

# ARBITRATION AGREEMENTS AND LIMITS ON CLASS ACTIONS

By Liz Coyle

Americans routinely enter into contracts for everything from cell phone service to apartment leases, even employment, but many sign contracts without fully understanding that their signature potentially forfeits their fundamental rights—such as the right to join together in a class action lawsuit. The U.S. Supreme Court, in a spate of rulings in recent years, has broadened the power of the Federal Arbitration Act, allowing corporations to insulate themselves from liability by forcing consumers to preemptively give up these rights.

In July 2017 the Consumer Financial Protection Bureau issued a final Arbitration Agreements Rule meant to protect consumers' right to join together in class action lawsuits when banks and lenders break the law. Just four months later, Congress used the Congressional Review Act to prevent the rule from going into effect.

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class-member-by-class-member basis. On the other hand, causes of action that do not require such individualized proof often provide viable alternative claims that class action litigants can bring. In the context of consumer protection, these sorts of cases often arise under state Unfair or Deceptive Acts or Practices statutes, civil Racketeer Influenced and Corrupt Organizations Act claims, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act, among others. Class actions under these statutes usually seek statutory damages, but at times they include actual damages, too.

## FINDING A CLASS REPRESENTATIVE

Even if an issue and set of facts lend themselves to class treatment, the next challenge is finding a class representative who will maximize the chances of success of the class as a whole. Sometimes this is the very person who brought the issue to you in the first place. But other times you might need to search for a better alternative or additional options. Either way, before deciding to represent any plaintiff in a class action, a practitioner always should carefully interview, evaluate, and educate the individual being considered to be a class plaintiff.

An ideal candidate for class representative should:

- **Understand the role of a class representative as a fiduciary for the class.** The named plaintiff must possess the personal characteristics and integrity necessary to act in that capacity.
- **Not have interests**

**antagonistic to those of the class.** A representative may have an additional claim against the defendant and remain an adequate representative if such individual claims do not interfere with the named plaintiff's representation of the class. Alternatively, the representative must be willing to set aside personal interests in order to act in the best interest of the class.

- **Understand the nature of a class action and the named plaintiff's responsibilities.** Reliable class representatives are essential because they must be available throughout the case to respond to discovery, give depositions, and testify at trial.
- **Be able to withstand pressure.** Typical defense tactics include an exhaustive deposition of the named plaintiff about the claims in the case and the plaintiff's duties as a class representative.
- **Be willing to educate**

**themselves about the case.** The named plaintiffs must be willing to read all the documents sent for review by class counsel (or to otherwise learn the information as his or her level of literacy allows).

The egregiousness of the facts underlying the named plaintiff's claims will often impact a court's willingness to certify the class and to grant the requested relief. Finding a named plaintiff with perfect facts may be difficult—or impossible. However, finding a plaintiff with strong and sympathetic facts will greatly increase the chances of successfully certifying a class.

## CLASS ACTION REALITIES

Consumer class actions come with their own requirements, and these standards can be daunting for any practitioner. Limitations placed on Rule 23 have made class actions more complex and difficult to certify. Similarly, trends over the past several years have increased costs for plaintiff classes. Litigating a consumer