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WHO DECIDES WHETHER AN ARBITRATION CLAUSE PERMITS CLASS ARBITRATION: JUDGE OR ARBITRATOR?

There is some evidence that arbitrators are more likely than judges to find that an arbitration clause allows class claims when the clause is silent on the question. The Supreme Court has not yet ruled on who decides; the two circuit courts to address the issue have ruled in favor of judges; both federal district courts and state courts are split. The authors review the cases and discuss the AAA and JAMS arbitration rules and the CFPB's coming regulation of arbitration clauses in consumer finance products.

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Arbitration clauses are nearly ubiquitous in consumer contracts. The Consumer Financial Protection Bureau ("CFPB") estimates that 75% of the largest 20 credit card issuers include mandatory arbitration clauses.[1] Almost all of those clauses also contain class waivers, meaning the parties waive the right to pursue any class relief in court or arbitration.[2] Despite receiving favorable treatment from the Supreme Court in recent years, these waivers are under constant attack. Indeed, the CFPB will likely regulate the use of class waivers in consumer financial agreements, after completing its mandated study of arbitration clauses in 2015. Any proposed rule (and legal challenge to the rule) will take months, if not years, to play out. In the meantime, the Supreme Court's recent decisions provide guidance for companies seeking to avoid class arbitration, yet they do not resolve head-on a critical question: who decides — judge or arbitrator — whether class arbitration is available?

The answer can be very consequential. Class arbitration can pose significant risks to companies, without many of the benefits commonly associated with arbitration. "[C]lass arbitration sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[3] Moreover, arbitration lacks the multilayered appellate review available in courts.[4] When relatively small claims are at issue, many companies conclude the benefits of arbitration outweigh its risks. "But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of

[1] CFPB, *Arbitration Study*, at 2-10 (March 10, 2015) ("CFPB Study").

[2] *Id*. at 1-10.

[3] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011).

[4] *Id*. at 1752.

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