

## consumer rights

# Are you giving up your rights without knowing it?

### When you buy things, you may be agreeing to terms that tip the scales against you



**J**on Perz was stunned when his mechanic's inspection revealed that the used 2002 Ford Escort he'd purchased about two weeks earlier had been rear-ended and flooded, and was unsafe to drive as a result. After trying unsuccessfully to recover his \$12,000 from the dealership that sold him the car, Perz, of San Diego, decided to sue. But he discovered that he couldn't because of a clause in his purchase contract requiring him to submit his case to binding arbitration, a method of dispute resolution in which a company selected by the dealer—not a judge—would rule on his complaint. Perz finally had his arbitration hearing in late July, more than seven years later.

The reason it took so long? The dealer refused to pay the required arbitration fee, prompting the designated arbitration firm not to hear any more of its cases. After years of legal battles, during which time Perz paid off a vehicle he couldn't use, another arbitration firm finally heard the case. As of publication time, the decision was pending.

The car still sits in Perz's garage. "Every so many months, I go and look at it and shake my head," he says. "I've been sick over it."

Perz's case is an example of how justice can be delayed or even denied because of binding arbitration agreements buried in many types of consumer contracts and which increasingly are being enforced by the courts.

The National Association of Consumer Advocates says that such agreements are now in hundreds of millions of consumer contracts. If you have purchased a product or service from Amazon, signed a cell-phone contract with AT&T, bought a gift card from Starbucks, went for a deal from Groupon, or tried to find love on Match.com, for example, there's a good chance you unknowingly agreed to binding arbitration. All it takes is signing a contract, clicking "I agree" on a website, or just using a product or service. If you eventually have a

complaint—say, you discover that for years your credit-card issuer charged improper fees—instead of being able to air your complaint to a judge or jury, you might be contractually obligated to take it to an arbitration firm selected by the very company that engaged in the wrongdoing. And there, critics say, the odds may be stacked against you.

### THE ARBITRATION DEBATE

Proponents of the clauses say arbitration makes settling disputes quicker and less costly than going to court. They say the agreements, which usually require every case to be heard individually, avoid class-action lawsuits, which can drag on for years and generate huge payouts for attorneys while providing little benefit for their clients. They say arbitration translates into lower prices for products and services that would otherwise bear the higher costs associated with lawsuits.

Critics say the agreements deny people their day in court. And because arbitration usually occurs in secret, the retailer that gets caught cheating customers can escape public scrutiny.

Critics also say some businesses look for arbitration firms that have a record of being company-friendly. The arbitration firm has an incentive to please the company that hires it, not you, says Paul Bland, executive director of the public-interest law firm Public Justice.

Evidence suggests that may be the case, at least in some instances. In 2009, the Minnesota attorney general sued the National Arbitration Forum, alleging that it hid ties to the debt-collection industry while promoting itself as being neutral and independent. The company settled the lawsuit, agreeing to stop administering arbitrations involving consumer debt, including in credit cards, loans, telecommunications, utilities, health care, and leases. The company had been the designated arbitrator in tens of thousands of credit-card contracts.

### NO CLASS ACTIONS

Preliminary survey results by the Consumer Financial Protection Bureau show that almost all mandatory, binding arbitration agreements for financial products and services, including credit cards and checking accounts, bar class actions. By prohibiting consumers and employees from arbitrating as a class, critics say, many complaints get dropped because they're too costly to arbitrate individually, especially when each person's loss is relatively small. Never mind, they say, that the company accused of wrongdoing made a windfall. So for instance, if a credit-card company charges its customers \$40 for a service such as credit monitoring that they didn't authorize, it stands to make tens of millions of dollars. And the company has little incentive to change its practices because class actions are never brought.

"Arbitration is a license to steal; it is carte blanche for any transgression a company wants to commit," says Perz's attorney, Michael Lindsey of San Diego.

Daniel Blinn of the Consumer Law Group, based in Rocky Hill, Conn., said a class-action ban is why he turned away a potential client who complained that an auto finance company charged him about \$300 too much for the personal property tax Connecticut charges on leased vehicles.

"There are probably hundreds of people who also have the claims," Blinn said. "If I had been able to do a class action, it would have been worth it to me to look into whether he was right."

### LOST IN LEGALESE

Another criticism is that people don't know they're signing away their right to sue when they purchase products or services. That's because mandatory binding arbitration clauses are usually part of the fine print in contracts or in website terms and condi-

tions. In some cases, as with many credit cards, the agreement that contains the clause is not sent until after the consumer orders the product or service.

Even if they see the clause, critics say, people often don't understand its implications. And they say companies often present contracts on a take-it-or-leave-it basis, with no opportunity for you to negotiate terms. Ironically, car dealers, who have made widespread use of arbitration clauses in their contracts with consumers, including Perz, made that same argument when they persuaded Congress in 2001 to prohibit automakers from imposing arbitration agreements on them.

### LIMITED RIGHTS

Another criticism is that some arbitration agreements limit the types of penalties arbitrators may award, such as punitive damages, or the types of claims people can raise, including negligence. And there's usually little basis on which an arbitration decision can be appealed.

Arbitration agreements can even take away your right to pursue administrative options provided by state, federal, or local laws. Consider a clause in a contract Consumer Reports signed for the purchase of a Mercedes-Benz for its new-car test program. The clause said that the parties agree to use arbitration as the exclusive method to settle any claims, including those involving consumer fraud, Lemon Law, and Truth in Lending.

### ASSESSING PUBLIC HARM

It's difficult to determine how much arbitration agreements hurt consumers, employees, and others. It's impossible to know, for example, how many disputes aren't pursued because the aggrieved parties can't sue or act as a class. And no one can say how a case that goes to arbitration would have been decided had it been heard in open court instead, perhaps as a class action.

But a few cases provide clues.

In one, a Maryland car dealership that had arbitration agreements in only some of its contracts was accused of selling used cars without giving customers conspicuous notice that the vehicles were former short-term rentals, in violation of state law. Most customers who had arbitration agreements were exempt from the class-action settlement, which provided the others with \$300 to \$1,500 in payments or vouchers good for services or the

purchase of another car. It's unknown whether those who were bound by the arbitration agreements went on to arbitrate their claims.

### COURTS ENFORCE AGREEMENTS

After a series of U.S. Supreme Court decisions, lower courts increasingly are enforcing arbitration agreements. One such Supreme Court decision said that the class-action prohibitions in most agreements must be upheld even when evidence shows that it would be economically impractical to pursue cases individually. The court has ruled that the 90-year-old Federal Arbitration Act, which allows parties to agree to binding arbitration instead of going to court, trumps state laws that attempt to limit the enforceability of mandatory binding arbitration agreements.

The decisions have led an increasing number of companies to insert arbitration clauses barring class actions in their contracts. They have also led to some lower-court rulings that have left some observers scratching their heads.

One case involved a New York woman's dispute with a debt-consolidation company that she said did little for the more than \$3,000 she had paid. She objected to a contract provision requiring her to have her complaint heard by an arbitrator in Arizona. A federal court in New York found that only the Arizona arbitrator had the authority to decide whether requiring arbitration in Arizona was fair, a decision the court itself acknowledged was logically flawed.

In response to such decisions, there have been several attempts to change the Federal Arbitration Act, including legislation sponsored by Sen. Al Franken, D-Minn., and Rep. Hank Johnson, D-Ga., that would invalidate binding arbitration agreements in consumer, employment, antitrust, and civil rights disputes. The bill is being supported by Consumers Union, the policy and advocacy arm of Consumer Reports.

As for Perz, he now plans to junk his Ford. "I want the car out of my life," he says. **\$**

## What to do

### BEFORE BUYING

**Comparison shop.** Look for sellers that don't have mandatory binding arbitration agreements. In its survey findings, the CFPB noted that larger banks are more likely to have binding arbitration clauses in their credit-card and checking-account agreements than smaller banks and credit unions.

**Opt out.** If a contract has an opt-out provision, take advantage of it. Bland at Public Justice estimates that more than 80 percent of nursing-home contracts have arbitration agreements with opt-out provisions that hardly anyone uses.

But follow the opt-out instructions so that you don't miss important requirements. For example, if you want to opt out of the arbitration clause in the contracts for Cablevision and Comcast, and Hertz rental cars, you must notify the companies in writing within 30 days of receiving your agreement. Also watch for changing contract terms from companies with which you have an ongoing relationship, such as telecommunications providers. They may notify you that they're adding an arbitration clause to your existing agreement and giving you a limited time to reject it.

**Try deleting it.** If it's a contract for a major purchase, try deleting the arbitration clause by crossing it out or asking the seller to provide a new agreement without

it. If you cross it out, ask the seller to initial the change on every copy. One of our staffers who was purchasing a Jeep for our road tests persuaded the dealer to delete part of the arbitration clause in the purchase agreement.

### AFTER BUYING

**Exhaust your complaint options.** Take every reasonable step to resolve the problem with the company, including complaining to its executive offices and on its social-media pages.

Complain to government agencies. If a company has violated the law by committing fraud, failing to provide required prepurchase disclosures, or anything else, a government agency may come to your rescue. Complain to your state consumer protection office, attorney general, or utility regulators, and, at the federal level, the Federal Trade Commission ([ftc.gov](http://ftc.gov)), Consumer Financial Protection Bureau ([cfpb.gov](http://cfpb.gov)), or Federal Communications Commission ([fcc.gov](http://fcc.gov)). For a list of local and state consumer agencies, go to [usa.gov/directory/stateconsumer/index.shtml](http://usa.gov/directory/stateconsumer/index.shtml). For a list of federal agencies and the areas they regulate, go to [usa.gov/topics/consumer/federal.pdf](http://usa.gov/topics/consumer/federal.pdf).

**Seek legal help.** Find out whether you can challenge the clause by contacting a consumer attorney ([naca.net](http://naca.net)).