# EDITORIAL

# IMPORTANT STUDY FINDS CONSUMERS DON'T UNDERSTAND ARBITRATION CLAUSES

**By Jeff Sovern***

Professor Roseanna Sommers of Michigan Law School has written an important new paper, *What do consumers understand about predispute arbitration agreements? An empirical investigation.* Here's the abstract:

> The results of a survey of 1,071 adults in the United States reveal that most consumers do not pay attention to let alone understand, arbitration clauses in their everyday lives. The vast majority of survey respondents (over 97%) report having opened an account with a company that requires disputes to be submitted to binding arbitration (e.g., Netflix, Hulu, Cash App, a phone or cable company), yet most are unaware that they have, in fact, agreed to mandatory arbitration (also known as "forced arbitration"). Indeed, over 99% of respondents who think they have never entered into an arbitration agreement likely have done so.
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> Respondents overwhelmingly (over 92%) report that they have never based a decision to use a product or service on whether the terms and conditions contain an arbitration agreement. They largely endorse the following reasons: they were unaware of the arbitration clause, they did not read the terms and conditions, and they thought they had no choice but to agree to mandatory arbitration. Moreover, many respondents presume that if a dispute arises, they will still be able to access the public courts, notwithstanding that they agreed to the terms and conditions.
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> **The results of a survey of 1,071 adults in the United States reveal that most consumers do not pay attention to let alone understand, arbitration clauses in their everyday lives.**
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> Consumers are largely unaware of opportunities to opt out of mandatory arbitration. They generally do not pay attention to, let alone retain, information about the steps required to opt out successfully (e.g., contacting the company within a specified time period). Generally, consumers are unaware that companies like Cash App and Venmo (mobile payment systems utilized by nearly 60% of respondents) allow customers to opt out of mandatory arbitration if they act within a limited time period. Among the minority of respondents (21%) who stated that they had been given an opportunity to opt out, vanishingly few could name any of the steps that would have been required to opt out successfully.
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> When presented with a run-of-the-mill contract, of the type consumers routinely encounter, most respondents did not take notice of the arbitration clause. Less than 5% of respondents could recall that the contract they were shown had said anything at all about arbitration.
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> Furthermore, most consumers misperceive the consequences of signing a predispute arbitration agreement. Most mistakenly believe that, after agreeing to terms and conditions mandating binding arbitration, they can still: choose to settle their dispute in court, have a jury decide their case, join a class action, and appeal a decision made based on a legal error. For instance, less than 5% of respondents (n = 46) correctly reported that they could neither appeal an erroneous decision to another arbitrator (or set of arbitrators) nor start all over again in court. Indeed, less than 1% of respondents correctly understood the full significance of the arbitration agreement, as indicated by their responses to questions about whether they retained the rights to sue, have a jury decide their case, access the public courts, and appeal a decision based on a legal error.
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> In summary, consumers are generally unaware of whether their contracts contain arbitration clauses, and consumers who have agreed to such clauses tend to hold mistaken beliefs about their procedural rights, including wrongly believing they can still sue in court.

**Only two respondents–about a fifth of one percent–were able to identify a company that permitted opt-outs and describe correctly a step needed to opt-out.**

One point I want to highlight about the study is that it makes clear that consumers don't understand arbitration opt-outs at all. First, some background: some companies insert in their arbitration clauses a provision that allows consumers to opt out of arbitration if they notify the company in writing shortly after agreeing to the contact. Companies then use the opt-out provisions to claim that arbitration clauses are not unconscionable. I have previously argued that the opt-outs are a type of opaque (dark) pattern. The Sommers study offers much to confirm this view.

Professor Sommers showed consumers a contract including an arbitration clause and opt-out provision and asked them if it included an opt-out. More than twice as many respondents incorrectly said it didn't include such a provision as correctly said it did. Add in those who said they didn't know, and you have 4.5 times as many respondents saying either the contract didn't give them a right to opt-out, or that they didn't know if it did, as said that it did give them a right to opt-out. When asked how they could opt out, not even a third of one percent mentioned that they had a 60-day deadline for opting out.

The study also asked respondents whether they had agreed to contracts with companies, like Netflix, that provided for opt-outs and asked about opt-outs in connection with those companies. Only two respondents–about a fifth of one percent–were able to identify a company that permitted opt-outs and describe correctly a step needed to opt-out.

In short, the Sommers study makes a devastating case that consumers are not aware of arbitration opt-outs and that the opt-outs are no more than a fig leaf to protect companies, not consumers.

** Michael Millemann Professor of Consumer Protection Law, University of Maryland Francis King Carey School of Law*