So What If You Can't Join a Class Action?

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Breathes there a man with heart so dead that he has not wanted to sue his credit card company? Well, apparently there are -- in the Senate of the United States.

Last week, they narrowly voted to overturn a ruling by the Consumer Financial Protection Bureau which would have banned banks from using forced arbitration clauses to prevent consumers from banding together in class actions and suing the heck out of their financial institution.

The left was not pleased.

"Wall Street won and ordinary people lost," said Richard Cordray, the head of the CFPB. "This bill is a giant wet kiss to Wall Street," said Senator Elizabeth Warren, adding: "Bank lobbyists are crawling all over this place, begging Congress to vote and make it easier for them to cheat consumers."

At first blush, this rule sounds hard to defend. How could anyone -- even Republicans -- want to deny consumers their day in court against giant banks that would, if allowed, undoubtedly turn us upside down and shake us until the last few cents fell out of our pockets?

We Americans love the idea of our "day in court." We are a litigious people, and always have been, and we love the idea that before the majesty of the law, we are all, at last, perfectly equal: the president of Citibank, and the ordinary HVAC installer who's struggling to make his credit card payments. When anyone starts tinkering with our right to sue, we are apt to get pretty testy about it.

But when you dig into this issue, the right to sue your bank starts looking considerably less exciting, and the CFPB regulation seems to be solving a largely imaginary problem, in a rather expensive fashion.

For lawsuits are expensive. Very expensive. Voltaire's epigram will draw a rueful laugh from anyone who has ever been involved in a lawsuit: "I was never ruined but twice: once when I lost a lawsuit, and once when I won one." Our law is crusted around with a lot of formal process, much of it wise, just and entirely necessary, but also time-consuming and costly because you have to pay expensive professionals to help you navigate all this red tape.

On the one hand, the process is really expensive. On the other hand, it takes forever. One report found that 15 percent of class actions studied were still pending after four years.

The alternative to lawsuits, arbitration, is supposed to follow the same laws as courts, and to do so more quickly and without a lot of the costly procedure. As a result, says Walter Olson of the Cato Institute, consumers are in general surprisingly satisfied with the arbitration experience, because it provides the kind of justice we imagine courts will: You sit down and tell your story in your own words. In court, by contrast, everything has to proceed according to complicated rules of evidence, with opposing counsel interrupting to tell the court that you can't say certain things. Class actions, the focus of this rule, are a particularly artificial, and expensive, sort of construct. Many of the plaintiffs aren't even aware that they have a claim, and wouldn't bother suing even if they were. Those who participate often get trivial recompense -- a free mascara, say, or a credit toward future purchases from the same company. The only people who reliably benefit from the suits are trial lawyers, who take home millions. And who, it must be noted, are a traditional donor base for the Democratic Party.

Offenses that are small at the individual level can of course be major in aggregate. Supporters of the rule might argue that without the class-action suit, they will never be remedied, because the cost of suing exceeds the benefit any one individual would gain from doing so. But if you bring enough of those cases together, you can make it cost effective to sue, and thereby right a wrong. But we should also ask whether "wrongs too small to go to court in an individual or group action" are really worth suing over. Consider that free mascara -- an actual class-action award. It stemmed from complaints that department-store makeup never went on sale, because the big manufacturers were effectively colluding to keep prices high. When all the dust settled, the companies had paid some lawyers a bunch of money, and also, agreed to give free products to consumers.

Now, the companies had no way of knowing who had been affected by this grossly unjust pricing of expensive cosmetics, so the products seem to have just gone to anyone who showed up, while many of the customers who had been paying high prices for years got nothing. To add insult to injury, who is likely to ultimately pay for the cost of those "free" products? That's right, people who buy department-store makeup.

But that's really a side complaint. Let's ask a deeper question: Was the wound inflicted by the inability to secure discounted Estee Lauder really something that society urgently needed to remedy? We're not talking about conspiring to fix rail freight prices here. We're talking about makeup, which can be readily procured at your local drugstore, often at attractively discounted prices.

Okay, but we're not talking about makeup, are we? With the CFPB rule, we're talking about banking, the center of our financial lives. But here too, the problem simply doesn't look that large.

The CFPB has tried to make this sound large by pointing to a study showing that class actions returned over $1 billion to 34 million customers over five years. But that sounds less impressive when you break it down: about $30 per person. Arbitration returned only $360,000 to 78 persons in that study, which sounds a lot smaller, but on a per-person basis amounts to $4,600. This is not so much an argument for class actions as a suggestion that consumers only bother pursuing a claim when the numbers are large. They may perhaps have grasped a principle that a lot of us in America seem to be struggling with lately: Sometimes, when a wrong is small, it's best to just let it go.

Or maybe not. We should remember that there is an alternate dispute resolution for small-dollar claims: You can complain to your bank. That seems to be a surprisingly effective tactic. According to Jason Johnston and Todd Zywicki, based on data they've studied from a "mid-sized regional bank," most fee disputes are settled without either arbitration or lawsuit, and mostly resolve in favor of the customer. Which shouldn't be all that surprising. If your bank won't refund an unjust fee, you're probably going to find another bank. So when the amounts are small, banks have good reason to err on the side of the customer, rather than trying to squeeze every last dollar out of them.

And this is presumably also why consumers don't really seem to care about the right to join a class-action suit. Or at least, they're not so focused on it that they'll read the fine print. If consumers were experiencing a lot of abuse at the hands of their banks, then financial institutions could presumably differentiate themselves by marketing products that guaranteed consumers "their day in court." They'd have to make up for the added litigation costs, of course, by charging a higher interest rate, or higher fees, or offering fewer benefits. But if this right were really valuable, then consumers should be willing to pay for it.

Maybe they just don't realize how badly things could go wrong between them and their bank, how much they are losing by not pursuing their right to redress over every small-dollar claim. But maybe they realize what the CFPB seems to be unable to grasp: that some problems are just too small to make a federal case over.