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Arbitration Cuts the Public Out and Limits Redress

OPINION: The pervasive clauses, in cell phone contracts, job applications and more, curb collective action.

Judith Resnik, The National Law Journal

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Arbitration is having a moment in the spotlight, as former Fox News chairman Roger Ailes tries to use it to push TV anchor Gretchen Carlson's sexual harassment claims out of open court.

Arbitration clauses are everywhere: in forms customers sign when buying cellphones, in job applications and even to enter nursing homes. If enforced, no one can go to court, whether claiming that a bank has violated federal law, an employer has discriminated or a nursing home has committed malpractice. Instead, people are shunted into a closed arbitration via one-sided, "take it or leave it" obligations, imposed by the party given the power under current federal law to do so. But the law needs to change.

PROPOSED RULES

The agency that Congress created after the financial crisis — the Consumer Financial Protection Bureau (CFPB) — has proposed rules to stop banks and credit card companies from making customers waive rights to courts and to class actions by forcing them into single-file arbitrations. Public comments are due this month, and pushback is coming from the many companies promoting these clauses.

Two arguments support arbitration: first that it's for volunteers, signing "contracts." But the form clauses don't merit that term. They are neither bargained for nor bargainable. (For instance, one wireless provider's website states: "We may change any terms, conditions, rates, fees, expenses, or charges regarding your Services at any time.")

The other argument is that arbitration is cheaper and better than courts — opening more doors for redress. If that were true, one would expect to find lots of arbitrations. However, few individuals ever make their way into arbitration.

Take data on AT&T Mobility LLC, for instance. To get service, its forms prevent customers from joining class actions. When two consumers protested that the ban was unfair and illegal under California law, AT&T persuaded the U.S. Supreme Court in 2011 that companies can impose class bars.

In each of five years from 2009 to 2014, AT&T Mobility had 85 million to 120 million customers. During that entire time, 134 individuals — fewer than 30 a year — tried to use arbitration for claims against

that company.

The CFPB found similar data in its study of consumer loans, credit cards and checking accounts. Tens of millions of people use these services. But the CFPB identified only about 400 individual arbitrations brought by consumers during three years, ending in 2012.

Why don't people arbitrate? One answer comes from U.S. Supreme Court Justice Stephen Breyer's dissent in the court's April 2011 *AT&T v. Concepcion* decision: "only a lunatic or a fanatic" brings a claim "for $30" — the amount that the plaintiffs said they were overcharged.

Another explanation proffered is that people don't need to use arbitration because companies are responsive to customer complaints and otherwise law abiding. But in 2014, the federal government (not precluded by arbitration clauses) sued all the major wireless services for illegally overcharging customers for unwanted services and for paying insufficient refunds when customers complained. Multimillion-dollar settlements resulted.

Thus, the debate on whether arbitration is cheaper or quicker than courts and whether consumers or employees do better or worse misses the underlying fact that almost no consumers or employees "do" arbitration at all. The lack of use reflects the minimal oversight of arbitration's fairness and lawfulness, the failure to require a comprehensive system of fee waivers, the bans on collective actions, and the closed process cutting off knowledge about the claims filed, the arbitrators and the outcomes.

NEED COMPREHENSIVE SOLUTION

Courts are far from perfect, and I don't aim to idealize courts as the sole path to or the embodiment of justice. But the ability to uncover when courts are failing comes from the judiciary's obligations to open its doors to the public and keep records. Closed arbitrations cut the public out.

Fixing the problem entails a multipronged approach. The proposed CFPB rules are important to halt bans on class actions by providers of "financial products" — loans and credit cards that the CFPB regulates. But the CFPB regulations don't touch cellphone providers and hundreds of other companies.

Other federal agencies can deal with segments (nursing homes, for example), and lower courts can look at individual challenges to specific clauses. But a comprehensive approach needs Congress to pass pending bills, such as "the 2015 Arbitration Fairness Act" or the "Restoring Statutory Rights and Interests of the States Act of 2016," making unenforceable "predispute" court waivers, put into place before people know of legal claims.

The other avenue for redress is the U.S. Supreme Court. Before the 1980s, the court never applied the 1925 Federal Arbitration Act to employees and consumers or licensed class action bans. The court then switched gears, and misinterpreted the statute, designed long ago to support freedom of contract between business equals.

The issue isn't freedom of contract. It's class. The only way consumers and employees can manage in court is to have the resources — collectively — to pursue their claims. Regulations can help. Legislation is essential. And the Supreme Court could itself correct its wrongheaded reading of the Federal Arbitration Act.

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