Arbitration in America

A Secretive System Favoring Corporations Over People

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[1] Public Justice pursues high impact lawsuits to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. I oversee Public Justice's docket of consumer, worker protection, environmental and civil rights cases. I have argued or co-argued and won more than 40 reported decisions from federal and state courts across the nation, including cases in six of the federal Circuit Courts of Appeal and at least one victory in ten different state high courts. I was named the "Vern Countryman" Award winner in 2006 by the National Consumer Law Center, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the wellbeing of vulnerable consumers." In 2013, I received the Maryland Consumer Rights Coalition's "Legal Champion" award. In 2010, I received the Maryland Legal Aid Bureau's "Champion of Justice" Award. In the late 1980s, I was Chief Nominations Counsel to the U.S. Senate Judiciary Committee.

For 20 years, Public Justice has represented consumers in a large number of cases challenging abuses of forced arbitration clauses. While arbitration clauses are widely enforceable as a matter of federal law, we have successfully represented consumers and workers in cases where corporations added outrageous terms to their arbitration clauses (such as requiring consumers with small claims to travel across the country), or corporations have attempted to enforce arbitration clauses against consumers who never agreed to them, and similar abuses.

INTRODUCTION

The vast majority of consumer products are sold subject to a forced arbitration provision – consumers can't go to court if they're cheated or injured; they have to go to a secretive, unreviewable system selected by the corporation that wrote the contract. Most workers in America are subject to a forced arbitration clause – either they sign a document saying that if their wages are stolen or are they otherwise treated illegally, that they will submit to a system that is far more likely to favor the corporation, or they can't keep their job or apply for a job. Hardly any nursing homes in the U.S. will let a patient in without presenting them (or their family) with an arbitration clause, and the nursing home industry lobbyists openly acknowledge that the point of these clauses is to reduce their liability. The vast majority of new houses in America are sold with arbitration clauses that make it impossible for buyers to sue the builder in court, no matter what defects and problems there are in the house.

My organization has represented consumers, workers, nursing home patients and many others in challenging forced arbitration clauses. Our first case (on behalf of home buyers in Alabama) was in 1998. We've won dozens of cases in more than 25 states over the years. As the Supreme Court has become more and more favorable to forced arbitration clauses, now the vast majority of our cases are where a corporation is trying to force someone into arbitration where it's very clear that they never agreed, or where the clause is badly drafted or illegal for some unusual reason. But no law firm or organization in the country has won nearly as many cases as we have in challenging forced arbitration clauses. As a result, over the years, literally thousands of people with

legal claims who are faced with forced arbitration clauses have reached out to us, asking us if we can help them avoid having their claims forced into arbitration.

All too often, we cannot. While it varies by type of case a good deal, in a great many of these cases, in our experience, people simply drop their case and give up, rather than pursue their claims in arbitration. In recent months, though, I have had the following experiences:

- We were contacted by a woman who was raped by an employee of a corporation, where the corporation had a strong argument that she had "agreed" (she didn't know about it, of course, but the clause was deep in many thousands of words of fine print) to forced arbitration. Our team could find no defect, and she had to go forward with arbitration. She's now bound by strict confidentiality; her arbitrator is a lawyer who principally defends corporations against sexual harassment and similar claims.
- I was contacted by a person whose mother had died in a nursing home in circumstances that strongly indicated gross negligence by the nursing home. I couldn't find any flaw in the clause, and the family is now in arbitration, under strict secrecy terms, before a local arbitration company. I could find no information about this company other than that it handles a lot of cases for that nursing home.
- We have been contacted in 2019 about several scams perpetrated against consumers by predatory lenders, where consumers were promised a financial service with favorable terms and then found themselves with a product that was far inferior to what they'd expected. The claims in the cases I've handled

> or helped handle ranged between $100 and a few thousand dollars. In my experience, very few (if any) attorneys would be willing or able to handle such claims on an individual basis. The clauses couldn't be challenged, and the cases will not be brought. Whether the claims have merit or not, the consumers' claims will be lost.

There are a LOT more cases like this. Very few of the individuals want to talk to reporters or Members of Congress or do anything other than take their case to court. But that's not possible for most Americans with a consumer or workplace dispute; powerful corporations have taken away those rights.

Very Few Americans Genuinely Agree to Arbitration

Forced arbitration clauses are ubiquitous in modern society, and are virtually impossible to avoid when purchasing many products or services. From transactions as small as downloading a smartphone app to major financial decisions, clauses informing consumers that they are surrendering their Constitutional right to court are hidden in fine print. They are often presented in long, complex forms, or in a paragraph or two hidden in a large agreement. Many on-line contracts bury the arbitration clause hundreds of lines deep in fine print; the corporations know that nearly all people will just click "agree" rather than scroll down so far. Unsurprisingly, consumers are typically unaware of these provisions, or if by some chance they are aware of them, they do not understand the implications.

In our experience of talking to many workers and consumers, nearly everyone first learns that they have supposedly agreed that they don't want to take their case to a jury or court only after the dispute arises. In most cases, when someone first learns of

an arbitration clause, it is a bitter surprise. I've had innumerable conversations where people – often very angry and dissatisfied people – were utterly unaware that they had supposedly agreed to such a clause.

Based on survey data, the CFPB study found that "consumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally do not know whether they can sue in court or wrongly believe that they can do so."[2] When they do read the arbitration clauses, it turns out that most consumers misunderstand them. For example, "less than 7% of consumers whose credit card agreements included pre-dispute arbitration clauses stated that they could not sue their credit card issuers in court."[3] And most consumers with such clauses "wrongly believe that they can participate in class actions."[4] In fact, misunderstanding is so commonplace that when researchers at St. John's Law School pointed consumers to the arbitration clause and asked them to read it, only "approximately 13% understood that the contract they had just been shown prohibited them from participating in a class action lawsuit."[5]

Even when consumers do learn of arbitration clauses, based on Public Justice's experience, consumers, workers, people being admitted to nursing homes, and others in similar situations often don't understand the clause even after they read it. In other words, our experience strongly supports the conclusions of the Consumer Financial Protection Bureau ("CFPB") study on forced arbitration. Few people know what

[2] Sec. 1, p. 11
[3] Sec. 3.1, p. 4
[4] Sec. 1, p. 11
[5] Amy J. Schmitz, "Consideration of 'Contracting Culture' in Enforcing Arbitration Provisions," 81 St. John's L. Rev. 123, 160 (2007).

arbitration means, or wrongly assume they can still go to court. If individuals do notice the arbitration clause, and try to figure out what it means and how it would work, our experience is that they generally quickly become confused and discouraged. The arbitration rules are also lengthy, hard to find, and it's often unclear which set of rules apply to the consumer's case. Consumers also often must pay up front expenses absent in a court, and often face extensive delays when (as they often do) corporations refuse to pay their share of arbitrators' fees.

Forced Arbitration is a Secretive, Non-transparent System

Forced arbitration creates a culture of secrecy, where largely unaccountable arbitrators hear disputes behind closed doors and render decisions without being bound to follow legal precedents and often without publishing a written decision that explains their reasoning. This culture of secrecy prevents consumers and employees who are having a dispute from learning whether others have experienced a similar problem before and how that problem was resolved. It also leads to arbitrary and inconsistent results in the arbitral forum because arbitrators, unlike judges, are not required to follow precedents created by earlier-decided cases with similar facts. Most arbitration companies, and most arbitration clauses, impose varying levels of secrecy on individual workers, consumers and others who are subject to the clauses – it is very common for people to be barred from discussing the facts of their case, or the arbitrator's decision, publicly.

But while arbitration remains cloaked in secrecy from the perspective of outsiders, the employers and companies that participate in multiple arbitrations, and the lawyers who represent those companies, are not outsiders. This repeat player bias

benefits employers and other corporate participants in arbitration in many ways, from giving them a sense of what arguments an arbitrator is likely to favor to allowing them to select, in advance, an arbitrator who they believe will support their position.

Arbitration Tends to Favor Corporations Over People

There are a number of different private arbitration companies who compete to be selected by corporations in their standard form contracts with consumers and employees. Arbitration work is often very lucrative, and arbitrators know that if they rule against a corporate defendant too frequently or too generously (from the standpoint of that corporation), they will lose the work. Companies imposing arbitration clauses on their employees and consumers through standard form contracts of adhesion sometimes justify their actions with rhetoric about arbitration being cheaper and faster and fairer than litigation in court. From numerous conversations with lawyers both for corporations and advocates for individuals generally, and participation in multiple mediations and settlement negotiations, I can unequivocally testify that the nearly universal perception among both plaintiff-side and defense-side lawyers is that arbitrators are more likely to have a pro-defense attitude than are judges or juries.

There is extensive empirical evidence of the outcomes of forced arbitration in the employment setting. Professor Alexander Colvin found in a comparison of American Arbitration Association (AAA) arbitrations with federal and state court judgments that employees' win rate was 21.4 % in AAA arbitration, 36.4% in federal court employment

discrimination cases, and 57% in state court non-civil rights cases. Employees also typically won notably smaller damage awards in arbitration even when they did prevail.[6]

Companies help their advantage further by "blackballing" arbitrators who have even the slightest indication that they may rule against them. This was revealed in a study of arbitration in managed care cases in California, which found a small number of cases where an arbitrator awarded a plaintiff more than $1 million against an HMO. In each case, it was the only HMO case that the arbitrator handled, indicating that when the arbitrator rules against the HMO, he can no longer get any work from them. The study also found that arbitrators were twenty times more likely to enter summary judgment for HMOs than a judge.[7]

Studies have also found that companies will repeatedly hire arbitrators who they know will rule in their favor. A study of employment arbitrations subject to forced arbitration clauses found that when an employer and employee both appeared before an arbitrator for the first time, the employee had a 17.9% chance of winning. But if the employer had been before the arbitrator four times, the employee in the fifth case only had a 15.3% chance of winning, and if the employer had appeared before the same arbitrator 25 times, the 26th employee only had a 4.5% chance of winning.[8]

Arbitrators' Decisions Are Not Subject to Meaningful Judicial Review

[6] Alexander J.S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," 8 Journal of Empirical Legal Studies 1, 8

[7] California Managed Health Care Systems 22 23 (2000).

[8] Katherine V.W. Stone and Alexander J.S. Colbin, "The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights," Economic Policy Institute, December 7, 2015. Available at http://www.epi.org/publication/the-arbitration-epidemic/.

Sometimes even very smart, hardworking people make mistakes. But arbitrators' decisions are nearly always final, no matter how unfair or wrong they may be. The general rule is that judicial review of arbitrators' decisions "is very narrow; one of the narrowest standards of judicial review in all of American jurisprudence." *Lattimer-Stevens Co. v. United Steelwokers of Am. Dist. 27*, 913 F.2d 1166, 1169 (6th Cir. 1990). For example, Judge Richard Posner wrote for the Seventh Circuit that courts should not review arbitrators' interpretations of contracts even if they are "wacky," so long as the arbitrator attempted to "interpret the contract at all." *Wise v. Wachovia Securities, Inc.*, 450 F.3d 265, 269 (7th Cir. 2006). And when the Third Circuit considered an arbitrator's decision that "inexplicably" cited and relied upon language that was not included in a key document, the court held that "such a mistake, while glaring, does not fatally taint the balance of the arbitrator's decision in this case. . . ." *Brentwood Medical Associates v. United Mine Workers of America*, 396 F.3d 237 (3d Cir. 2005). The Supreme Court itself has held that "courts are not authorized to review the arbitrator's decision on the merits" even if the fact finding was "silly." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2002). The California Supreme Court found that even when an arbitrator's decision would "cause substantial injustice" on its face, it was not subject to judicial review. *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992).

It Will Be a Disaster for Investors and American Markets if Forced Arbitration Replaces Securities Fraud Class Actions

For many decades, there has been a bi-partisan consensus that on occasions when many investors are defrauded, securities class actions have been an important vehicle for recovering losses for shareholders. And while many individual investor cases are forced into arbitration, forced arbitration clauses have never been permitted

to block investor class actions. In the last two years, certain actors are attempting to erase this consensus, and to promote forced arbitration as a means of wiping away accountability for those who lie to or cheat investors.

Simply put, this would be disastrous. As resources at governmental enforcement agencies such as the Securities and Exchange Commission are often limited, private action has been an essential compliment to safeguarding investors. For example, in the mid-2000s, there were a series of extremely egregious and well-publicized securities frauds in the U.S. involving Enron, WorldCom, Tyco, Bank of America and Global Crossing. In those five cases, the SEC's enforcement actions recovered penalties and fees of $1.8 billion. By contrast, private litigation by investors themselves recovered $19.4 billion for investors. The need for such private action is more important than ever: since 2016, there has been a 33% decline in securities enforcement and a more than 80% drop in SEC settlements.[9]

Wiping away the enforcement of securities laws through private enforcement would make the U.S. marketplace less attractive. One of the main reasons foreign investors hold more than $6.2 trillion in stocks in U.S. corporations is that American markets are particularly well policed compared to those in many other countries. For example, Petrobras, a Brazilian oil company, was recently charged with misleading investors about their financial statements and business operations. When claims were filed, the court found there were two different sets of investors: those who purchased securities on the U.S. market and those who purchased securities on the Brazilian stock

[9] NYU Pollack Center for Law & Business and Cornerstone Research, "SEC Enforcement Activity: Public Companies and Subsidiaries," (2017). Available at http://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-2017-Update.

exchange. Thanks to the U.S. securities law, the first group of investors was able to bring class actions despite a forced arbitration clause banning class actions in Petrobras' bylaws. These investors are set to recover more than 90 percent of the $3 billion fraud settlement. The second group of investors, at the mercy of Brazilian law, were forced into individual arbitration and barred from joining a class action. They are not expected to recover a dime.

It's Not Just Securities Fraud: By Banning Class Actions,

Forced Arbitration Clauses Suppress Many Valid Claims and Immunize Corporations from Liability Even When They Have Clearly Broken the Law

When corporations can simply ban their workers or customers from banding together in a class action, the consequence is often that the corporation can simply break the law and get away with it. The Consumer Financial Protection Bureau study, mandated by the Dodd-Frank Act, provided ample empirical proof of this fact.

In recent years, for example, if a bank systematically cheated 10,000 customers in the same way, the bank could use its arbitration clause to stop those customers from going to court together. Each individual had to figure out the scam, figure out what their rights were and then spend time and money fighting the bank. In the incredibly inefficient system that banks foisted on their own customers, everyone was essentially on their own. In contrast, a class action could offer all 10,000 people a fair shot at justice.

The CFPB conducted an extensive empirical study of forced arbitration. Its results, reported to Congress in March of 2015, are entirely consistent with what most experts in consumer law would have predicted:

Incredibly few consumers ever actually take cases to arbitration, and very few of them recover much. The CFPB looked at *every single arbitration* conducted by the American Arbitration Association (by far the largest private arbitration company in the United States that handles consumer cases) over a period of three years in cases against lenders. In those three years, the TOTAL number of cases that consumers arbitrated against lenders was 411 per year. Out of hundreds of millions of arbitration clauses, and compared to the legal system, where more than 13 million consumers received recoveries in class actions. That is not a typo. *Throughout the entire United States*, the total number of arbitrations against lenders each year was 411. Sec. 1, p. 11.

Over those three years, and again for the entire United States, 32 (thirty-two) consumers won recoveries from arbitrators in cases against lenders, where the arbitrators issued decisions. Sec. 1, p. 11. In those 32 cases, the consumers recovered 12 cents for every dollar of their legal claims. Sec. 5, p. 13.

By contrast, in a study of 400 private lawsuits that were brought in court and litigated as class actions, more than 13 million customers received more than $2.7 billion in recoveries. Sec. 1, p. 16. The attorneys' fees in those class actions amount to 16% of the gross relief received by the consumers. Sec. 8, pp. 23, 32-33.

This study is consistent with Public Justice's experience: Very few consumers have any interest in bringing cases in arbitration. There are a number of factors that we see again and again:

- The arbitration system is foreign and confusing to consumers. Most consumers don't know what the word means, or wrongly assume they can still go to court.
- The rules of the arbitration providers are lengthy, hard to find, and often it's not clear which set of rules apply. The American Arbitration Association has many different sets of rules, and cases are often litigated for some time as to which set of rules will govern in a given case.
- Consumers often must pay up front expenses that exceed what they'd have to pay in a court. It is not at all uncommon for corporations to refuse to pay their share of arbitrators' fees (even when their customer contracts promise that they will pay most of the costs of arbitration), so when consumers do go to arbitration there are often extensive delays while the arbitration company collects fees from the company.
- There are a number of examples of arbitrators requiring consumers to pay enormous "loser pays" awards (meaning that even if a consumer brought a well-grounded case and they end up losing before the private corporate arbitrator, they are forced to pay the corporation's attorneys' fees, in some cases amounting to several hundred thousand dollars), which makes consumers reluctant to go to arbitration.
- Most private consumer lawyers are very reluctant, or completely unwilling, to represent clients in a system that they believe is rigged against consumers. Unlike the banking industry lawyers, consumer lawyers generally only get paid if they win cases. Many of them have a reasonable, earned distrust of

forced arbitration, and extensive surveys of consumer lawyers consistently show that most will walk away from a case rather than go to arbitration.

The CFPB study's findings that very, very few consumers go to arbitration are not even slightly surprising to experienced consumer lawyers. Let me start with an example. I represented a client who was cheated by a bank in a case, but because the U.S. Supreme Court changed the law governing forced arbitration clauses fairly dramatically while the case was pending, our client ended up receiving nothing and none of the other consumers who were cheated in the same way received anything. In *Homa v. American Express*, our client, Mr. Homa, agreed to purchase a credit card based on the company's offer of a specific set of conditions and terms. In fact, however, he discovered that the terms that were advertised were far better than what a cardholder could ever receive and that the credit card company was misleading people about the true cost of its loans (by exaggerating the size of the rebates the cardholders were supposed to receive).

Mr. Homa, who is far better at numbers than the average consumer, figured out the scam – that his rebate was much lower than he had been promised -- and tried to get his money back. The company rebuffed him at every turn, telling him he had miscalculated the rates and that he was not entitled to his money. He finally went to a lawyer, who told him that, while he had a valid claim, the damages in his case were so small that it did not make financial sense to pursue his claim on an individual basis. After realizing that the company had likely cheated many consumers in this bait and switch scheme, Mr. Homa sought to hold the company liable for its unfair and deceptive lending practice by filing a class action complaint in federal court.

Because the amount of individual damages was so small and the nature of the claims was so complex, no one could actually obtain a remedy on an individual basis. The company nevertheless sought to force Mr. Homa into arbitration on an individual basis, but this effort was rejected by the U.S. Court of Appeals for the Third Circuit, which found that the American Express arbitration clause's ban on class actions was "unconscionable." In other words, because the ban on class actions would gut the state of New Jersey's consumer protection laws, and give the bank a 'get of jail free' card, the court struck down the arbitration clause as unenforceable.

Then the U.S. Supreme Court intervened, with its notorious decision in *Concepcion v. AT&T Mobility*, 131 S. Ct. 1740 (2011).[10] In this 5-4 decision, Justice Scalia invented a new rule of federal law that wiped away state contract laws that refused to enforce contracts that undermined consumer protection or civil rights laws. After *Concepcion*, the district court was provided with a powerful evidentiary record that proved no consumer could effectively vindicate his or her statutory rights relating to the claims at issue in the case under American Express's arbitration clause, including expert testimony, testimony from Mr. Homa, and records of the paltry number of arbitrations pursued. This evidence, as well as the plaintiff's briefs, is available at our website, www.publicjustice.net, on the page dedicated to the *Homa* case. American Express did not bother to challenge the evidentiary record, taking the position that these

[10] Justice Ginsburg recently gave a speech where she compared the Court's decision in *Concepcion* with the infamous *Lochner*-era decisions from the U.S. Supreme Court back in the early part of the 20th Century, when the Court would strike down laws such as minimum wage and child labor laws as an infringement of freedom of contract.

facts did not matter, after *Conception*. Notwithstanding this evidence, the district court dismissed the case and enforced the arbitration clause without comment.

On a final appeal to the Third Circuit, the Court of Appeals accepted the factual record showing that American Express's ban on class actions would gut Mr. Homa's case: *"*We accept this characterization, for the record demonstrates that the significant cost of arbitrating Homa's claim and the likelihood that there would be a limited recovery even if his arbitration was successful makes it unlikely that an attorney would take his case. Furthermore, in view of the complexity of the issues pertaining to the merits of Homa's claim, it would be very difficult for him to prosecute the case without the aid of an attorney whether in a judicial proceeding or in arbitration*."*

Notwithstanding these facts, in light of the *Concepcion* case, the Third Circuit said that American Express's arbitration clause should be enforced even though the arbitration offered only an "illusory remedy": "Even if Homa cannot effectively prosecute his claim in an individual arbitration **that procedure is his only remedy, illusory or not**. Though some persons might regard our result as unfair, [the Federal Arbitration Act] requires that we reach it." 494 Fed. Appx. 191 (2012).

Similarly, I was co-counsel in a class action that was litigated in Maryland state court, *Wells v. Chevy Chase Bank*. The credit card issuer had promised in promotional materials and in its contract that it would "never" raise its interest rates above 24%, and then it did raise its interest rates (as well as add a number of other charges) for a number of people. It was a classic bait-and-switch. The case was settled for $16.1 million (as well as actions taken to remove improper negative information from class

members' credit records), and checks were mailed to more than 200,000 class members. (Compare this, again, to the 411 people who take cases to arbitration each year against lenders throughout the entire United States.)

During the challenge to the arbitration clause in the *Wells* case, however, evidence was put before the trial court that if the arbitration clause had been enforced, no consumers would have been able to pursue their claims on an individual basis. This evidence was never challenged or refuted by the defendant, who argued that this did not matter. Our clients had approached a number of lawyers without finding any willing to handle the case, and the case was only filed shortly before the limitations period ended. This was an important case that needed to be brought, and which resolved very favorably for the consumers, but if the arbitration clause had been enforced, no consumers would have received any recovery.

As one further example, I was co-counsel in five cases brought against payday lenders in North Carolina state court. While payday lending is legal in many states, it was not in North Carolina. The judge divided the five cases into two groups, to better manage them. The first three cases were litigated and resolved before the *Concepcion* decision. We settled those cases for $45 million, and sent checks to more than 200,000 class members. The second two cases were thrown out because of the payday lenders' class action bans, and so far as I know, not a single one of the consumers pursued their claims in arbitration and recovered anything. The contrast is striking: 200,000 consumers who retained their constitutional rights to go to court recovered $45 million and received checks, and tens of thousands of consumers who were subject to forced arbitration clauses with class action bans received nothing.

IMPORTANT HISTORICAL POINT: THE COMPANY THAT WAS THE LARGEST PRIVATE ARBITRATION PROVIDER IN THE U.S. FOR ABOUT 10 YEARS WAS SHUT DOWN FOR CORRUPT AND ILLEGAL BEHAVIOR

This Committee should look back at the history of the late (but not lamented) National Arbitration Forum (NAF). Here are the key things to know:

O For about a decade, NAF was by far the largest provider of arbitration services to lenders for consumer arbitration;

O NAF's operations were outrageously unfair to consumers, and favorable to lenders, to a degree where words such as "corrupt" are entirely fair characterizations;

O The overwhelming majority of courts took no action with respect to the NAF, as courts were reluctant or unwilling to probe into the fairness of a major arbitrator who was used by many corporations, in the wake of the Supreme Court's rush to favor mandatory arbitration; and

O The exact same factors that gave rise to the NAF – corporate desire for immunity from consumer protection law; a willingness by some actors to do ANYTHING to favor corporations if this would bring them substantial income; and the unwillingness of courts to meaningfully police arbitration – could easily give rise to a very similar actor down the road.

There is no reason whatsoever that this disgrace could not easily happen again. The NAF cloaked itself in respectability by spending a ton of money on articles and studies praising itself, hiring former judges and prominent political figures, fighting off discovery into its operations, and geting secrecy orders covering any documents that

did become public, etc. Indeed, if the Minnesota Attorney General had not happened to discover that the NAF had crossed the most blatant line of inappropriate conduct – taking tens of millions of dollars for shares of a wholly owned corporation from entities who were currently litigating tens of thousands of cases in front of NAF – the NAF might well still be operating corruptly. I pose the question: "How can mandatory arbitration by lenders be fair when by far the largest provider of arbitration services for a decade operated in a dishonest and lawless manner, nothing happened, and there is nothing to stop this from happening again?"

Before it was shut down by a law enforcement action brought by the Minnesota Attorney General, however, very few courts ever struck down NAF arbitration clauses on the basis of bias, and the organization operated on a large scale for about a decade after the first evidence emerged that its neutrality was questionable. It took the discovery that NAF had a substantial undisclosed conflict of interest before it was shut down. On July 14, 2009, the Attorney General of Minnesota sued the NAF and its corporate affiliates for consumer fraud, deceptive trade practices, and false advertising based on the NAF's undisclosed financial relationship with one of the country's largest debt collection law firms. *See* Compl. at ¶ 5, *State v. Nat'l Arbitration Forum, Inc.* (Minn. Dist. Ct. July 14, 2009). Within days, the NAF announced that it would cease conducting consumer arbitrations. *See* Robin Sidel and Amol Sharma, *Credit-Card Disputes Tossed Into Disarray*, Wall Street Journal (July 21, 2009).

Although the NAF did not initially acknowledge any wrongdoing after the Minnesota action was filed, a year and a half later the company *did* admit that the key allegations in the Minnesota complaint were true:

> On April 6, 2011 the NAF executed a settlement agreement in which it formally stipulated that effective June 27, 2007 it became a holding company, transferred its operations to two subsidiaries and sold a 40% ownership interest in one of the subsidiaries to participants in the consumer debt collection industry for $42 million.

Torrence v. Nationwide Budget Finance, No. 05-0047, 2012 WL 335947 at ¶ 30 (N.C. Super. Ct. Jan. 25, 2012).

NAF aggressively marketed itself to credit card companies and debt collectors.[11] While NAF trumpeted itself to the public as fair and neutral, "[b]ehind closed doors, NAF sells itself to lenders as an effective tool for collecting debts."[12] In its solicitations and advertising, NAF "has overtly suggested to lenders that NAF arbitration will provide them with a favorable result."[13] BusinessWeek described a September 2007, PowerPoint presentation aimed at creditors—and labeled "confidential"—that promises "marked increase in recovery rates over existing collection methods."[14] The presentation also "boasts that creditors may request procedural maneuvers that can tilt

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[11] *See* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post, Mar. 1, 2000, at E1 ("[A]rbitration industry experts say [that] the forum's business involves more corporate-consumer disputes, in large part because of the company's aggressive marketing.").

[12] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008. *See also* Sean Reilly, *Supreme Court Looks at Arbitration in Alabama Case This Week*, Mobile Reg., Oct. 1, 2000, at A1 ("In marketing letters to potential business clients, [NAF's] executives have touted arbitration as a way of eliminating class action lawsuits, where thousands of small claims may be combined."); Sarah Ovaska, *3 Cases Cite Payday Lending: Consumer Groups Say Arbitration Clauses Deny People Recourse to Courts*, News & Observer, Jan. 7, 2007 ("[NAF], which in 2006 resolved $3 billion worth of claims involving debts and other disputes, has been singled out by consumer advocates, who criticize it for advertising its services to businesses.").

[13] Ken Ward, Jr., *State Court Urged to Toss One-Sided Loan Arbitration*, Charleston Gazette & Daily Mail, Apr. 4, 2002, at 5A.

[14] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.

arbitration in their favor. 'Stays and dismissals of action requests available without fee when requested by Claimant—allows claimant to control process and timeline.'" Speaking on condition of anonymity, an NAF arbitrator told BusinessWeek that these tactics allow creditors to file actions even if they are not prepared, in that "[i]f there is no response [from the debtor], you're golden. If you get a problematic [debtor], then you can request a stay or dismissal."[15] BusinessWeek also highlighted another disturbing NAF marketing tactic: NAF "tries to drum up business with the aid of law firms that represent creditors." Neither AAA nor JAMS cooperate with debt-collection law firms in such a manner.[16]

NAF had an arsenal of other ways of letting potential clients know that NAF can immunize them against liability. One NAF advertisement depicted NAF as "the alternative to the million-dollar lawsuit."[17] Additionally, NAF sent marketing letters to potential clients in which it "tout[s] arbitration as a way of eliminating class action lawsuits, where thousands of small claims may be combined . . . ."[18] NAF's marketing letters also urged potential clients to contact NAF to see "how arbitration will make a positive impact on the bottom line" and told corporate lawyers that "[t]here is no reason for your clients to be exposed to the costs and risks of the jury system."[19]

The NAF also manipulated the process for selecting arbitrators, so that favored clients got better results. The Center for Responsible Lending analyzed this data and

[15] Id.
[16] Id.
[17] Nadia Oehlsen, *Mandatory Arbitration on Trial*, Credit Card Mgmt., Jan. 1, 2006, at 38
[18] Sean Reilly, Supreme Court Looks at Arbitration in Alabama Case This Week, Mobile Reg., Oct. 1, 2000, at A1.
[19] See Caroline E. Mayer, Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided, Wash. Post, Mar. 1, 2000, at E1.

reached two conclusions: (a) companies that arbitrated more cases before certain arbitrators consistently got better results from those arbitrators, and (b) individual arbitrators who favored creditors over consumers got more cases.[20] Similarly, the Christian Science Monitor analyzed one year of data and found that NAF's ten most frequently used arbitrators—who were assigned by NAF to decide nearly three out of every five cases—ruled for the consumer only 1.6% of the time. In contrast, arbitrators who decided three or fewer cases during that year found in favor of the consumer 38% of the time.[21] One particular arbitrator, Joseph Nardulli, handled 1,332 arbitrations and ruled for the corporate claimant 97% of the time. On a single day—January 12, 2007—Nardulli signed 68 arbitration decisions, giving debt holders and debt buyers every cent of the nearly $1 million that they demanded. [22] One former NAF arbitrator boasted, "I could sit on my back porch and do six or seven of these cases a week and make $150 a pop without raising a sweat, and that would be a very substantial supplement to my income. . . . I'd give the [credit-card companies] everything they wanted and more just to keep the business coming."[23]

NAF also blackballed arbitrators who dared to rule in favor of consumers. Harvard law professor Elizabeth Bartholet went public with her concerns that, after she awarded a consumer $48,000 in damages, NAF removed her from 11 other cases, all of which involved the same credit card company, on the credit card company's objection.

[20] Joshua M. Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration* (2009), http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.
[21] Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, Christian Sci. Monitor, July 16, 2007.
[22] Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 17 (2007), http://www.citizen.org/documents/ArbitrationTrap.pdf.
[23] Chris Serres, Arbitrary Concern: Is the National Arbitration Forum a Fair and Impartial Arbiter of Dispute Resolutions? Star Trib. (Minneapolis), May 11, 2008, at 1D.

As Bartholet described her experience, "NAF ran a process that systematically serviced the interests of credit card companies."[24] Similarly, former West Virginia Supreme Court Justice Richard Neely stopped receiving NAF assignments after he published an article accusing the firm of favoring creditors.

Conclusion

Forced arbitration clauses are pervasive in nearly every aspect of consumer and employment law, and most consumers and employees are unaware of, or do not fully understand, the consequences of agreeing to such provisions. As a result, millions of consumers are locked out of the court system and forced into secretive proceedings that, data from multiple sources show, overwhelmingly favors corporate defendants. This increasing trend has, in turn, had chilling effects on efforts to battle, and ensure accountability in, cases of sexual harassment, consumer fraud, employment discrimination and nursing home abuse, to name just a few examples.

Through ending forced arbitration in sectors where it is now routinely employed, and standing against attempts to introduce forced arbitration into new sectors such as securities law, Congress can ensure countless Americans are no longer denied their day in court and are no longer forced into a system where they are unlikely to prevail or, even if they do, to facilitate meaningful changes in how corporations and employers treat their customers and employees or compensate them for abuse.

Public Justice believes it is imperative that Congress act to curb these attacks on consumers and workers in nearly every corner of American life.

[24] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.