

HOME

DO YOU WANT ARBITRATION WITH THAT?

## Do You Want Arbitration with That?



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Imagine our country as a place where citizens were actually asked that question and given a choice. Unfortunately, the United States today is rife with mandatory arbitration—a process by which parties “agree” to have a third party arbitrator resolve a dispute instead of a judge or jury. Consumers are bombarded with choices of products and services in the marketplace, yet they often have no choice when it comes to resolving disputes. The Seventh Amendment right to a trial by “jury in civil cases is so fundamental and sacred to the citizen that it should be jealously guarded.”<sup>[1]</sup> In fact, deprivation of a trial by jury was an express justification for the fifty-six signers of the Declaration of Independence in severing ties with England.<sup>[2]</sup> Americans, however, are forced to give up this fundamental constitutional right on a daily basis, oft times unknowingly, through mandatory arbitration clauses.

In March of this year, the Consumer Financial Protection Bureau (CFPB) delivered a study to Congress showing that these forced arbitration agreements prevent or severely restrict consumers from finding relief when they have been wronged.<sup>[3]</sup> The CFPB found that tens of millions of consumers are subject to pre-dispute arbitration clauses. Yet, three out of every four consumers in credit card agreements did not know if they were subject to an arbitration clause and, of those subject to an arbitration clause, *fewer than 7% recognized that they could not sue their credit card issuer in court.*

More than half of the credit card market is subject to an arbitration clause, but arbitration in the mobile wireless market is even more extensive. In today’s technological age, many would argue that cell phones have almost become a necessity—especially for on-the-go attorneys who need constant access to their office and their email. The CFPB found that seven of the eight largest mobile wireless providers, covering 99.9% of subscribers, used arbitration clauses in their 2014 customer agreements.<sup>[4]</sup> Arbitration is just as much a part of a cell phone plan as texting. Worse, today, the Seventh Amendment right is as prevalent in the mobile wireless market as a rotary phone.

A key problem of mandatory arbitration is that its bar of class actions leaves consumers with little to no relief. The CFPB study showed that in 2010 and 2011, consumers obtained less than \$400,000 in relief from arbitrators compared to the \$220 million average per year through class action settlements.<sup>[5]</sup> Larger numbers of consumers are eligible for financial redress through class action settlements than through arbitration.<sup>[6]</sup> Given those numbers, it is no surprise that the companies that routinely utilize mandatory arbitration clauses have long argued that arbitration keeps costs down for consumers because it reduces costly litigation. The CFPB, however, completely undermined this argument. The CFPB found no evidence that the companies that eliminated their arbitration clauses increased their prices or reduced access to credit.<sup>[7]</sup> The CFPB study shows, unsurprisingly, that arbitration proceedings are unfairly skewed towards the companies. Arbitrators are typically picked and paid by the companies who are repeat players in the arbitration process. Ruling for the companies ensures the arbitrator gets hired again...and again...and again. As Upton

Sinclair once said, "It is difficult to get a man to understand something when his salary depends on his not understanding it."

### **Action Against Arbitration**

Congress required the CFPB to conduct its study of consumer arbitration agreements under Section 1028(a) of the Dodd-Frank Act, and this Section also gives CFPB express authority to implement regulations prohibiting or limiting the use of arbitration agreements in connection with consumer financial products or services.[8] On May 21, 2015 lawmakers urged the CFPB to utilize this authority to implement rules and eliminate the use of mandatory arbitration clauses in consumer contracts.[9] "These clauses force individuals into private binding arbitration as a condition of buying a product or service, and are designed to stack the deck against consumers and ensure that the final outcome of forced arbitration is unreviewable by courts," wrote the lawmakers. "Forced arbitration clauses—often buried deep within the fine print of financial products and service contracts—harm American consumers by depriving them of their day in court even when companies have violated the law." [10]

Also in May, the Arbitration Fairness Act was reintroduced into the Senate.[11] The bill prohibits mandatory pre-dispute arbitration agreements in employment, consumer, civil rights, and antitrust claims. It expressly recognizes that most consumers and employees have little or no meaningful choice of whether to submit their claims to arbitration; thus, its focus is on ensuring that arbitration is truly voluntary.[12] The Act does not completely eliminate arbitration as a means of settling disputes, but it does require that the decision to arbitrate be made after the dispute arises. The Act also preserves pre-dispute mandatory arbitration agreements between businesses. Similarly, a bill was introduced into the House to protect students against mandatory arbitration imposed by higher education institutions. The Court Legal Access & Student Support (CLASS) Act prohibits any school receiving student aid funding from the Department of Education from including any restrictions on students' ability to pursue legal claims, individually or with others, in court.[13]

In a recent win against binding mandatory arbitration, the Federal Trade Commission (FTC) upheld rules that allow warranty buyers to pursue litigation despite mandatory arbitration agreements. On May 22, 2015, the FTC stated, as it has in the past, that the Magnuson-Moss Warranty Act of 1975 never intended for arbitration rulings to be final.[14] Although the rules do not prohibit companies from requiring customers to enter into an arbitration agreement, they do prevent the arbitrator's decision from being legally binding. On May 28, 2015, the Department of Defense, joined by the General Services Administration and the National Aeronautics and Space Administration, followed suit by proposing a rule limiting companies that contract with the federal government from using inconspicuous arbitration clauses in their employment agreements.[15] Like the Arbitration Fairness Act, this proposed rule requires that the decision to arbitrate be voluntarily made after the dispute arises.[16]

Although it is still unclear what actions the CFPB may take, the CFPB study provides some foundation for changing the current landscape. The fight against mandatory arbitration is fundamental in protecting consumers, ensuring consumers obtain adequate relief, and restoring Seventh Amendment rights. Making arbitration a legitimate choice for consumers may not happen this year, but at the end of the day, slow progress is better than no progress.

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[1] *Jacob v. New York City*, 315 U.S. 752 (1942).

[2] The Declaration of Independence (U.S. 1776).

- [3] Consumer Financial Protection Bureau, *Arbitration Study Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015), available at: [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).
- [4] *Id.* at 7.
- [5] [http://files.consumerfinance.gov/f/201503\\_cfpb\\_factsheet\\_arbitration-study.pdf](http://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf).
- [6] *Id.*
- [7] *Id.*
- [8] Dodd-Frank Act; 18 U.S.C. § 1514A(e).
- [9] Letter to Hon. Richard Cordray, Dir. Consumer Financial Protection Bureau (May 21, 2015); available at: <http://www.franken.senate.gov/files/documents/150521CFPBarbitrationLetter.pdf>.
- [10] *Id.*
- [11] Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015); available at: <https://www.congress.gov/114/bills/s1133/BILLS-114s1133is.pdf>.
- [12] *Id.*
- [13] CLASS Act, H.R. 2079, 114th Cong. (2015); available at: <https://www.congress.gov/114/bills/hr2079/BILLS-114hr2079ih.pdf>.
- [14] [https://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2015/05/150522mag-mossfrn.pdf](https://www.ftc.gov/system/files/documents/federal_register_notices/2015/05/150522mag-mossfrn.pdf).
- [15] <https://www.federalregister.gov/articles/2015/05/28/2015-12560/federal-acquisition-regulation-fair-pay-and-safe-workplaces#h-50>.
- [16] *Id.*

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