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

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friend,

The controversy over the September 11 Victims Compensation Fund – whether payments will be adequate and fair – brings to mind the problems that often arise when injured victims are prevented from suing in court.

Many Americans rely on the civil jury system for reasons other than monetary compensation. In *The Suing of America: Why and How We Take Each Other to Court,* the author observed, "The use of lawsuits is an affirmation that the individual can fight against big corporations, the government, his own employer, the faceless bureaucracies that rule his life – that he has equal power against his adversaries through the courts." Jury verdicts are often the only means available to individuals to obtain personal justice.

There is an insidious movement underway to undermine our civil justice system with mandatory binding arbitration. This alarming new trend is a wicked development not only for injured victims but also for society at large. When disputes are resolved without trial and without a public record, wrongdoers can prolong misconduct and suppress for years information about dangerous products and practices.

We strongly support the efforts of those fighting mandatory binding arbitration and we are doing whatever we can to help.

Joanne Doroshow
Executive Director

IN THIS ISSUE: FOCUS ON PRIVATE JUSTICE

A Raw Deal for Workers and Consumers

In August 2001, the managing director of the National Arbitration Forum gave a detailed interview for *Metropolitan Corporate Counsel* magazine. He explained how corporations could use mandatory binding arbitration, including basic clauses that eliminated punitive damages and class action lawsuits, to accomplish the objectives of "tort reform."

He declared, "Now is the time for corporate counsel to reexamine the use of the arbitration tool to accomplish their own Civil Justice Reform goals."

Without question, mandatory arbitration is achieving what the tobacco, insurance, pharmaceutical, chemical, oil and auto industries have been trying to accomplish in Congress and state legislatures for the last 20 years – elimination of the American public's right to sue and hold accountable corporations that cause harm.

According to Paul Bland, staff attorney with Trial Lawyers for Public Justice, "Many corporations claim that with mandatory binding arbitration, you've forfeited your constitutional right to sue them. Mandatory arbitration clauses slam shut the courthouse doors for millions of consumers and workers just like you."

A 1925 federal law called the Federal Arbitration Act is providing the legal basis for the broad use of arbitration clauses in consumer contracts. In the 2001 case *Circuit City v. Adams,* the U.S. Supreme Court relied on the law to say that companies can force arbitration clauses on workers. This term, the high court will decide if the Equal Employment Opportunity Commission, which filed a discrimination case against Waffle House on

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"Take it or Leave it" Arbitration

In October 1995, Saint Clair Adams applied for a sales counselor job at Circuit City in Santa Rosa, California. He was offered a position in the small office/home office department and filled out a work application. As a condition of being hired, Adams had to sign a form agreeing to mandatory binding arbitration of all employment-related disputes. He signed on the dotted line and began selling computers.

Over the course of his employment, Adams was subjected to repeated harassment based on his sexual orientation, prompting him to sue Circuit City in state court for discrimination and related tort claims. While the 9th Circuit Court of Appeals refused to enforce the arbitration clause and ordered the case to trial, the U.S. Supreme Court reversed, forcing Adams into arbitration and upholding employers' efforts to compel all workplace disputes into binding arbitration.

Adams objected to being forced into Circuit City's arbitration process for good reason. The procedure placed caps on punitive damages no matter how egregious the misconduct; it obligated employees to pay half the cost of arbitration and vested complete discretion in the arbitrator to decide whether to award attorney's fees to a prevailing employee, even on statutory discrimination claims; and it did not require the arbitrator to provide findings or reasoning to support the arbitration award.

Mandatory binding arbitration clauses are not unique to employment contracts. Aided by the *Circuit City* case and

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CENTER FOR JUSTICE & DEMOCRACY
P.O. Box 3326
Church Street Station
New York, NY 10008-3326
Phone: 212.267.2801
Fax: 212.764.4298
E-mail:
centerjd@centerjd.org
Web: centerjd.org

IMPACT
Editor: Joanne Doroshow
Contributors:
Joanne Doroshow
Emily Gottlieb

In Pursuit of Justice... Jere Beasley

This country is full of champions for the "little guy," but there is perhaps no more tireless an advocate than Alabama trial lawyer Jere Beasley. Back in 1998, the *Montgomery Independent* newspaper had this to say about Jere Beasley: "He is on the side of the Alabama consumer and is probably the closest thing to Ralph Nader we have in Alabama."

Lately, through a series of lawsuits and political efforts, he has been on a crusade to rid this country of mandatory binding arbitration. Former Alabama Insurance Commissioner Mickey DeBellis, who resigned in January 1998 after refusing to approve mandatory arbitration clauses in insurance contracts, said, "Jere Beasley has done more to protect the policyholders in Alabama; he's put the fear of god in these companies' heart."

Beasley is a senior partner at the Montgomery law firm Beasley, Allen, Crow, Methvin, Portis & Miles. In addition to being a successful trial lawyer specializing in products liability and insurance fraud, each month Beasley writes and publishes *The Jere Beasley Consumer Report*, an in-depth analysis of consumer news and information that often features the work of the Center for Justice & Democracy and other groups.

His place in Alabama political history is well established. From 1971 to 1978, he was elected and then re-elected Alabama's lieutenant governor. For five weeks in 1972, he was Alabama's acting governor while then-Governor George Wallace recovered in a Maryland hospital from an assassination attempt.

Beasley's last political campaign was the 1978 gubernatorial race. While he did not succeed, he has continued to serve Alabama's consumers. In recent years, he has concentrated on building his law practice, fighting mandatory arbitration and advocating for consumers throughout Alabama and the nation.

He's our champion too.

"Take it or Leave it" Arbitration continued...

other recent Supreme Court decisions expanding federal arbitration law, contracts with forced arbitration terms presented on a "take-it-or-leave-it" basis are steadily becoming the norm in agreements between businesses and consumers. According to one recent article, in the last two years all of the top 10 credit card companies, except Chase, have placed mandatory binding arbitration notices in credit card agreements. A survey by First USA, the nation's second-largest credit card company, showed that it won 99.6 percent of the cases that went all the way to an arbitrator.

Arbitration has many built-in advantages that favor businesses. Bias is an obvious problem. According to a recent *San Francisco Chronicle* investigative report, "General Electric pays ... arbitrators and American Arbitration fees to conduct the hearings. As of Dec. 31 [2000], American Arbitration owned $680,000 in bonds of GE Capital Corporation, a GE subsidiary that accounts for almost half of GE's sales."

Arbitrators may be on contract with the businesses against which claims are brought. Often the company, not the victim, is allowed to choose the arbitrator. This creates inherent bias and self-interest on the part of the arbitrator – the arbitrator is motivated to rule in a way that will attract future company business. Businesses that are frequently before an arbitrator also know from experience which arbitrators are likely to rule in their favor.

Arbitration saves neither time nor money for the consumer/employee. There are many reports of arbitration cases taking years. For example, a 1998 *Los Angeles Times* article described a case where it took nearly two years for a victim to even get to an arbitration hearing after an auto accident.

Moreover, whereas victims who go to court pay little or nothing up front, arbitration costs must generally be split between the injured victim and the insurance company, including the arbitrator's fees, which can range between $200 and thousands of dollars per hour. The American Arbitration Association, the nation's largest arbitration firm with more than 140,000 cases each year, charges up-front fees ranging from $500 for claims under $10,000 to more than $7,000 for claims above $1 million.

Such fees can be prohibitively expensive for an injured victim who has suffered financial loss, particularly in personal injury cases. Victims who are in need of medical care, who are disabled or perhaps in pain, who cannot work, whose families are disrupted and who may have major expenses are in a substantially weaker position than their opposing party, the

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A Raw Deal for Workers and Consumers continued...

behalf of a former employee, is also bound by an arbitration clause in an employment contract.

The Federal Arbitration Act was enacted at a time when businesses were beginning to promote the use of arbitration tribunals to resolve commercial disputes. Now, however, mandatory binding arbitration clauses are becoming standard business practice in consumer contracts such as credit card and real estate agreements, applications for bank loans and leasing cars, employment contracts and even HMO policies. In some states, they may apply broadly to insurance contracts. Consumers or small businesses that refuse to submit to mandatory binding arbitration may be unable to get credit cards, insurance, health care or jobs.

There are currently many and varied non-statutorily mandated ways of resolving disputes outside the court system. The most common voluntary method is negotiated settlement between disputing parties. What distinguishes mandatory binding arbitration and other non-voluntary systems are the restrictions they place on the rights of injured people.

Under mandatory binding arbitration, access to the courthouse is blocked. Arbitrators are not required to have any legal training. They may be biased, former industry executives or even under contract with the party against whom the claim is filed. The discovery process, whereby parties obtain information from one another, is extremely limited. Rules of evidence do not apply. The proceedings are not public. Arbitrators issue no written legal opinions, so no legal precedent or rules for future conduct can be established. Costs must generally be split between the injured victim and the insurance company, including arbitrator's fees, which can range between $200 and thousands of dollars per hour. And there is no right to appeal.

Mandatory binding arbitration is part of a centuries-long corporate movement toward "private justice," replacing the civil jury system with one over which corporations have more control. In addition to mandatory binding arbitration, legislative proposals abound to establish "no-fault" compensation systems or force injured victims before administrative tribunals, as exists in the workers' compensation area where compensation is set by statute, often at horribly low amounts. Workers now face serious disadvantages relative to those with access to the judicial system.

The chief consequence of the nation's movement towards "private justice" is the protection of corporations, professional groups and governmental bodies from lawsuits and liability. Whereas the judicial system is structured more to neutralize resource and power imbalances between the parties, mandatory alternative dispute resolution systems require victims to resort to compensation systems where more powerful corporate interests can and do prevail. As a result, victims often receive less compensation and other important functions of the tort system are disrupted, especially deterrence of unsafe practices and the disclosure of dangers to the public.

The HMO'S Private Judiciary

Imagine someone in your immediate family goes to her HMO doctor after experiencing pain and other discomfort. Though she continues to relate the same complaints over a series of visits, the doctor never refers her to a specialist. The HMO later authorizes tests which reveal a large mass that needs to be surgically removed. The surgeon insists she can wait.

The pain becomes so unbearable that your relative is taken by ambulance to the HMO's emergency room, waiting one hour to be seen and four hours to be admitted. More than five days later, she has surgery and the doctor finds a perforated ulcer. Four weeks later, the woman dies.

You decide that you want to hold the HMO responsible in court for negligence. Unfortunately, a clause in the fine print of her HMO contract mandates that any disputes must be resolved through binding arbitration instead of a court trial.

This is exactly what happened to Kathy Cailteaux, who was forced to arbitrate after her mother died. Unable to pay expert witnesses and other arbitration-related fees, which exceeded $20,000, not to mention spending nearly two years without any resolution, Cailteaux dropped her claim against the HMO.

Kathy Cailteaux's story is not unique but representative of how HMOs eliminate the right to sue as a condition of coverage.

Although some states allow patients to take their health provider to court for denial or delay of care, most HMO contracts require them to arbitrate their disputes rather than file a lawsuit. "The HMOs' private judiciary, known as 'binding arbitration,' embodies the worst elements of American hypercapitalism and Soviet-style justice," explains Jamie Court, executive director of the non-profit Foundation for Taxpayer and Consumer Rights (FTCR), a Santa Monica-based advocacy organization. "To have access to the 'market' of health care coverage, a patient must give up his right to a court trial. Patients cannot appeal errors of law to a judge. None of the evidence and testimony presented is public record, and the media are not welcome to observe proceedings. Delays are common, as is abusive behavior by HMO defense lawyers, because there is no judge to ensure fairness."

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"Take it or Leave it" Arbitration continued...

actual perpetrator of the harm or its insurers.

Further, by keeping cases out of court, arbitration clauses eliminate the possibility of consumers banding together to file class action lawsuits. "When consumers are overcharged a modest amount but it affects many people, then a class-action suit is the only way to go against credit card companies in an efficient way," says Jean Ann Fox of the Consumer Federation of America in a recent article in the *San Antonio Express*.

While mandatory arbitration is said to be justified on the ground that it is voluntary, this is hardly true. Arbitration clauses are usually outlined in tiny print, buried in documents and paragraphs and written in legalese that is incomprehensible to most people. Moreover, consumers/employees have no ability to chose to go to court and preserve their right to jury trial. If they refuse to accept arbitration, they will not get the job, service or product in question. Like employees, consumers sign contracts with a forced arbitration clause because they have no idea of the clause's impact on their substantive rights and remedies, think its terms will never affect them or are unaware that the clause exists until an actual dispute arises.

Alabama attorney Jere Beasley, who has fought mandatory binding arbitration in the states, says, "[P]eople who can't read or write are being bound by these things." Beasley's legal challenges against arbitration in insurance contracts have come from a wide assortment of organizations and individuals, including Mothers Against Drunk Driving (MADD), Alabama Victims of Crime and Leniency, the Alabama Education Association, the AFL-CIO and Democrats for Christian Values. Actor Christopher Reeve, who has been paralyzed since May 1995 after falling from a horse in a riding accident, filed an *amicus* brief in support of one of Beasley's cases. He said in his court pleading, "One of the hardest things I have had to do since my disability is to deal with insurance companies. I found them to be callous and to try to set up any roadblocks they can to keep from paying legitimate claims. … I am totally against binding, mandatory arbitration in insurance policies."

Reform in this area is desperately needed. Consumer organizations like Public Citizen have advocated certain mandatory principles. They say, "[A]rbitration agreements must be entered into voluntarily after the dispute arises and the consumer, employee — or even the small business owner such as an auto dealer — knows which rights she is waiving, who will arbitrate the dispute, who will bear the costs of arbitration, whether discovery will be allowed, what law will be applied, what information will be public, and whether she will have recourse following the award."

The arbitration clause itself should be in plain view, explaining in layman's terms what rights and remedies are being surrendered. There should be a national standard governing the arbitration process, whose rules and procedures are currently dictated by companies.

The adoption of these and other reforms will eliminate some of the potential roadblocks workers and consumers face when they seek to hold corporations accountable for injuries they've suffered.

The HMO'S Private Judiciary continued...

A December 2000 report by the California Research Bureau, the state legislature's research arm, shows the extent to which the mandatory arbitration process has an inherent bias against victims. Looking at California data, the Bureau found that "arbitration is expensive, at least for patients on normal budgets," with arbitrators typically charging $250 to $400 per hour, not to mention the additional costs of renting a hearing room, attorney's fees and related administrative expenses. The report points out that, California, like most states, lacks uniform professional standards and licensing requirements for arbitrators, allowing HMOs to have claims decided by repeat arbitrators who tend to rule in their favor. According to the researchers, unlike patients, "[h]ealth plans, which are likely to have repeat experiences with individual arbitrators, are in a good position to make informed decisions when choosing an arbitrator for a case." The study also discovered that many health plans in California ignore state notification laws that require them to report arbitration cases to the state Department of Managed Health Care, thereby depriving both the state and the public of access to complete records about the process of managed care arbitration.

"To the market-oriented HMOs, this system represents 'choice,'" says FTCR's Court. "Yes, consumers can avoid mandatory binding arbitration by joining an HMO that doesn't require it – if they can find one. The only true choice for the typical patient is between health care and due process – 'choice' only in Stalin's lexicon."

An arbitrator's decision to approve or deny medical treatment can literally be a matter of life and death. Given the gravity of the issues at stake, not to mention the one-sidedness of the process, pre-dispute, mandatory binding arbitration clauses should be banned from HMO contracts altogether.