Mandatory Arbitration:

How the Fine Print Deprives Ordinary People of Their Day in Court

By Nicholas Mattison

This issue of the *New Mexico Lawyer* explores the diverse ways that people and businesses voluntarily use alternative dispute resolution to settle controversies without litigation. However useful ADR may be when it is truly voluntary, these methods of resolving disputes, primarily arbitration, are often used in a way that runs contrary to ADR's founding principle of empowering people to choose to work together creatively to resolve conflicts. Increasingly, business interests use mandatory, binding arbitration agreements to deprive people who have little or no bargaining power—and no true choice when it comes to agreeing to ADR—of their day in court.

Everyone reading this article has signed contracts that contain mandatory arbitration agreements. Nursing home admission agreements, credit card agreements, car loans, employment agreements and many other consumer contracts are contracts of adhesion, meaning they are offered on a "take it or leave it" basis in which the consumer has no option to negotiate any of the terms. The businesses that draft these contracts often include in the fine print, in language most non-lawyers would not understand, arbitration "agreements." By agreeing to a contract containing such a provision, the consumer purportedly gives up the right to take disputes to court and instead is obligated to submit all disputes arising under the contract to arbitration.

Arbitration is a private proceeding, held outside of the court system, in which the arbitrator, or panel of arbitrators, has the authority to make a binding ruling on anything from the merits of a dispute to the issue of whether the arbitrator has the authority to arbitrate the dispute in question. Arbitrators often favor the businesses that created and sustain the arbitration industry by continuously referring their disputes to arbitration. There is usually no meaningful right to appeal the decisions of an arbitrator. The proceedings are frequently kept secret altogether because of confidentiality clauses contained in the arbitration agreement. Procedural rules applicable to civil cases in court are truncated or eliminated, evidentiary rules may not apply, and the right to discovery is limited or eliminated.

There is no question that arbitration benefits businesses as a cost-saving tool by shielding the business from being held responsible for wrongdoing. While arbitration has benefits from the perspective of big businesses, these same aspects of arbitration place the consumer at a severe disadvantage. For example, in most cases, a consumer may obtain very little or none of the evidence needed for successful prosecution of a claim without the discovery to which they would be entitled if they litigated the same dispute in court. Unlike in cases that go to court, consumers bound to arbitration usually have no way to combine their resources and knowledge with similarly situated consumers to increase their leverage against the business that harmed them. Moreover, arbitration often involves prohibitive fees that discourage many people from even attempting to seek remedies for their injuries.

Arbitration, except in those cases where it is truly a voluntary proceeding between litigants who prefer it to court proceedings, causes unsuspecting people to give up their constitutional right of access to the courts. Businesses include arbitration agreements in their contracts because they know that avoiding litigation in court reduces the cost of any potential wrongdoing, but in so doing, it eliminates or reduces the business's motivation to do right by the consumer. The result is more defrauded consumers, more senior citizens injured in nursing homes, and more victims of workplace harassment.

Big businesses have also used arbitration agreements to impose a private ban on class action lawsuits. Nearly all arbitration agreements state that disputes can only be decided on an individual basis. This effectively immunizes many wrongdoers, such as banks, from liability for fraud committed against thousands of individuals with smaller claims in which the potential damages are eclipsed by the cost of arbitration. Without a class action, the incentive to hold an offending business accountable for wrongdoing may be eliminated.

Industry groups insist that arbitration agreements benefit consumers. The U.S. Chamber of Commerce, for one, argues that the existence of mandatory arbitration ensures "that consumers can continue settling disputes without incurring staggering court expenses and wading through the overburdened court system." The premise of the Chamber's argument is that

mandatory arbitration increases consumer choice, but the opposite is true. If people have the option of going to court or voluntarily entering into arbitration or any other ADR arrangement once a dispute arises, then consumer choice is maximized. When people unwittingly give up their day in court before a dispute arises, consumer choice is all but nonexistent.

Many of the same businesses that favor mandatory arbitration for consumers actually recognize the drawbacks of mandatory arbitration, as they often strenuously oppose it for themselves. For example, car dealers frequently include arbitration agreements in the fine print of their contracts with consumers, but these same car dealers successfully lobbied Congress to prevent auto manufacturers from forcing them into arbitration unless "after such controversy arises all parties to such controversy consent in writing to use arbitration."

Supporters of mandatory arbitration attempt to sway public opinion by trading in negative stereotypes of lawyers. In an editorial, the Albuquerque Journal claimed that if mandatory arbitration of class actions were banned, "the real beneficiaries would be trial lawyers." This tired attack on the legal profession is both untrue and irrelevant. Class action lawsuits often involve substantial payments or other benefits to class members. In cases involving smaller payments for smaller injuries, the class action lawsuit is a crucial tool to prevent businesses from reaping windfall profits by stealing a little bit from a lot of people.

The United States Supreme Court has facilitated the proliferation of arbitration with its increasingly broad readings of the Federal Arbitration Act. Originally enacted in 1925 and geared toward commercial disputes, the FAA has been reinvented over the past 20 years to keep people out of court. Continuing this pattern, on May 21, 2018, the Supreme Court ruled that employers may require workers to waive their rights to participate in class action lawsuits as a condition of employment. The dissent warned that this "egregiously wrong" decision will result in "the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."

The Consumer Financial Protection Bureau commissioned a study concluding that arbitration agreements unfairly limit justice for consumers. Among other things, the CFPB found that arbitration agreements are highly common in consumer financial products, but that consumers are rarely aware of them. The CFPB concluded that arbitration agreements limited relief for consumers.

Based on its findings, the CFPB issued a rule that would have prevented financial services companies from banning class actions in arbitration agreements. In the fall of 2017, Congress and President Trump prevented the implementation of this rule.

Despite these setbacks, consumers and their advocates we are not powerless to fight mandatory arbitration. The Supreme Court's jurisprudence is based on the FAA, which can be repealed or amended by Congress. Those who believe ADR should be voluntary and empowering should continue to remind politicians that the right to a day in court is a founding principle of America's democracy. ■

Endnotes

[1] https://www.uschamber.com/series/your-corner/protecting-consumers-right-arbitration

[2] 15 U.S.C. §1226(a)(2).

[3] 9 U.S.C. §1 *et seq.*

[4] *Epic Systems Corp. v. Lewis*, No. 16-285 (U.S., filed May 21, 2018).

[5] https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[6] https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements

[7] https://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements

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ADR from an Insurance Coverage Perspective *continued from page 8*

chances of success in a "real" jury trial. In the insurance coverage context, a mock jury trial makes little sense when most of the issues are legal to be decided by a court, not a jury. However, in a high exposure "bad faith" case against an insurer that involves coverage issues it makes sense for the insurer to consider this option.

Summary Jury Trial

This is another form of a mock trial with a neutral jury that produces a verdict, but it is ordered by a court rather than being stipulated to by the parties. After hearing the verdict, the court usually requires parties to attempt settling their case before litigating in court. In the insurance coverage context, a summary jury trial makes little sense when most of the issues are legal to be decided by a court.

Conclusion

Because most civil cases are resolved without trial using ADR tools, a thorough understanding of alternative dispute resolution is far more important to practicing civil litigation lawyers and their clients than an understanding of trials. Civil litigators rarely try cases. Coverage lawyers try even fewer because coverage cases usually involve fewer or no questions of fact, and therefore are susceptible to being resolved by motion practice. It is therefore incumbent upon every practicing civil litigator and insurance coverage lawyer to have a thorough understanding of the various ADR tools available and become an expert at using those tools, which saves time and money. ■

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