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# Mass Arbitration of Individual Claims: The Inevitable Result of Forced Arbitration

## Forced Arbitration Keeps People from Accessing Justice

Many Americans assume that they have a constitutional right to bring legal disputes in court. The ability to access the courts is often critical for individuals and groups seeking relief from corporate or government wrongdoing. Because court proceedings are open to the public, the court system also helps to inform the public about wrongdoing against consumers, workers, and others. Pursuing claims in the judicial system, however, is increasingly out of reach because corporations have worked hard to shield themselves from the system by inserting forced arbitration clauses and class-action bans in a wide array of contracts.

Forced arbitration clauses allow corporations to deny consumers and workers their day in court, deter consumers from pursuing claims, keep misconduct out of public view, and limit accountability when a corporation's actions have harmed large numbers of people. Corporations often insert these clauses into non-negotiable consumer and worker contracts, where many people do not discover them until after a dispute arises. These clauses require that any individual only use private arbitration, not the courts, to handle disputes, and the clauses frequently include provisions that ban class actions, thereby creating a significant barrier to challenging unlawful practices that impose small-value harm on large numbers of people. Because arbitration proceedings are generally private and decisions often remain hidden, forced arbitration also generally keeps corporate wrongdoing out of the public view.

Increasingly, corporations impose additional hurdles before arbitration can even begin, such as mandatory notice requirements, pre-dispute procedures, and forced mediation. A 2024 academic review found that nearly 80% of arbitration clauses analyzed require some form of pre-arbitration dispute resolution before a claim may proceed.

Because arbitration proceedings are generally secret and decisions often remain hidden, forced arbitration can shield corporate wrongdoing from public view and deny the transparency and accountability that a fair civil justice system requires. For example:

- In 2020, Wells Fargo & Company agreed to pay $3 billion to resolve potential criminal and civil liability stemming from the creation of 3.5 million unauthorized bank and credit accounts and the misuse of consumer identities over approximately 14 years. As affected consumers began filing lawsuits against the bank, the bank relied on terms of service in customer agreements that imposed mandatory arbitration, out of public view, for disputes concerning accounts that customers had never consented to open.

In a few cases, courts have found that a forced arbitration provision creates such a significant hurdle to accountability as to be unconscionable, based on the specific facts of the case. For example, in some cases, the costs of arbitration have been so high as to effectively prevent the consumer from pursuing the dispute. In employment cases, courts have held that arbitration agreements cannot "require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." In response, some corporations insert language into their employment contracts making the company responsible for paying initial arbitration filing fees.

Public Citizen has a long history of fighting companies' use of forced arbitration in the courts and advocating in Congress for legislation that would give workers and consumers the right to decide *after* a dispute arises whether to bring their claims before a court or an arbitrator.

## Mass Arbitration of Individual Claims

"Mass arbitration" refers to a situation in which large numbers of consumers file claims in individual arbitration proceedings arising from the same underlying company action. For example, 1,000 people may file claims against the same credit card company concerning an allegedly unlawful overcharge. Mass arbitration is a foreseeable consequence of corporations making forced arbitration a standard provision in consumer and worker contracts. What would be one class action, had corporations not imposed forced arbitration and class-action bans; may, not surprisingly, now be thousands of individual arbitration proceedings.

Corporations complain about mass arbitration filings by individuals, especially when the corporations are responsible for paying initial filing fees, a responsibility that they have tried to evade. For example:

- In 2020, facing 5,010 individual claims by gig economy workers seeking overtime pay and minimum wage, DoorDash tried to avoid paying arbitration fees and instead proceeded in court. The court ordered the company to pay the $9.5 million in arbitration fees. The judge rightly observed that "[]in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order."

Rather than acknowledging that corporate wrongdoing can affect large numbers of people, leading to numerous individual claims, supporters of forced arbitration criticize mass arbitration as an abuse by consumers' lawyers. This criticism disregards the principal cause of mass arbitration: companies' insistence that claims be brought in arbitration rather than in court, and their practice of revising the terms of consumer contracts at will to make it more difficult for consumers and workers to bring claims in court.

### Batch Arbitration: Yet Another Corporate Tool to Circumvent Accountability

As discussed above, mass arbitration is a predictable consequence when arbitration is the only option available to individuals seeking remedies for corporate wrongdoing that affects a large number of people. When that happens, claimants, the company, and the arbitrator may look for efficient ways to address the claims. Some corporations, however, attempt to do so in ways that create additional hurdles for people seeking a resolution, much less relief.

One technique is referred to as "batch arbitration", where the company requires that similar claims submitted to arbitration be considered in groups—say, for example, 30 at a time—and allows the next batch to be heard only after the first batch is resolved. The same 2024 study found that more than 40% of the arbitration clauses studied require proceedings that employ some form of batch arbitration.

Batch arbitration guarantees delays – and allows corporations to postpone or even evade liability – because individual claimants in later batches must wait years before their claims can be heard, let alone have any chance of receiving relief. Under batch arbitration, the more customers a company injures, the longer the queue of case batches will stretch, and the longer all but a few lucky customers will have to wait for relief. And batch arbitration offers none of the advantages present in multi-district litigation (MDL), where the court may first try a "bellwether" case, or representative lawsuit, from among a large group of cases in the MDL to give the parties on both sides a chance to see how their legal positions and factual presentation fare at trial, before other cases proceed.

Delays required by batch arbitration provisions are not accidental; they are built into the system. And they inevitably block timely resolution for aggrieved consumers and workers. For example, in a case involving one thousand injured customers, and given data showing that the median time for a claim to proceed through arbitration is approximately 9.5 months, a batching provision requiring that no other batch of cases proceed until each assigned arbitrator decides each of twenty cases in a batch would mean that some claimants would wait as much as 40 years for their claims to reach an arbitrator.

Some batching provisions further limit people's ability to use the lawyer of their choice. Typically, batching provisions consist of a "minimum number of similar claims, usually at least twenty-five. Filed by the same counsel or a coordinated set of counsel." These restrictions interfere with claimants' right to counsel by barring individual claimants pursuing their own rights in individual arbitration from retaining attorneys who specialize in matters and who may also be able to manage other similar, but individual, cases efficiently and at a lower cost. Furthermore, the limitation makes it less feasible to represent consumers with low-dollar claims. And those who require counsel due to disability or accessibility concerns are even less likely to file a claim at arbitration without representation.

## Corporations and Arbitrators Update Their Rules to Favor Corporations

Corporations weaponize their power against consumers and workers, actively rewriting nonnegotiable contracts in their favor. When their initial efforts don't produce the results that corporations seek, corporations and arbitration providers update mass arbitration rules in response to corporate concerns.

Corporations regularly take advantage of their power to actively update their terms of service to insert language that usurps consumers' and workers' ability to hold them accountable. For example, sometimes they will update their terms of service in anticipation of a legal dispute, allowing them to adopt more favorable terms for themselves while providing limited – and sometimes no – prior notice to the consumers or workers affected by the change in terms. Recently, at a time when customers are facing rising costs and federal regulators have abandoned their role in holding corporations accountable, Bank of America re-adopted a forced arbitration clause in its terms of service after 17 years of not imposing forced arbitration on its customers.

Where corporations are unable to adopt contractual language addressing pressing concerns, such as steep initial filing fees in arbitration, arbitration providers have stepped in and updated their mass arbitration rules in ways responsive to corporate concerns. In 2024, the leading arbitration providers in the United States, including the American Arbitration Association (AAA), with 88% of the market share, and JAMS, with approximately 12% of the market share, updated their mass arbitration rules, procedures, and fee schedules in a manner that shifts the burden of initial mass arbitration filing fees away from the corporation. For example, AAA's mass arbitration rules replaced individual filing fees with a flat $11,250 initiation fee, and other related fees were also capped to reduce corporations' financial exposure from mass arbitration filings.

Additional updates to mass arbitration rules go a step further by sanctioning anti-consumer practices, similar to batch arbitration, that create further delays and barriers for consumers and workers. For example, AAA's 2024 Supplementary Mass Arbitration Rules define mass arbitration as "twenty-five or more [c]onsumer or [e]mployment/[w]orkplace similar [d]emands for [a]rbitration [] filed against or on behalf of the same party or related parties;" and "where representation of all parties is consistent or coordinated across the cases."

Other procedural updates to mass arbitration rules proffered by AAA and JAMS offer additional protective mechanisms for corporations, and in response to criticism of mass arbitration, which include requiring filing attorneys to submit an affirmation, or sworn declaration, stating that the information provided in each case is "true and correct" under threat of sanctions. Moreover, both AAA and JAMS mass arbitration rules allow for the appointment of a process arbitrator (AAA) or a process administrator (JAMS), who is granted broad decision-making power over whether the mass arbitration will be allowed to move forward. They also hear and determine matters, including whether the parties have met the filing requirements and which demands, among others.

## Recommendations

Forced arbitration, not mass arbitration, is a problem that calls for reform. Decision-makers at the federal and state levels must oppose efforts to limit harmed consumers' and workers' ability to file their arbitration cases expeditiously and simultaneously through mass arbitration.

To truly protect consumers and employees, lawmakers should support legislation that would ban the use of forced arbitration in consumer and worker contracts.

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