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The Debate Over Consumer Arbitration Clauses

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Supreme Court members.

9. *United States v. Place*, 462 U.S. 696 (1983).

10. *Caballes*, 125 S. Ct. at 838.

11. *Id.*

12. *Id.*

13. *Citing United States v. Jacobsen*, 466 U.S. 109 (1984).

14. *Place*, 462 U.S. at 709-710.

15. *Id.* at 707.

16. *Id.* at 723 (Blackmun, H. concurring).

17. *Id.* at 710 (Brennan, J. concurring).

18. *Caballes*, 125 S. Ct. at 838.

19. *Id.* at 839. (Souter, D. dissenting).

20. *Id.*

21. *Id.* (Ginsburg, R. dissenting).

22. *Id.*

23. *Id.*

24. "Well, my dear Pangloss," said Candide to him, "when you were hanged, dissected, severely beaten, and tugging at the oar in the galley, did you always think that things in this world were for the best?"

"I am still of my first opinion," answered Pangloss; "for as I am a philosopher, it would be inconsistent with my character to contradict myself;"

Voltaire, *Candide*, Chapter XXVIII.

The Debate Over Consumer Arbitration Clauses

By Emily Rozwadowski

Predispute arbitration clauses are often used by businesses in contracts with other businesses. These clauses require the parties to settle disputes in arbitration rather than in court. However, these clauses are now being added by businesses into their contracts with consumers. These clauses also require consumers to settle disputes in arbitration. In addition, the clauses often preclude consumers from bringing class action lawsuits.

Proponents of arbitration say there are many advantages to the system. Arbitrations are kept confidential, are governed by a national set of procedures, and require limited discovery. Proponents argue that predispute arbitration clauses are not necessarily unfair to consumers. Arbitration lowers a business's costs and these costs will be passed on to other consumers.

The use of arbitration clauses in consumer contracts, however, is controversial. Opponents of arbitration clauses in consumer contracts say that the high cost of arbitration may prevent consumers from seeking redress. In addition, many clauses preclude class action suits, which opponents say is harmful to con-

sumers.

"In general, I believe mandatory arbitration clauses are unfair," said Jean Sternlight, Saltman Professor, University of Nevada-Las Vegas, Boyd School of Law, and director, Saltman Center for Conflict Resolution. "People haven't entered into them in a knowing, voluntary, and intelligent way."

Sternlight argues that arbitration clauses are harmful to consumers because they are imposed on consumers without the consumers' consent. "Because of the way the clauses are imposed, companies can construct them in a way that is beneficial to them," Sternlight said.

Professor Mark Budnitz, a law professor at Georgia State University College of Law, also believes arbitration clauses in consumer contracts are unfair because arbitrators are not required to follow consumer protection laws, there is no jury trial, and there is no way for the consumer to appeal the award. Budnitz also believes the clauses are unfair because arbitration proceedings are kept private.

"Companies can hide their misdeeds because arbitration proceedings are secret,"

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Budnitz said. "So even if many arbitrations find a company is cheating lots of people, there is no public record so other consumers and law enforcement people will not know."

In contrast, Prof. Stephen Ware of the University of Kansas School of Law believes that arbitration is ultimately beneficial to consumers. "Assuming that consumer arbitration agreements lower the dispute resolution costs of businesses that use them, competition will, over time, force these businesses to pass their cost savings to consumers," Ware said.

In addition, Ware believes that the potential benefits of all consumers should be considered when discussing arbitration clauses in consumer contracts. "An assessment of predispute arbitration agreements, therefore, must not be limited to a consideration of consumers with disputes. A proper assessment must consider consumers as a whole," Ware said. "Consumers without disputes are the main beneficiaries of the lower prices caused by arbitration agreements."

The issue of arbitration clauses in consumer contracts may not be so clear cut, according to Chris Drahozal, another University of Kansas law professor. "The basic idea is that you can't tell simply by the fact of arbitration or particular arbitration provisions in an arbitration clause, such as waivers of punitive damages or class relief, whether consumers are better or worse off," Drahozal said. "It depends on the conditions of a particular market."

Budnitz agrees that arbitration may be beneficial to the consumer - when it is agreed upon post-dispute. "After the dispute the consumer can make a rational decision whether arbitration is the best way to go," Budnitz said.

Ware also stresses that arbitration is not mandatory to consumers. "Those consumers who do not wish to enter into arbitration agreements are under no obligation to do so," Ware said. "Current law does not make arbitration mandatory; it makes arbitration a matter of contractual choice." Ware believes that opponents of predispute arbitration clauses in consumer

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contracts oppose the freedom of consumers to enter into contracts. "What opponents of so-called mandatory arbitration really oppose is freedom of contract," Ware said. "In particular, they oppose enforcement of a particular category of contract, the predispute arbitration agreement."

Opponents of arbitration clauses in consumer contracts believe that arbitration clauses that prohibit consumers from filing class actions are particularly harmful to consumers. According to Sternlight, arbitration clauses that preclude consumers from filing class action suits are harmful to consumers because often it is the only way a consumer can get relief. She added that whether a clause precluding class action is harmful depends on the nature of the consumer's claim and the other options available to that consumer.

Ware believes that there are several factors to consider when deciding if an arbitration clause that prohibits class actions should be enforced. "Anything that lowers businesses' costs, including reduction in class actions they have to defend, ultimately tends to lower consumer prices," Ware said. "But that's just one piece of information that might be relevant in deciding whether to enforce arbitration clauses barring class actions. I think some of the strongest cases for finding an arbitration clause unconscionable are cases in which large numbers of people have small dollar amount claims so the only cost effective way to bring the case is as a class action."

Currently, a consumer needs to go to court to challenge an arbitration clause in a consumer contract. A consumer can have the court find an arbitration clause unenforceable by proving that arbitration costs are prohibitively high, or that the arbitration clause is unconscionable. When deciding whether an arbitration clause is prohibitively high courts often consider the financial situation of the plaintiff, the

cost of an arbitration standing alone, and the cost of an arbitration compared to the cost of court proceedings. In considering whether an arbitration clause is unconscionable, the court will consider the reasonableness of the contract and the purpose and effect of the terms of the contract. It is the burden of the plaintiff to prove that the clause is unconscionable.

To protect consumers, Sternlight believes that congressional action is necessary. She would like Congress to prohibit companies from using mandatory arbitration clauses that prohibit class actions. Congressional action, according to Sternlight, is preferable to relying on courts to evaluate arbitration clauses in con-

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Prof. Mark Budnitz,

Georgia State University College of Law

sumer contracts on a case-by-case basis. Sternlight said it is preferable because it would be more efficient and would eliminate the need for individual plaintiffs. Individual plaintiffs may be hard to find because they do not know they have a claim, they cannot afford to file a claim, or they cannot find a lawyer to bring a claim, according to Sternlight.

Budnitz agrees that Congressional action is needed to protect consumers. He believes that pre-dispute mandatory arbitration clauses should be prohibited in consumer cases. He also believes that Congressional action is preferable to court action in individual cases. "The best way to protect consumers is to carve out an exception [in] the FAA (Federal Arbitration Act) as car dealers have done," Budnitz said. "Court cases cannot do that."

However, Ware believes bills to prevent consumer arbitration clauses will be harmful to consumers. "While purporting to advance the interests of consumers, the bills would likely harm most of those very people," Ware said.