Commentary: Will Congress help companies use forced arbitration to undercut consumers?

Wells Fargo is attempting to force its customers into arbitration and extinguish a class-action lawsuit about overdraft fees. (Justin Sullivan/Getty)

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If you're a baseball fan, you know how easy it is to get upset when a call doesn't go your team's way. Yet true fans know that good-natured complaining about the umpires is as much a part of baseball as peanuts, hot dogs, and the seventh-inning stretch.

But what if you knew from the start that the other team controlled the umpires? How would it feel to know they had rigged the game so that calls almost always went their way? Would it even be a real game? And what if you had to play the game alone without your team?

Consumers know this feeling all too well, as corporations accused of violating the law increasingly force the disputes into arbitration. Forced arbitration is a private system devised to ensure that customers can't challenge illegal behavior in court. The company sets the terms of the arbitration proceeding, usually picks the arbitrator, and often prohibits class actions. So when a company harms millions of people, you can't team up to fight to make things right.

People have to take the company on one by one, and not even a judge or an arbitrator can hold the company fully accountable. Unsurprisingly, big companies love forced arbitration, and it makes sense: It's easy for you to win the game when your team writes the rules and controls the umpires.

The Consumer Financial Protection Bureau — the consumer watchdog created after the financial crisis — has just finalized a rule that will prohibit banks from using forced arbitration clauses with class-action bans. But Wall Street lobbyists are trying to rig that game too; their supporters in Congress have just filed fast-track resolutions to block the CFPB rule.

A current lawsuit against Wells Fargo points to why companies are trying every trick in the book to ensure that customers are denied their legal rights — and why the courts and Congress shouldn't let them get away with it.

For years, Wells Fargo charged customers overdraft fees — often around $35 each — on purchases made when their accounts were not overdrawn. Wells Fargo changed the order of the payments deducted from consumers' bank accounts to take the biggest ones out first. That way, Wells Fargo could get more overdraft fees on smaller payments made before the account was overdrawn. This practice was especially harmful to struggling families who didn't have much in their accounts to begin with — and it allowed the bank to maximize its revenue.

Wells Fargo's customers ultimately took the bank to court in the form of a class action; after all, one consumer could almost never pursue a claim individually against a big company like Wells Fargo even over repeated charges of $35. A judge found Wells Fargo's practices were "unfair and fraudulent" and ordered the bank to pay $203 million to its California customers.

Today, Wells Fargo is fighting a nearly identical class action involving consumers from the 49 other states. Just as in the fake account scandal, Wells Fargo is attempting to force its customers into arbitration and extinguish the class action — belatedly, after litigating in courts for years. Courts have rejected Wells Fargo's arguments several times, pointing out that the bank was trying to have it both ways — fight in court until it looked like it was going to lose, then try again in arbitration. A second appeal to the 11th U.S. Circuit Court of Appeals is pending; arguments are set for later this summer.

If Wells Fargo is allowed to force its customers — most of whom are among the poorest and most vulnerable in their communities — into individual arbitration, the bank could keep up to $1 billion in fees it illegally obtained from customers outside of California. Most customers won't even know about their rights or won't have the time or resources to fight; those who do will have to argue in front of the bank's handpicked umpire. Customers in California got justice; most of those in the other 49 states will not. Ultimately, forced arbitration could prove to be Wells Fargo's get-out-of-jail-free card.

While the courts decide the fate of millions of Wells Fargo's consumers, Congress will decide the rules of the game for the future.

Both the courts and Congress should make Wells Fargo play fair and let consumers have their day in a court.

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