 of the Federal Arbitration Act preserves generally applicable contract defenses, nothing in the FAA suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. "As we have said, a federal statute's saving clause 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" The Court found that California's *Discover Bank* rule interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. The Court also noted, "the rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank*, and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis."

The Court also found arbitration poorly suited to the higher stakes of class litigation. It noted that in litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Additionally, in a normal class action lawsuit, questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, "§10 of the FAA allows a court to vacate an arbitral award *only* where the award 'was procured by corruption, fraud, or undue means'; 'there was evident partiality or corruption in the arbitrators'; 'the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced'; or if the 'arbitrators exceeded their powers, or so imperfectly

executed them that a mutual, final, and definite award . . . was not made.'" The Court also emphasized that is has held that parties may not contractually expand the grounds or nature of judicial review.[47] The Court concluded by noting, "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."

After the decision in *Concepcion*, it is clear that a business may prohibit its customers from joining or filing a class action lawsuit by simply including the appropriate language in a boiler-plate arbitration clause. As the Supreme Court noted, most of these contracts are contracts of adhesion and the consumer has no choice but to accept the terms offered by the business. For example, I was sent a change to my American Express Card agreement that contains the following language:

> PLEASE READ THIS AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT. YOU WILL NOT BE ABLE TO BRING A CLASS ACTION OR OTHER REPRESENTATIVE ACTION IN COURT SUCH AS THAT IN THE FORM OF A PRIVATE ATTORNEY GENERAL ACTION, NOR WILL YOU BE ABLE TO BRING ANY CLAIM IN ARBITRATION AS A CLASS ACTION OR OTHER REPRESENTATIVE ACTION. YOU WILL NOT BE ABLE TO BE PART OF ANY CLASS ACTION OR OTHER REPRESENTATIVE ACTION BROUGHT BY ANYONE ELSE, OR BE REPRESENTED IN A CLASS ACTION OR OTHER REPRESENTATIVE ACTION.

My only option was to stop using my American Express card or accept these terms.

Although the full scope of this *Concepcion* remains to be seen,[48] it is expected that there will be a substantial reduction in the number of consumer class actions. A few simple sentences in a form contract can now prevent a consumer from filing or joining a class action lawsuit.

【NOTES】

* Associate Dean, Dwight Olds Chair in Law and Director of the Center for Consumer Law, University of Houston Law Center. The author wishes to thank President Takeshi Kojima and Professor Manabu Kobayashi of Toin University of Yokohama for the opportunity to visit their fine University and present this paper.

1 A subprime loan is a loan that offered to someone who is not a "prime" lending candidate, such as someone with a bad credit record. The interest rate on a subprime loan usually is substantially higher than the interest rate you would expect on a standard loan from a bank or mortgage company.

2 Dodd – Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, H.R. 4173)15 V.S.C. §§ 5301-5641(2010), available at http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf

3 Professor Warren is a Harvard Law School Professor, who began her career as my colleague at the University of Houston Law Center.

4 The CFPB website is up and running, http://www.consumerfinance.gov/.

5 *See http://www.housingwire.com/2011/05/05/senate-republicans-say-no-cfpb-director-until-power-is-checked.*

6 *See http://www.huffingtonpost.com/2011/02/16/gop-budget-plan-would-cut_n_824179.html.*

7 Credit and debt card data may be found at CreditCards.com, http://www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics-1276.php

8 *See http://www.creditcards.com/credit-card-news/first-premier-79-rate-fees-credit-card-1265.php*

9 Credit card companies impose a fee on the merchant each time a credit or debit card is swiped. Fees for credit cards generally range from 1-3% of the value of the transaction.

10 Washington Post, May 30, 2010. http://www.washingtonpost.com/wp-dyn/content/article/2010/05/29/AR2010052900430.html

11 Federal Reserve Statistical Release, http://www.federalreserve.gov/releases/g19/

current/

12 Credit CARD Act of 2009, Pub. L. No. 111-24, *123 Stat. 1734* (codified as amended in scattered sections of 15 U.S.C.).

13 *See Ben Rooney, Credit Card Relief: Phase one: The First Part of Obama's Crackdown on the Credit Card Industry Will Give Consumers More Notice When Contracts are Changed and the Option to Reject Rate Increases*, CNNmoney.com, Aug. 20, 2009, http://money.cnn.com/2009/08/19/news/economy/credit_card_reform/?postversion=2009082004.

14 Jessica Silver-Greenberg & Mary Pilon, *Cards Return to Campus*, Wall Street Journal, Weekend Investor, May 7, 2011, http://online.wsj.com/article/SB10001424052748704322804576303652621312770.html.

15 *see 2011 CFA Survey of Big Bank Overdraft Loan Fees and Terms*, http://www.consumerfed.org/pdfs/OD-14BankSurvey-ChartAugust2011.pdf

16 In 2005, Congress enacted the Class Action Fairness Act of 2005 [CAFA], 28 U.S.C. Sections 1332(d), 1453, & 1711 – 1715, to reduce some of the abuses of the class action device, and make it easier to remove cases to federal courts.

17 This is referred to as the in terrorem character of a class action. See Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds, 571 F.3d 672, 677-678 (7th Cir. 2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good.")

18 *See generally* General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977).

19 Due process requires that parties who do not want to be bound by a class action decision have the right to "opt-out" of the litigation and remain free to file their own lawsuit. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985).

20 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

21 As discussed in the last section of this article, consumer class actions may all but disappear through the inclusion of an arbitration clause and class action waiver. *See* footnotes 40-46 and accompanying text.

22 *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.")

23 The provisions of the FAA [Federal Arbitration Act] manifest a "liberal federal policy favoring arbitrations agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). This pro-arbitration stance of the Supreme Court began in earnest with the decision in Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). Subsequent Supreme Court cases all evidence a strong pro-arbitration position. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (FAA's employee exception should be narrowly construed); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (possibility of excessive costs is insufficient to defeat arbitration clause); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (FAA preempts state statute restricting arbitration); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (courts should "rigorously enforce agreements to arbitrate").

24 "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983).

25 546 U.S. 440 (2006).

26 *Id.* at 446.

27 This is not to imply that recent decisions uniformly recognize the lack of bargaining in the typical consumer contract of adhesion. In fact, most courts use a traditional contract analysis to find assent and a valid contract. *See generally* Jean Braucher,

The Afterlife of Contract, 90 NW. U. L. REV. 49 (1995).

28 *See, e.g.*, KLPR TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315 (W.D. Ark. 1971) (express warranty in leased equipment); Sarafanti v. M.A. Hittner & Sons, 35 App. Div.2d 1004, 318 N.Y.S.2d 352 (1970) (implied warranty in lease of automobile). *See generally* Hawkland, *Impact of the Uniform Commercial Code on Equipment Leasing*, 1974 ILL. L. F. 446 (1972).

29 For a general discussion of the development of the law with respect to the sale of goods and service transactions, see Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231 (1996).

30 741 S.W.2d 349 (Tex. 1987).

31 *Id.* at 354.

32 In *Archibald v. Act III Arabians*, 755 S.W.2d 84 (Tex. 1988), the court suggested that the warranty could be applied to professional services.

33 Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1998) (no implied warranty for professional services).

34 Rocky Mountain Helicopter, Inc. v. Lubbock County. Hosp. Dist., 987 S.W.2d 50 (Tex. 1999) (no implied warranty for services incidental to helicopter maintenance).

35 In fact, this is already happening. Many have noticed that jury trials are vanishing in the United States, and that this has been caused at least in part by the increased use of arbitration clauses. Much has been written recently about the privatization of justice and the vanishing jury trial. *See generally* THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS — REPORT OF THE 2003 FORUM FOR STATE APPELLATE COURT JUDGES (Pound Civil Justice Institute 2006) *See also 2004 ABA Annual Meeting--Program Materials Bench and Bar: The Vanishing Jury Trial (2004)*, available at http://www.abanet.org/abanet/litigation/mo/premium-lt/prog_materials/2004_abaannual/20.pdf (membership required); Glenn A. Ballard, Jr., *The State of Trial Work — 2007*, 44 HOUSTON LAWYER 6 (2007); Ileana Blanco and Tanya C. Edwards, *Arbitration v. Litigation Pros and Cons: What Business Lawyers Need To Know (Arbitration and the Vanishing Jury Trial)*, 69 TEX. BAR JOURNAL 858 (Oct.

2006); Scott Brister, *Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191 (2005); Dennis J. Drasco, *The American Jury Project and the Image of the Justice System*, 32 LITIGATION No. 2 at 1 (2005), *available at* http://www.abanet.org/litigation/journal/opening_statements/ 05winter_openingstatement.pdf; John Fleming, *Using Best Practices to Draft Arbitration Agreements (Arbitration and the Vanishing Jury Trial)*, 69 TEX. BAR JOURNAL 866, 868 (2006); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2005); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67 (2006).

36 W. Scott Simpson, Stephen J. Ware, and Vickie M. Willard, *The Source of Alabama's Abundance of Arbitration Cases: Alabama's Bizarre Law of Damages for Mental Anguish*, 28 AM. J. TRIAL ADVOC. 135 (2004).

37 *Id.* at 177. The authors also note that, "It is virtually impossible now for Alabama consumers to purchase a new automobile or home without first signing a pre-dispute arbitration agreement. *Id.* at 138.

38 *See* Richard M. Alderman, *Why we Really Need the Arbitration Fairness Act*, 12 J. CONSUMER AND COM. L. 151 (2009); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUSTON L. REV. 1237, 1264-67 (2001) (proposing amendments to the Federal Arbitration Act).

39 For example, Congress has recognized the "unfairness" of arbitration clauses and prohibited the inclusion of pre-dispute arbitration clauses in contracts between automobile dealers and manufacturers. Motor Vehicle Franchise Contract Arbitration Fairness Act of 2002, 15 U.S.C. §1226. *See, e.g.*, Volkswagen of America, Inc. v. Sud's of Peoria, Inc., 474 F.3d 966 (7th Cir. 2007).

40 Arbitration Fairness Act, S. 987, H.R. 1873, 112th Cong. (2011).

41 On December 12, 2007, I testified before the Senate Judiciary Committee in support of the Arbitration Fairness Act, an earlier version of the current bill. My testimony, was based in large part on this article. A video of my testimony may be found at http://www.peopleslawyer.net/arbitration.html.

42 563 U.S. ____, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

43 The arbitration agreement signed by the Concepcions was written in a manner generally more favorable to consumers than the typical arbitration agreement. It is difficult to tell to what extent the Court's opinion is dependent on the nature of the agreement. The Court, however, lays out the terms of the agreement in detail:

> The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $ 10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $ 7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

44 Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (2009).

45 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100 (2005).

46 Citing Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941).

47 Hall Street Assocs., V. Mattel, 552 U.S., at 578, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008).

48 Courts have already begun applying the rule in *Concepcion*. *See*, *e.g.*, Cruz v. Cingular Wireless, 648f. 3d 1205 (11th Cir. 2011) wherein the court noted,

> In light of Concepcion, our resolution of this case does not depend on a

> construction of Florida law. To the extent that Florida law would require the availability of classwide arbitration procedures in this case -- in spite of the parties' agreement to submit all disputes to arbitration "on an individual basis" only -- simply because the case involves numerous small-dollar claims by consumers against a corporation, many of which will not be brought unless the Plaintiffs proceed as a class, such a state rule is inconsistent with and thus preempted by FAA § 2.

See also NAACP v. Foulke Mgmt., Corp., 24A. 3d 777 (N.J, 2011) (notwithstanding Concepcion, arbitration agreement is too convoluted and inconsistent to be enforced); Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489, 2011) (FAA does not pre-empt state law regarding contractual waiver of right to pursue representative action under state Private Attorney General Act); Bernal v. Burnett, 2011 WL 2182903 (June 6, 2011) ("Given the Supreme Court's ruling in Concepcion the Court find that the arbitration agreements signed by Plaintiffs in this case were not unconscionable.")

Richard M. Alderman
(Professor of Law, Associate Dean,
University of Houston, Law Center)