

## Mandatory Arbitration Clauses Under the Spotlight

By Sean Pinckney, J.D. Candidate 2018 | November 9, 2015

In recent years, the use of [mandatory arbitration clauses](#) by corporations has increased following several Supreme Court decisions. Most credit card, cellular phone, utility, Internet purchase, and employment contracts today require customers and employees to sign lengthy and nebulous agreements that mandate private arbitration for any disputes arising from the contract. Some commenters feel that the [privatization of justice](#) leads to pro-corporation outcomes: customers are unable to bargain for different or better terms with the company, and the only way around the mandatory arbitration clause is to not enter the contract. However, with nearly every company in the industry adhering to this practice, avoiding arbitration clauses is all but impossible. Critics claim that the clause denies customers the fundamental right to their day in court, protected by the Seventh Amendment.

Arbitration clauses additionally prevent customers and employees from forming class actions against companies. This raises [questions of fairness](#) as it is very difficult for an individual to successfully sue a corporation with vast resources; the lawsuit often costs far more than the relief sought. By precluding the formation of class actions, companies are able to deny challenges to questionable business practices such as predatory lending, wage theft, overdraft fees, and discrimination. The New York Times reports that between 2010 and 2014, companies were able to [push 80% of class actions into arbitration](#), where then the claims would often be dismissed due to the class action waiver in the arbitration clause.

[David Oppenheimer](#), Professor of Law at University of California, Berkeley, School of Law, suggests that “[t]here are many circumstances in which private arbitration is freely selected by parties to a dispute because of its privacy and efficiency, and the Federal Arbitration Act properly divests courts of jurisdiction in such cases. But when companies insist that their customers and/or employees agree to arbitration as a condition of buying a product or being hired, and a dispute later occurs, the result is often terribly unfair to the employee or consumer. The Federal Arbitration Act was never intended to protect this kind of arbitration, and the courts or Congress should fix the problem the [New York] Times series has exposed.”

The New York Times articles have generated much debate. Proponents of the clause point out that mandatory arbitration eliminates the uncertainty of negotiations or jury trials. Arbitration is also procedurally simple and more accessible to consumers than expensive lawsuits. Scholarly research seems to suggest that consumers [fare slightly better with arbitration](#) outcomes than from individual consumer lawsuits, partly due to the high attorney fees associated with litigation. It is suggested that dispute resolution costs savings from arbitration can be [passed along to the consumer](#) in the form of lower prices. Meanwhile, class actions serve only a [slight deterrence factor](#) and often provide little compensation to class members. Further, arbitration meets a public policy desire to relieve an overburdened court system. Stephen Carter, Professor of Law at Yale Law School, originally predicted that the recent Supreme Court decisions would lead to

burdensome and one-sided arbitration clauses, but acknowledges that [this has not been the case](#) and that the language of clauses has changed slowly, if at all.

Congress has proposed a [bill that seeks to eliminate mandatory arbitration](#) clauses in employment, consumer, civil rights, and antitrust disputes, and restore the Fair Arbitration Act to its original intent. Additionally, the Consumer Financial Protection Bureau is considering a proposal to [prevent consumer financial companies from using arbitration clauses](#) to preclude class action formation. It remains to be seen how these proposals will alter the landscape of consumer and employment contract formation and enforcement.