Forced Arbitration

by: Jim Iagmin, CASD President

Arbitration clauses are becoming ubiquitous. They are included in an array of agreements, from consumer "click wrap" to healthcare contracts. Often they a not negotiated, but included in a commercial agreement drafted by a large corporation and signed by a consumer who often does not the clause is included and does not know what "arbitration" is. Forced arbitration is effectively a waiver of the Seventh Amendment's right to a civil jury trial. Accordingly, there must be safeguards in place to protect citizens from infringement on their Constitutional right to seek redress in the courts.

Financial institutions, global communications corporations, employers, and other entities often cite lower costs and quicker resolution as the justification for requiring arbitration agreements. But some studies have shown that neither is necessarily true. One study showed that legal fees were higher in private arbitration than in federal court and arbitrations took, on average, three months longer to resolve. (E.g., http://www.insidecounsel.com/2012/12/06/which-costs-less-arbitration-or-litigation.) And in some situations, arbitration is particularly expensive for business defendants. For example, because a California employer must pay for all costs unique to arbitration, this form of dispute resolution can cost thousands of dollars in upfront costs.

Another motive, then, for the inclusion of arbitration clauses in consumer and employment contracts may be more sinister than the usual "speed and cost" justification. One major incentive is the relative size of awards in arbitration versus judgments in court. For example, one study showed that 27 percent of the medical malpractice cases litigated in courts received awards over $1 million, while only 6 percent of plaintiffs in arbitration cases received more than $1 million. (https://www.citizen.org/sites/default/files/arbitrationdebatetrapfinal.pdf.) The reason for this difference is often attributed to the "repeat player effect."

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The "repeat player effect" is a dynamic which favors the institutional defendant. For example, an empirical study of employment arbitration cases provides strong evidence that employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration cases. This may be due to advantages accruing to larger organizations with greater resources and expertise in dispute resolution procedures. The data also reveals a significant repeat-employer–arbitrator pairing effect; employees on average have lower win rates and receive smaller damage awards where the same arbitrator is involved in more than one case with the same employer. "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," Alexander J. S. Colvin, Journal of Empirical Legal Studies, Volume 8, Issue 1, 1–23, March 2011.

Recent Supreme Court jurisprudence that requires an arbitrator to decide whether a dispute is arbitrable amplifies this conflict. Courts in multiple jurisdictions have recognized the inherent potential for mischief in this scenario. (E.g., *Ontiveros v. DHL Exp.* (USA), Inc. (2008) 164 Cal.App.4th 494, 505 [where "one party tends to be a repeat player, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable"].) Forcing conflicts of interest onto arbitrators tends to benefit repeat players.

An agreement between people or entities to privately resolve disputes can be fair and efficient. However, we must be mindful of the inherent imbalances when forcing consumers into a private system that tends to favor their institutional adversaries. We must not erode the right to a civil jury trial. **TBN**

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