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FORCED ARBITRATION CLAUSES AND CLASS ACTIONS WAIVERS: BY THE NUMBERS*

A GROWING NUMBER OF COMPANIES ARE INSERTING FORCED ARBITRATION CLAUSES AND CLASS ACTION WAIVERS INTO NON-NEGOTIABLE CONTRACTS.

Employment contracts

- According to a recent survey, the percentage of companies that include forced arbitration clauses and class action waivers in employment contracts increased from 37.2 percent in 2017 to nearly 48.9 percent in 2018.[1]

- An earlier study found that 56.2 percent of private-sector nonunion employees are subject to forced employment arbitration procedures. That is more than 60 million American workers.[2] In addition, 41.1 percent of these workers had also waived their right to be part of class action claims. That amounts to 23.1 percent of private-sector nonunion employees, or 24.7 million American workers.[3]

Consumer contracts

- A recent survey of large companies found:

    - "Eighty-one companies in the Fortune 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with consumer transactions.
    - Of the eighty-one companies in the Fortune 100 with consumer arbitration agreements, seventy-eight companies include class waivers in their arbitration agreements.
    - At least a majority of the households in the United States (and possibly almost two-thirds) are covered by broad consumer arbitration agreements.
    - More than sixty percent of United States retail e-commerce sales are covered by broad consumer arbitration agreements.
    - In 2018, at least 826,537,000 consumer arbitration agreements were in force, based on estimates from just a few companies for which information was readily available.

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The actual number of consumer arbitration agreements is likely higher. For a point of comparison, the U.S. population is about 328,000,000."[4]

- Regarding servicemembers, the U.S. Defense Department found that "most predatory lenders require borrowers to waive their rights to go to court to resolve disputes and instead submit borrowers to private adjudication through mandatory arbitration."[5]

WHEN A CASE IS THROWN OUT OF COURT AND INTO PRIVATE ARBITRATION BECAUSE OF ONE OF THESE CLAUSES, THE CLAIMS USUALLY DISAPPEAR.

Employment contracts

The *Wall Street Journal* reported that as more companies use forced arbitration clauses and class action waivers, "many employees are walking away from harassment, wrongful-termination and discrimination claims rather than taking them to a privately run tribunal, according to experts and new research." Often, workers simply drop the claims.[6]

Consumer contracts

In 2015, the Consumer Financial Protection Bureau (CFPB) found that "tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses," nearly all of which contain class action waivers. Yet from 2010 through 2012, consumers only filed a tiny number of claims in arbitration: an average of only 411 cases each year for six major product markets combined – credit card, checking account/debit cards, payday loans, prepaid cards, private student loans and auto loans." (By comparison, at least 350 million consumers benefitted from class action settlements during this period, with total relief well over $2 billion.)[7]

CONSUMERS AND WORKERS ARE SEVERELY DISADVANTAGED BY THESE CLAUSES.

Employment contracts

In a recent analysis by the *National Law Journal*, about 63% of decisions citing a 2018 U.S. Supreme Court case upholding the validity of class action waivers[8] broke in favor of the defendant. These cases were predominantly class actions "centered on wage and hour claims."[9]

Consumer contracts

The Economic Policy Institute found that in arbitration, "consumers only win relief in 9 percent of disputes." Even worse, what is far more typical is that companies fight consumers in arbitration with claims or counterclaims. In those situations, arbitrators grant companies relief 93% of the time, and then often order the consumer to pay the financial institution. So considering "both sides of this equation," in arbitration, the average consumer is actually paying $7,725 to the company.[10]

NOTES

[1] Carlton Fields, *2019 Class Action Survey*, https://classactionsurvey.com/wp-content/uploads/2019/04/2019_Class_Action_Survey.pdf

[2] Economic Policy Institute, *The growing use of mandatory arbitration* (April 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/

[3] Ibid.

[4] Imre Stephen Szalai, "The Prevalence of Consumer Arbitration Agreements by America's Top Companies," 52 *UC Davis L. Rev. Online* 233 (February 2019), https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf

[5] U.S. Department of Defense, *Report on Predatory Lending Practices Directed at Members of the Armed Forces and their Dependents* (August 9, 2006), http://archive.defense.gov/pubs/pdfs/report_to_congress_final.pdf. Notably, for Navy personnel, 80% of denied and revoked security clearances were due to financial issues.

[6] Jacob Gershman, "As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle," *Wall Street Journal*, January 25, 2018, https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201

[7] Consumer Financial Protection Bureau, *Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a)* (March 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[8] In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the U.S. Supreme Court gutted an important part of the National Labor Relations Act, ruling that concerted *legal* activity, such as class action lawsuits, is not covered by the NLRA's protections, and that the NLRA is superseded by the earlier 1925 Federal Arbitration Act. That case upheld the validity of class action waivers in employment contracts, affecting millions of employment agreements.

[9] Erin Mulvaney, "'Epic' Impact: How a Major SCOTUS Decision in Favor of Arbitration is Shaping the Landscape for Workplace Lawsuits,'" *National Law Journal*, February 28, 2019, https://www.law.com/nationallawjournal/2019/02/28/epic-impact-how-a-major-scotus-decision-in-favor-of-arbitration-is-shaping-the-landscape-for-workplace-lawsuits/

[10] Economic Policy Institute, "Correcting the record," August 1, 2017, https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/