

Read the Fine Print: Arbitration Agreement May Have Benefits for Consumers

Commentary by *Laura M. Reich, Daily Business Review*

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In 2011, the U.S. Supreme Court rendered a historic and sweeping pro-arbitration decision in *AT&T Mobility v. Concepcion*, holding that state-law contract defenses targeting arbitration agreements are in conflict with the Federal Arbitration Act. Although governing case law pre-*Concepcion* already trended in that direction, the Supreme Court's decision definitively established that consumer arbitration agreements — including those with a waiver of the right to pursue class actions — are valid and enforceable.

A subsequent Supreme Court case, *American Express v. Italian Colors*, further held that courts may not invalidate arbitration agreements simply because the cost of individually arbitrating a federal statutory claim may exceed the plaintiff's potential recovery.

Although the law is now mostly settled, the debate about whether pre-dispute mandatory arbitration agreements are beneficial or harmful to consumers rages on. Understandably, most observers focus on the Supreme Court's holding that class action waivers do not preclude enforcement of consumer arbitration clauses. Personal and professional biases often color the debate, with consumer advocates decrying their use while businesses argue that they are a legitimate and necessary way to manage litigation risk and resolve disputes with consumers.

Both sides pay much less attention to the Supreme Court's discussion of the arbitration agreement under review in *Concepcion*, specifically those provisions in the agreement that were favorable to the consumer. In fact, courts have even noted that some arbitration agreements are so favorable to plaintiffs that those plaintiffs would probably be better off in arbitration than in a class action.

Since pre-dispute mandatory arbitration agreements, often including class action waivers, have become standard practice in many industries, consumers and their advocates should learn to recognize and utilize these contractual provisions that work in their favor.

For example, businesses may agree to provide some of the following consumer benefits:

- Pay or advance some or all costs and expenses of arbitration, likely including the filing fee and any administrative charges.
- Arbitration located where the consumer lives or receives services, or at another location convenient to the consumer. This may be of significant benefit to consumers residing outside of major urban centers or in rural areas, and may be a significant disadvantage to national companies operating from a central location.

- Exempt individual claims within the exclusive jurisdiction of a small claims court from arbitration.
- Payment of the attorneys' fees of a successful plaintiff, or an agreement not to seek reimbursement of the business' own attorneys' fees, either in full or above a certain threshold.
- Pay a "recovery fee" or other windfall to a successful plaintiff either in a set amount or a multiple of the actual recovery.
- Proceed on an expedited basis or in person by phone or via written submissions at the consumer's discretion.
- Allow the consumer to opt out of arbitration entirely by giving reasonable notice as required by the agreement. These opt-out provisions often explicitly state that the consumer's services or relationship with the business will not be adversely affected by a decision to opt out of arbitration.

Better Option?

As courts have noted, these types of provisions may make arbitration a better option for consumers — even potential class action plaintiffs — than expensive and drawn-out litigation in court. Accordingly, consumers need to read the fine print to determine if their standardized contracts include these types of provisions and whether they can benefit from them.

Additionally, many consumer arbitration agreements call for administration of the dispute by the American Arbitration Association, a nonprofit organization with offices throughout the U.S. and a long history of helping individuals and organizations resolve their conflicts out of court.

The AAA has established the Consumer Arbitration Rules designed to apply fairly to disputes between individuals and businesses arising out of consumer transactions and based on standardized, non-negotiable contracts. The AAA also instituted the Consumer Due Process Protocols to ensure that arbitration agreements meet minimum due process standards. Among these protocols are the requirements that the consumer arbitration process be fundamentally fair, administered by an independent and impartial arbitrator and reasonably priced.

Consumers and their advocates should not automatically assume that arbitration is unfair or will not meet their needs. Indeed, where consumer contracts contain some or all of the favorable terms noted above, arbitration may be an ideal choice for consumers to resolve their disputes.

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