CENTER FOR JUSTICE & DEMOCRACY
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IMPACT

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...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friend,

There's been much discussion lately about whether the U.S. Supreme Court is moving in a dangerous direction, that is, towards affirming a Bush administration-inspired revolution in laws governing litigation against corporate America.

In this newsletter, we address the important issue of mandatory arbitration. We are happy to report that so far, at least on this issue, the Supreme Court has done the right thing. (See box on p. 3).

The Court also did the right thing in *Wyeth v. Levine*, upholding the right of injured patients to sue reckless drug companies. This groundbreaking case shows what an anomaly last year's decision, *Riegel v. Medtronic*, truly was. In that case, the court found medical device manufacturers immune from suit on federal preemption grounds.

Hopefully, Congress acts quickly to fix *Riegel*. In the meantime, CJ&D will continue to monitor these Supreme Court cases, which hopefully turn out well for consumers. As we all know, elections have consequences not just for picking Presidents and Members of Congress. They have consequences for the Supreme Court, as well.

Sincerely,
Joanne Dorordshow
Executive Director

IN THIS ISSUE: MANDATORY BINDING ARBITRATION

MANDATORY BINDING UNFAIRNESS

On July 25, 2005, 20-year-old Jamie Leigh Jones, an employee of Halliburton subsidiary KBR, went to Iraq in support of Operation Iraqi Freedom. Three days later, she was drugged and gang-raped by male co-workers. Jones awoke groggy the next morning to find herself bleeding, bruised and in severe pain. She reported the incident and was eventually taken to the hospital by KBR security.

After her medical exam, the same security personnel locked Jones in a shipping container for at least 24 hours without food or drink; KBR also posted two armed guards outside the doors. Jones managed to persuade one of the guards to let her contact her father by cell phone, who in turn called U.S. Rep. Ted Poe (R-Tex.), who then contacted the State Department.

Within two days, agents from the U.S. Embassy in Baghdad freed Jones. She was later interviewed by Halliburton/KBR supervisors, who warned her that she'd lose her job if she left Iraq. Severely injured, Jones decided to return home where she underwent reconstructive surgeries and psychiatric treatment.

When the government failed to bring criminal charges against KBR, Jones turned to the civil courts and learned that she had unwittingly signed away her right to trial. How? She had entered an employment contract with KBR without noticing a small mandatory binding arbitration provision in the 18-page document. The clause stated that "any and all claims that you might have against your employer, including any and all personal injury claims arising in the workplace, must be submitted to binding arbitration instead of the United States court system." As Jones told the House Committee on Education and Labor on February 12, 2008, when she signed the contract she had no idea that the arbitration clause was there, didn't know what arbitration was and hadn't been told that she'd be barred from holding KBR accountable in court.

In May 2008, a federal judge ruled that Jones's claims of sexual assault, battery, rape, false imprisonment and others could proceed to trial since they fell outside the scope of her employment. KBR appealed. The case is still pending.

Unfortunately, pre-dispute mandatory binding arbitration clauses have become the norm in contracts between businesses and ordinary Americans. The Federal Arbitration Act — enacted in 1925 to help resolve commercial disputes between businesses — is providing the legal basis for the broad use of such clauses. As a result, millions of individuals are being compelled to give up their right to have disputes resolved by a judge or jury and instead submit their claims to binding arbitration.

These forced arbitration provisions are usually buried in the fine print and written in legalese that is incomprehensible to most people. So if you've bought a car, had a credit card, purchased a computer, used a cell phone,

(continued on page 2)

MANDATORY BINDING UNFAIRNESS continued...

invested in stocks, had insurance, saw a doctor or worked for a large corporation during the last decade, chances are you unwittingly forfeited your constitutional right to access the courts.

Many corporations have also added "remedy-stripping" provisions to their binding arbitration clauses, precluding people from asserting class claims (the right to sue as a class or arbitrate as a class), getting injunctive relief (to stop misconduct), collecting punitive damages or recovering attorney fees. Arbitration clauses often require that hearings be held in a location inconvenient to the claimant. In addition, most arbitration clauses force the consumer, employee or franchisee to arbitrate its claims while allowing the corporation the option of having its claims heard in court.

Because entire industries are inserting mandatory binding arbitration terms into contracts, people increasingly have no choice but to waive their rights. If they refuse, they will be unable to get the job, credit card, insurance, health care or other product/service they want. Without question, mandatory binding arbitration clauses are achieving exactly what the tobacco, insurance, pharmaceutical, chemical, oil and auto industries have been trying to accomplish for over 30 years: Elimination of the public's ability to sue and hold accountable corporations that cause harm.

In cases that are forced into binding arbitration, a single arbitrator or a panel

— not a judge — decides disputes. Arbitrators are not required to have any legal training and they need not follow the law. In other words, their decisions are still enforceable with the full weight of the law even if legally incorrect. This is especially disturbing since victims have virtually no right to appeal an arbitrator's ruling.

Arbitrator bias is another problem. Arbitrators may be under contract with the businesses against which claims are brought. Often the company, not the victim, is allowed to choose the arbitrator. Companies track how arbitrators rule and reject arbitrators who do not rule in their favor. This creates inherent bias and self- interest on the part of the arbitrator, who is motivated to rule in a way that will attract future company business.

Arbitration companies also have a financial incentive to side with corporate repeat players who generate most of the cases they handle. In March 2008, the city of San Francisco filed a lawsuit alleging that one of the nation's major arbitration providers operated an "arbitration mill" that favored debt collectors. According to the complaint, National Arbitration Forum (NAF) arbitrators ruled in favor of California consumers in less than 0.2% of all cases (30 out of 18,075) heard from January 1, 2003 through March 31, 2007. These 30 victories only occurred in hearings where a consumer brought claims against a business; when companies brought claims against consumers, they were successful in hearings 100% of the time.

Harvard Law Professor and former NAF arbitrator Elizabeth Bartholet confirmed NAF's anti-consumer bias in recent testimony before Congress. On July 23, 2008, Bartholet told the Senate Judiciary Committee how a credit card company had been allowed to remove her from cases once she ruled in favor of a consumer. "I concluded from this experience that the NAF process was systematically biased in favor of credit

card companies and against debtors, since the process gave the companies a peremptory challenge right which they could use to systematically remove any arbitrator who ruled against a credit card company in a single case, since the companies were apparently using it in this way, since the alleged debtors were not in a position to know what was going on, and since NAF was fully aware of the practice and was either facilitating it or at a minimum tolerating it rather than doing anything to address it."

(continued on page 3)

ARBITRATION BILLS IN CONGRESS

Arbitration Fairness Act of 2009 (H.R. 1020).
Bans pre-dispute arbitration agreements that require arbitration of employment, consumer or franchise disputes or disputes arising under any statute intended to protect civil rights.

Consumer Fairness Act of 2009 (H.R. 991).
Voids pre-dispute binding arbitration clauses in all consumer transactions and consumer contracts. Arbitration clauses imposed on consumers without their consent would be treated as an unfair and deceptive trade act or practice under federal or state law.

Servicemembers Access to Justice Act of 2009 (S. 263).
Protects military service members from being forced into arbitration in disputes with their employers.

The Nursing Home Arbitration Act (H.R. 1237, S. 512).
Bans mandatory arbitration agreements in nursing home contracts.

MANDATORY BINDING UNFAIRNESS

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The high cost of arbitration also makes it difficult for victims to pursue disputes with businesses. Take Erika Ricer, who was forced into arbitration when she tried to remedy the purchase of an unsafe car. "I can't even afford the cost of going through with the arbitration process," Ricer explained to a House subcommittee on March 6, 2008. "In order to just start that process, I would have to pay half or more of all the cost of arbitration. I have learned that arbitrator's fees usually range from at least $700 to $1,800 per day with an average of $1,300," said Ricer, adding that she "would also have to pay half of the administrative fees. I know that the cards are totally stacked against me."

Limited discovery is an additional drawback of arbitration. Without full discovery, it is much more difficult for individuals to have access to important documents that may help their claim.

Arbitration is also a privatized system with no transparency. Unlike the courts, where proceedings and records are open to the public, arbitration hearings are held behind closed doors, without a transcript of the proceedings and are often confidential. Such secrecy prevents victims

from knowing about similar instances of corporate misconduct, eliminates the opportunity for potential victims to protect themselves from possible injustice and fails to alert the broader public to corporate abuses.

And since arbitrators don't write or publish detailed written decisions, no legal precedents or rules for future conduct can be established. The lack of written decisions disadvantages victims in another way: Only businesses that force arbitration can track past rulings and know which arbitrators are favorable to them.

Congress must ban the use of pre-dispute mandatory binding arbitration clauses in all consumer and employment contracts. If not, corporations will be allowed to escape accountability for the injuries they cause or the laws they break.

ARBITRATION HYPOCRITES

In a letter to Congress dated May 1, 2008, over a dozen business trade groups, including the U.S. Chamber of Commerce, the National Association of Manufacturers and the American Insurance Association, sang the praises of arbitration. "[A]rbitration is an efficient, effective, and less expensive means of resolving disputes for consumers, employers, investors, employees and franchisees, in addition to the many businesses that use the same system to resolve business disputes."

Yet when it comes to contracts with each other, corporations are far less likely to use arbitration clauses than they are in contracts with consumers. This was the finding of a December 2007 study by

Cornell Law Professors Theodore Eisenberg and Emily Sherwin and Professor Geoffrey P. Miller of NYU Law School, who examined contracts from 21 financial and telecommunications companies. The data showed mandatory arbitration

(continued on back page)

U.S. SUPREME COURT ARBITRATION UPDATE

The Court is considering three arbitration cases this term:

Arthur Andersen LLP v. Carlisle.
Whether non-signatories to an arbitration agreement can appeal a district court's denial of their motion to enforce the agreement and compel arbitration.

14 Penn Plaza LLC v. Pyett.
Whether an arbitration clause in a collective bargaining agreement waving union members' rights to file statutory discrimination claims is enforceable.

Vaden v. Discover.
The Court ruled on March 9 that a federal court has no jurisdiction to compel arbitration when the suit to compel arises under state law but a counterclaim may also involve a federal law.

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ARBITRATION HYPOCRITES continued...

clauses in over 75 percent of consumer agreements but in less than 10 percent of their negotiated non-consumer, non-employment contracts.

"The absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers," explained the authors. "Systematic eschewing of arbitration clauses also casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses." Based on the data, the researchers concluded that "[l]arge corporations' assertions that mandatory consumer arbitration is justified because it provides consumers with a superior form of dispute resolution thus appear to be disingenuous."

The corporate response to a forced arbitration provision in the proposed Employee Free Choice Act (EFCA) confirms that businesses don't think mandatory binding arbitration is so fantastic for resolving disputes. For example, in a June 12, 2008 article, U.S. Chamber Labor Policy Director Marc Freedman criticized the EFCA arbitration clause as a "horrendous provision for employers" which "totally stacks the deck against the employer." "In this environment," wrote Freedman, "the employer will always lose; it's only a question of by how much. ...So favorable is the binding arbitration process to the union position that union negotiators should be expected to drag out the process intentionally to get the matter into arbitration."

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