

2016

# The Funny Thing About Forced Arbitration and the CFPB

Joanne Doroshow

*New York Law School*, joanne.doroshow@nyls.edu

Follow this and additional works at: [https://digitalcommons.nyls.edu/fac\\_other\\_pubs](https://digitalcommons.nyls.edu/fac_other_pubs)

 Part of the [Banking and Finance Law Commons](#), and the [Consumer Protection Law Commons](#)

---

## Recommended Citation

Doroshow, Joanne, "The Funny Thing About Forced Arbitration and the CFPB" (2016). *Other Publications*. 314.  
[https://digitalcommons.nyls.edu/fac\\_other\\_pubs/314](https://digitalcommons.nyls.edu/fac_other_pubs/314)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.

# The Funny Thing About Forced Arbitration and the CFPB



By Joanne Doroshow

When Funny or Die's Adam McKay was [tapped to direct](#) *The Big Short* starring the hilarious Steve Carell, lots of people probably thought "Well, that's a mistake. Wall Street isn't funny." So wrong. As Hollywood has begun noticing [\(comedy after comedy after comedy\)](#), Wall Street can be hilarious.

Lately, my biggest laughs have come while monitoring the reaction to a [rule](#) just [proposed](#) [by](#) the Consumer Financial Protection Bureau (CFPB). That's the little agency [set up](#) [after](#) the 2008 financial collapse "to protect consumers from abusive lending practices." I've been digging for anything amusing I can find about this rule because, as Gawker [put it](#), this CFPB rule fixes "one thing that is too boring for anyone to pay attention to and also will potentially destroy your life." So let me explain - or let Gawker try:

*A while back, huge corporations figured out that nobody reads the contracts that you have to sign anyhow, so they might as well stick in clauses that say, in essence, "if you f\*\*k me over I will not sue you in the courts, which could be bad for you—instead I agree to take our dispute to a private arbitrator, who is much more prone to favor corporations over consumers."*

Let me ask, when was the last time you read - let alone understood - the lengthy contract to which you have to "agree" to update your software, use your new credit card, or get a loan? Well, it wouldn't matter if you did because you basically have no choice but to agree to the terms. Most credit card, cell phone, online "terms of use" agreements, nursing home admission forms and many other everyday contracts, including employment, contain "forced arbitration" clauses buried in the fine print. This means that if the company cheats, defrauds, discriminates against, physically injures or otherwise harms you, you cannot sue the company in court or have a jury trial. Or to put it another way, big corporations have decided that it's better for *you* if you are forced to resolve your disputes

in rigged, secretive tribunals, where the arbitration provider is picked by the company that harmed you, and there's no appeal.

At the CFPB's [field hearing](#) on the rule last week, Paul Bland, Executive Director of [Public Justice](#), put it this way:

*The eternal lesson that is going on in this conversation, we the banks and the payday lenders decided that the Constitutional system is a crappy one and we will replace it with a secretive arbitration system and that is good for you and that's what the consumers want?...*

*The obvious analogy to me is if anyone saw Caddyshack where Ted Knight is a judge [i.e., Judge Elihu Smalls, and says] "I've sentenced boys younger than you to the electric chair, I didn't want to do it but I owed it to them."*

(Actually, it's the [gas chamber](#) but you get the point.)

Yet the CFPB isn't even proposing to ban this practice (the arbitration one, that is). All they've proposed to do is to say to financial institutions, "if you defraud many people all at once, or rip them off in the exact same fashion, customers must be able to join with others to try to hold you accountable. In other words, arbitration clauses can't ban class actions." This is important because cases against banks and lenders over illegal conduct are often filed as class actions under state consumer protection laws. Class actions are the only way customers realistically can take on huge corporations, get their money back, and/or stop the illegal behavior.

As the *New York Times* wrote in its recent arbitration [series](#) (a 2016 Pulitzer Prize [Finalist in Investigative Reporting](#), by the way),

*[Class action waivers] bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices....*

*Some state judges have called the class-action bans a "get out of jail free" card, because it is nearly impossible for one individual to take on a corporation with vast resources.*

And class actions work, too. The CFPB's review of 419 federal consumer financial class action settlements over a couple recent years found that "the total amount of gross relief - defined as the total amount defendants offer to provide in cash relief (including debt forbearance) or in-kind relief and to pay in fees and other expenses - was \$2.7 billion," and covered 350 million class members. By contrast, consumers filed almost no arbitration cases even though the process was fully available to them. Or as Paul Bland explained at the CFPB field hearing, "almost no consumers have been willing or able to jump through the hoops to bring cases to individual arbitration." He continued,

*The Wild West is over. The banks are going to have to follow the consumer protection laws or they are going to have to face consumers in court. Not a corporate controlled system where everyone is by themselves. It is no longer the Hunger Games....*

*[T]he court system is good enough for the people who framed the Constitution of this country and the founders and it should be good enough for the banks and their customers.*

Boom!

I thought this CFPB hearing couldn't be any more amusing, which itself was surprising. But then bank attorney Alan Kaplinsky spoke. You may recognize that name because in its forced arbitration series, the *New York Times* found out - and then brought to wide attention - the following: In 1999, Mr. Kaplinsky and a few other corporate lawyers, including now Supreme Court Chief Justice John Roberts, met and devised a strategy for companies to use "arbitration clauses as a means to an end. The goal was to kill class actions and send plaintiffs' lawyers to the 'employment lines.'"

At the CFPB hearing, Mr. Kaplinsky, in true Judge Smalls fashion, called the rule's announcement, "a sad day for consumers." Then he explained, "I will tell you I am not speaking out of self interest. I pioneered the use of class action waivers about 15 years ago."

Oh, we know.