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RECONSIDERATION OF FORCED ARBITRATION IN DATA PRIVACY LEGISLATION

Andy Xu

Pre-dispute arbitration principles were established in 1925 by Congress through the Federal Arbitration Act (FAA) and were meant to “create an efficient way for businesses with comparable bargaining power to *negotiate and agree* upon an alternative means of conflict resolution.”¹ However, the driving legal maxims behind the FAA failed to address cases with a large power imbalance between the parties.² Arbitration in such cases usually see a company “likely be[ing] represented in arbitration by lawyers who are well-versed in the process and the issue involved, while the wronged customer must find an attorney willing to represent them for what is likely a meager award, if any.”³ The benefits of forced arbitration led to corporations adopting the practice on a massive scale to the extent where the advocacy group Public Citizen put forth a statement that “[f]orced arbitration has crept into virtually every sector of Americans’ lives.”⁴

Data privacy is an area of particular concern when it comes to forced arbitration.⁵ Personal information collected and used by websites, applications, and social media platforms may exceed a user’s expectations.⁶ In addition, adequate safeguards might be missing, possibly resulting in data breaches that expose users’ personal information.⁷ In *Scott v. AT&T Inc. et al.*, Electronic

¹ Chao Liu & Adam Schwartz, *Stop Forced Arbitration in Data Privacy Legislation*, ELECTRONIC FRONTIER FOUNDATION (April 19, 2022), <https://www.eff.org/deeplinks/2022/04/stop-forced-arbitration-data-privacy-legislation> [<https://perma.cc/BGC4-59HA>].

² *Id.*

³ Chris Morran, Bill Aims to Restore Consumers’ Legal Rights Stripped Away by Supreme Court Rulings, CONSUMERIST (Feb. 4, 2016, 4:49 PM), <https://consumerist.com/2016/02/04/bill-aims-to-restore-consumers-legal-rights-stripped-away-by-supreme-court-rulings/> [<https://perma.cc/E3BA-YZRA>].

⁴ *Restoring Statutory Rights Act Letter*, PUBLIC CITIZEN, <https://consumerist.com/consumermediallc.files.wordpress.com/2016/02/restoring-statutory-rights-act-support-ltr.pdf> [<https://perma.cc/Y2Y2-MB7B>] (last visited Sept. 10, 2022).

⁵ Liu & Schwartz, *supra* note 1.

⁶ *What is Data Privacy?*, CLOUDFLARE, <https://www.cloudflare.com/learning/privacy/what-is-data-privacy/> [<https://perma.cc/6WLC-CXPY>] (last visited Sept. 10, 2022).

⁷ *Id.*

Frontier Foundation sued AT&T for the unlawful disclosure of users' location data. AT&T moved quickly to prevent the case from proceeding, arguing that the arbitration agreements it forces upon every product or service purchaser, bars plaintiffs from bringing the action.⁸ Personal information provides a "detailed picture of our movement and private lives."⁹ Such sensitive data would be expected to be protected, yet carriers such as AT&T have shown throughout the last several years that they are willing to sell this information to any willing purchasers.¹⁰ Unfortunately, the court agreed with AT&T and upheld the arbitration agreements buried deep in its contracts. Data breach class action lawsuits such as *Flores Mendez v. Zoosk, Inc.* were also denied due to a class-action waiver.¹¹

The underlying issue with forced arbitration is the imbalance of power. The Supreme Court expanded corporations' ability to use the FAA to enforce unilaterally placed arbitration clauses.¹² A series of decisions beginning in the 1980s allowed corporations to use the FAA to prevent lawsuits in state and federal courts. Today, "it has become increasing commonplace for corporations to insert arbitration clauses into their contracts with customers and employees."¹³ This is especially true for corporations who collect and share private data. A majority of the Fortune 100 companies, many of whom collect and share data as elements of their business model,

⁸ Aaron Mackey, Forced Arbitration Thwarts Legal Challenge to AT&T's Disclosure of Customer Location Data, ELECTRONIC FRONTIER FOUNDATION (April 14, 2021), <https://www.eff.org/deeplinks/2021/04/forced-arbitration-thwarts-legal-challenge-atts-disclosure-customer-location-data> [<https://perma.cc/42E2-JV3Z>].

⁹ *Id.*

¹⁰ *Id.*

¹¹ Ellen Choi & Kathryn Cahoy, Class Certification Denied in Data Breach Class Action Based on Class-Action Waiver in Terms of Service, Inside Class Actions (Aug. 11, 2022), <https://www.insideclassactions.com/2022/08/11/class-certification-denied-in-data-breach-class-action-based-on-class-action-waiver-in-terms-of-service/> [<https://perma.cc/EC73-PGKD>].

¹² Liu & Schwartz, *supra* note 1.

¹³ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/> [<https://perma.cc/Z4KT-H6D7>].

place class waiver provisions in their arbitration agreements.¹⁴ Even though the Supreme Court has acknowledged that the FAA is not applicable where “one of the parties characteristically has little bargaining power,”¹⁵ corporations’ usage of the FAA to enforce their arbitration clauses continue to be unregulated.¹⁶ Parties with little bargaining power after 1985 have almost no ability to challenge an arbitration clause on the basis of state law.¹⁷

Arbitration can be a useful and powerful tool in resolving disputes in both the private and public sectors, as it is often a more efficient process than litigation due to its speed, economic feasibility, and its greater flexibility in process and procedure.¹⁸ Arbitration, however, should not be forced because it lacks safeguards that exist within the court system – such as the right to conduct discovery.¹⁹ Parties providing sensitive personal information to data companies should not be barred from litigation because of obscure arbitration clauses hidden within dense and long contracts, as it has often proven to result in data privacy abuse.

¹⁴ Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, UC DAVIS L. REV. ONLINE, 233, 248 (2019).

¹⁵ *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 402 n.9 (1967).

¹⁶ Szalai, *supra* note 15.

¹⁷ Stone & Colvin, *supra* note 14.

¹⁸ *Using Arbitration to Resolve Legal Disputes*, FINDLAW, <https://www.findlaw.com/adr/arbitration/using-arbitration-to-resolve-legal-disputes.html> [<https://perma.cc/5X98-UEEA>] (last visited Sept. 10, 2022).

¹⁹ Liu & Schawartz, *supra* note 1.