OAJ Consumer Law Section Article January 2014

Although Little Known, Forced Binding Arbitration is a Big Threat to Civil Liberty

By: Rocco Yeargin, Young & Yeargin, LLC, Akron, OH

"In suits at common law, trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." – James Madison

The development of forced binding arbitration may present the most pervasive current threat to American civil liberty that almost no one is talking about. Forced arbitration clauses have found their way into nearly every type of consumer and employment contract. On an alarmingly wide-scale, businesses are requiring people to waive access to the public justice system as a precondition to the purchase of staples such as a car, television, or credit card. Service organizations, ranging from proprietary schools to nursing homes, are now requiring people to surrender their constitutional right to hold such organizations accountable in court. As a means of dodging public accountability, corporations are requiring consumers, through the use of embedded fine print in cookie-cutter contracts, to submit all disputes to private binding arbitration.

By definition, binding arbitration is final and lacks any meaningful right to appeal to the court system. In contrast to the public justice system with its clearly defined appeal process, binding arbitration has no useful mechanism for correcting bad decisions. In addition, the binding arbitration provider is almost always chosen by the business with little or no input from the consumer. The business is a "repeat player" within its chosen arbitration system while the consumer is a stranger to the process. The lack of established rules of discovery and procedural safeguards is another common feature of binding arbitration – which makes it more difficult for people to get evidence and to prove their cases. As discussed in greater detail below, forced arbitration clauses frequently over-reach by limiting substantive rights and legal remedies.

Due to the limitation of rights and the relative lack of input into the arbitration process, it is not surprising that consumer lawyers have found it difficult to pursue claims in forced arbitration. Frequently, consumer lawyers will advise their clients that their cases are simply not worth pursuing in arbitration -- leaving the consumer with no remedy at all. The sting of binding arbitration comes as a surprise to the average person, who usually has no idea that he waived his legal rights when he signed the sales contract. As a result, the large scale privatization of our civil justice system, and its associated loss of rights for consumers, has occurred without the knowledge or consent of the people whose rights are affected. With some exceptions, this widespread and systematic deprivation of civil rights is legal.

The need for Legislation. Most commentators agree that the solution to this problem must come from Congress. Ironically, the need for federal legislation in this area was first recognized by the National Automobile Dealers Association (NADA). In 2000, NADA petitioned Congress to stop forced arbitration in dealers' service and sales contracts with

manufacturers.[1] This position is ironic because car dealers are some of the most vocal supporters of forced arbitration that routinely prohibits people from taking those dealers to court.

The congressional testimony of Gene Fondren, representative of NADA, explains why forced pre-dispute arbitration raises serious due process concerns in any setting. Fondren testified that forced arbitration, "rather than being merely a benign tool for the management of judicial dockets, . . . may be used as a hammer by which one party to a contract takes unconscionable advantage of the other. At the same time, in the case of the sales and service agreements [between dealerships and manufacturers], arbitration can circumvent an entire body of state substantive law enacted precisely to bring equity to that specific relationship."[2] Fondren added that dealers should not be forced to arbitrate claims with manufacturers because the "contract is a classic example of a contract of adhesion. It is not negotiated. It is handed to a dealer who is expected to make or already has made, a very substantial investment, on a 'take it or leave it' basis."[3] According to Richard Holcomb, the Commissioner of the Virginia Department of Motor Vehicles, "[t]his practice clearly violates the dealers' fundamental due process rights and runs counter to basic principles of fairness."[4]

Ultimately, NADA was successful in winning legislation that exempted car dealerships from mandatory arbitration clauses with manufacturers.[5] What's good for the corporate goose should also be good for the consumer gander. If businesses such as car dealers can obtain legislative relief from forced arbitration clauses, is there hope for the rest of us?

The Consumer Financial Protection Bureau has been studying the use of forced arbitration in lending contracts for nearly two years and has recently held a ground breaking field hearing on the subject. The Senate Committee on the Judiciary has also conducted a hearing entitled, "The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Business." Witnesses addressed how forced arbitration was used to cheat small businesses and how it was cheating members of the armed services of important legal protections relating to predatory lending.

While these legislative developments are encouraging, they won't help your clients who are currently trapped in forced arbitration. The remainder of this article offers some practical suggestions on how to attack an onerous arbitration clause and protect your clients' access to the court system.

Establish a factual record. Any successful challenge to a forced arbitration clause begins with establishing an extensive factual record to support the challenge. This means that the practitioner must commit the time and effort to conduct discovery devoted to the issue of

---

[1] Administrative Law Fairness and Voluntary Arbitration Act of 2000, H.R. 534

[2] *Fairness and Voluntary Arbitration Act of 2000: Hearing on H.R. 534 Before the Subcomm. on Commercial and Admin. Law*, 106th Cong., 2nd Sess. 38, 2000 WL 763559 (F.D.C.H) (statement of Gene Fondren, President, Texas Automobile Dealers Association).

[3] *Id* at 41.

[4] *Fairness and Voluntary Arbitration Act of 2000: Hearing on H.R. 534 Before the Subcomm. on Commercial and Admin.* Law, 106th Cong., 2nd Sess. 81, 2000 WL 762065 (F.D.C.H) (statement of Richard D. Holcomb, Commissioner, Department of Motor Vehicles, Commonwealth of Virginia).

[5] 15 U.S.C. 1226(a)(2).

enforceability of the clause. The successful challenge to arbitration will most likely require the submission of affidavits, deposition testimony, and authenticated documents that explain why the particular arbitration clause in your case is unconscionable or otherwise unenforceable.

This is particularly true in the context of an unconscionability claim, which has been one of the more common ways to successfully challenge an unfair arbitration clause. Importantly, it is not enough to show that the sales contract was induced by fraud, the consumer must show that the arbitration clause itself is unconscionable or otherwise unenforceable.[6]

Unconscionability has two prongs, procedural and substantive.[7] As to procedural unconscionability, the "court will consider factors bearing on the relative bargaining position of the contracting parties, including age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, who drafted the contract," whether the consumer was represented by counsel,[8] and other factors.

Substantive unconscionability concerns the actual terms of the contract and its commercial reasonableness.[9] Factors the court may consider are, "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability."[10]

A "quantum of both procedural and substantive unconscionability" must be proven.[11] In order to mount a successful challenge, counsel must present evidence as to each relevant factor of the analysis. The more complete the factual record, the more likely that a challenge will be successful. Conversely, a poorly developed record will guarantee an unsuccessful challenge and will likely result in the creation of unfavorable case law.[12] It simply is not advisable to challenge an arbitration clause, unless lawyer and client are willing to commit the needed resources to the battle.

Clauses that gut substantive rights. Forced arbitration provisions are substantively unconscionable or violate public policy when they effectively prevent consumers from vindicating their statutory rights or when the clause at issue destroys the remedial purpose of a consumer law. [13] Examples of unconscionable clauses include provisions that: deter the

---

[6] *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 42.

[7] *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 20. See generally *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553, ¶ 6 (9th Dist.); see also *Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2nd Dist.1993), citing White & Summers, *Uniform Commercial Code*, Section 4-7, 219 (1988). *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 34.

[8] (Citations Omitted.) *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 31 (9th Dist.).

[9] *Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2nd Dist.1993).

[10] *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 33, citing *John R. Davis Trust 8/12/05 v. Beggs*, 10th Dist. Franklin No. 08AP-432, 2008-Ohio-6311, ¶ 13; *Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2nd Dist.1993).

[11] *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 30, citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 34.

[12] See *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408.

[13] *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 27, ¶ 68 (9th Dist.), citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); But see

consumer from pursuing a claim in arbitration due to excessive costs,[14] contain a secrecy provision that prohibits the parties from identifying or making known to the public the unfair or deceptive acts which led to the claim,[15] impose a loser pays provision,[16] or ban statutory remedies, such as Attorney Fees.[17] In addition, an arbitration provision containing misleading, incomplete, or confusing terms will not be enforced.[18]

One-sided terms. A clause that requires arbitration in a distant forum is one-sided and unenforceable.[19] A clause that forces the consumer into arbitration, but not the supplier, is also improperly one-sided.[20] Another over-reaching arbitration clause prohibited the consumer from initiating arbitration until the defendant certified the substantial completion of a construction contract.[21]

Other contract Defenses. The dispute at issue must fall within the purview of the clause.[22] Stated more broadly, a forced arbitration provision is not binding if there is no agreement to arbitrate the dispute between the parties.[23] An arbitration clause may not be enforced if the party seeking enforcement has waived such by first filing suit.[24] And, a party cannot unilaterally rewrite the contract by attempting to impose an arbitration clause after the contract is formed.[25]

Severability. **"[**W]hen the cumulative effect of multiple illegal provisions 'taints' the overall agreement and prevents a court from enforcing that agreement, severability is improper."[26]

While consumers desperately need a legislative solution to the forced arbitration problem, consumer lawyers must continue to bring attention to this massive assault upon the fundamental right to trial by jury. Until Congress acts, the battle against forced arbitration will continue to be waged one consumer at a time.

Hawkins v. O'Brien, the Second District stated, "the private attorney general and class action provisions aid consumers in their prosecution of CPSA violations" and "confer no additional substantive rights." *Hawkins v. O'Brien*, 2nd Dist. Montgomery No. 22490, 2009-Ohio-60, ¶ 34. .

[14] *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 51 (9th Dist.)

[15] *Id* at ¶ 72.

[16] *Id* at ¶ 77; *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757, 823 N.E.2d 19, ¶ 26 (6th Dist.).

[17] *Schwartz v. Alltel Corp.*, 8th Dist. Cuyahoga No. 86810, 2006-Ohio-3353, ¶ 30.

[18] *Olah v. Ganley Chevrolet*, 8th Dist. Cuyahoga No. 86810, 2006-Ohio-3353, ¶ 26; *Jones v. Fred Martin Motor Company*, 9th Dist. Lorain No. 20631, 2002-Ohio-716, *2.

[19] *Aetna Finance Co. v. McGhee*, Cuyahoga C.P. No. 24287, 1993 WL 944559 (Aug. 26, 1993).

[20] See National Consumer Law Center, Consumer Arbitration Agreements (6th Ed. 2011) and 2012 Supplement.

[21] *Porpora v. Gatliff Bldg Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081, ¶ 15 (9th Dist.).

[22] *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 23.

[23] *Benjamin v. Pipoly*, 155 Ohio App.3d 171, 2003-Ohio-5666, 800 N.E.2d 50, ¶ 37; *Giltner v. Mitchell*, 9th Dist. No. 21039, 2002-Ohio-5771, ¶ 14.

[24] Farrow Builders, Inc. v. Slodov, 11th Dist. Geauga No. 2000-G-2288, 2001 WL 735583 (June 29, 2001).

[25] *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 2004-Ohio-6425, 821 N.E.2d 198, ¶ 35 (1st Dist.).

[26] *Schwartz v. Alltel Corp.*, 8th Dist. Cuyahoga No. 86810, 2006-Ohio-3353, ¶ 39.

For in depth analysis of arbitration provisions on a national basis please see Consumer Arbitration Agreements, 6th Edition 2011, by the National Consumer Law Center and the 2012 Supplement.