The vast majority of arbitration clauses in use in consumer contracts explicitly prohibit consumers from bringing or participating in class actions either in court or in arbitration.\(^{23}\) According to the CFPB’s study, across all of the products studied, between 85 and 100% of arbitration clauses included such class waivers.\(^{24}\)

In 2011 and 2013, the United States Supreme Court affirmed that these clauses are enforceable,\(^{24}\) even though the class action offers individuals with small claims their only realistic opportunity to receive justice or to vindicate their rights under state and federal law.\(^{26}\) There are indications that many lenders have adopted arbitration clauses precisely for the purpose of avoiding all class actions.\(^{22}\) The general counsel of Automotive Compliance Consultants recently asserted that in car dealership contracts “the purpose of an arbitration agreement is to keep a customer’s suit against a dealership from becoming the basis for a class action.”\(^{28}\)

When a business victimizes a large number of consumers, but individual injuries are relatively small, class actions in court or arbitration often provide the only effective way for consumers to vindicate their rights. The Supreme Court has held that class plaintiffs cannot avoid enforcement of an arbitration clause and accompanying class action waiver by arguing that the costs of individual litigation exceed the value of an individual claim.\(^{29}\) Furthermore, commentators have pointed to other structural problems with the individual arbitration of legal claims common to a class of consumers that prevent consumers from bringing claims at all.\(^{29}\)

Because of the profound effects class action waivers have on potential consumer claims, businesses sometimes—along with class action waivers—add provisions to their arbitration clauses that make them appear more consumer friendly, such as provisions that allocate costs to the merchant or that provide increased payments to claimants who receive more in arbitration than the company offered before the arbitration began. These provisions may appear to make individual arbitrations more consumer friendly, but their goal is to decrease the likelihood that the arbitration clause and concomitant class action waiver will be struck down by a court.\(^{31}\)

The proliferation of class action bans has had dire effects. A report from Public Citizen and the National Association of Consumer Advocates identifies hundreds of potential class actions that have been squelched by such contractual provisions.\(^{32}\) Thus the result of the pervasiveness of class action bans in many industries is that arbitration has been transformed from an alternative dispute resolution mechanism to a means of squelching consumer claims altogether.\(^{33}\)

After reviewing the use of forced arbitration over a three-year period, the Consumer Financial Protection Bureau concluded in its March 2015 study that the consequences of “class waiver” provisions are particularly dire. By contrast to consumer arbitration—which rarely occurs and, when it does occur, generally proceeds on an individual basis—consumers fare relatively well in class litigation.

Consumers recover significant amounts in affirmative relief in class litigation. The CFPB study found that in 419 federal consumer class action settlements “the annual average of the aggregate . . . [financial recovery for consumers] was $540 million per year. This estimate covers, for settlements approved between 2008 and 2012, more than $2 billion in cash relief including fees and expenses and more than $600 million in in-kind relief.”\(^{34}\)

Footnotes


27 [27] See Brief of Amicus Curiae [3] Trial Lawyers for Public Justice, the American Association of Retired Persons, the Association of Trial Lawyers of America, and the National Association of Consumer Advocates in Support of Appellees, Baron v. Best Buy Co., 260 F.3d 625 (11th Cir. 2001) (includes as an attachment such a letter from an arbitration service provider) (available online as companion material to this treatise). See also Alan S. Kaplinsky & Mark J. Levin, Excuse Me, But Who’s the Predator?, Bus. L. Today 24 (May/June 1998) (encouraging banks to use arbitration as a “defense” against class actions and class action lawyers).


1.4.3 Limitations on Class Actions