

# BUSINESS LAW TODAY

The ABA Business Law Section's Online Resource

## What's Really Wrong with Forced Consumer Arbitration?

By Richard M. Alderman

*Unilateral imposition of arbitration by business has shut consumers out of the civil justice system.*

For two decades the use of pre-dispute consumer arbitration, forced upon consumers in nearly every contract entered into, has been the subject of articles, litigation, and legislation. Authors, litigators, jurists, and legislators have discussed the enforceability of such clauses, the grounds for invalidating them, and the policy issue of whether arbitration is good or bad for consumers. With the exception of the Supreme Court, which routinely upholds the validity of consumer arbitration pursuant to the Federal Arbitration Act, most others disagree about when and if such clauses are valid and enforceable, and whether consumer arbitration is fair, efficient, or inexpensive.

This article will not discuss any of these issues. It is premised on one fact that is not debated—consumer arbitration is unilaterally imposed by the business, and can be imposed in as many situations as the business desires. In other words, the use of consumer arbitration can increase, and has been, at the whim of business. Therefore, consumer arbitration has the potential to become universal, almost eliminating the courts from the realm of consumer law. Regardless of whether arbitration favors individual consumers or businesses or is more or less efficient, the elimination of the judicial branch of

government from an entire area of law is its most serious shortcoming.

### Separation of Powers

We are all familiar with the phrase, “separation of powers”—the division between the legislative, judicial and executive branches of government—a system of checks and balances. Americans have long appreciated the way in which our founding fathers established an independent judiciary, and the important role courts play in the American system of law. We respect our right to trial by a jury, judicial review, and the common-law system by which courts can create and modify judicial rules.

But when it comes to our rights as a consumer, “separation of powers” may soon take on a very different meaning. Consumers may soon be “separated” out of the judicial branch of government. Mandatory, pre-dispute arbitration clauses found in most consumer contracts preclude the courts from being involved with consumer disputes, substituting a private system of justice. And unlike our civil justice system, arbitration has no judge, no jury, no appeal, and no ability to make a decision binding on anyone except the parties to the dispute.

### Consumers and the Courts

There is perhaps no entity or area of law that relies more on the judicial system than consumers and consumer law. Nearly

every consumer protection law is primarily enforced through private litigation, and the courts have long been involved in the creation of common-law doctrines designed to protect consumers. Although it is often said that arbitration is merely an alternative forum for disputes, it is in fact, a matter of substance not forum. Businesses do not impose arbitration to provide consumers with an easier and more efficient way to resolve disputes. They impose arbitration to keep the courts out of the business of consumer protection. Arbitration allows business to effectively opt-out of our civil justice system and replace it with a system of private justice. A recent law review article shows that, in fact, arbitration is not mere forum shopping, it is result shopping. In *W. Scott Simpson, Stephen J. Ware, and Vickie M. Willard, The Source of Alabama's Abundance of Arbitration Cases: Alabama's Bizarre Law of Damages for Mental Anguish*, 28 AM. J. TRIALADVO. 135, 177 (2004), the authors note that the auto and home industries in Alabama divorced themselves from the civil justice system, because of the fear of “unfair” awards:

The auto and home industries, fearing catastrophic verdicts before Alabama juries, now require customers, nearly across-the-board, to enter into pre-dispute binding arbitration agreements as a condition of doing business. These industries have effectively divorced themselves from the Alabama civil justice system in hopes

of obtaining fairer and more just awards before arbitrators.

Instead of appealing through the courts, working through the legislative process to enact change, or using the political process to elect different decision makers, car dealers and home builders simply included a short clause in their contracts, opting out of the civil justice system. A simple clause in a take-it-or-leave-it boilerplate contract enacts major substantive changes in the substance and application of the law.

And the business that includes an arbitration clause can also unilaterally decide when to exclude the clause and again require the consumer to resort to the courts. I assume that when a friendlier judiciary is elected, the auto and home industries in Alabama will stop using arbitration to take advantage of the friendlier forum. When it comes to consumer arbitration one thing is clear, only the business gets to decide whether disputes will go to court or an arbitrator. For example, Bank of America recently stopped requiring consumer arbitration, stating, "We think arbitration is a very fair way to resolve the issue. A lot of our customers did not feel the same way, so we decided to make a change." For the time being, this appears to be a good change for consumers. Of course, as the bank's quote indicates, "we" [the bank] may impose arbitration at any time in the future. While the bank recognizes its customers' feelings, it also made it clear that the ultimate decision rested solely with the bank.

#### Arbitration and the Common Law

Although consumer attorneys have had some success defeating forced, pre-dispute arbitration clauses, individual litigation is time consuming, expensive, and doesn't address the real issue—should consumers have resort to the courts? Under the current system it appears inevitable that consumer arbitration will eventually replace litigation. As courts uphold the validity of such clauses, and increase the authority of arbitrators, perhaps even eliminating class actions, business will surely choose to arbitrate as often as possible. As consumer dispute resolution is fully privatized, the

development and application of consumer law gradually will be skewed toward those who control the process. A system of private justice will always favor those who control access, procedures and the purse strings. As noted above, this is explicitly recognized in Alabama, where auto dealers and homebuilders have chosen to opt-out of the civil justice system to obtain the substantive benefits of arbitration.

Whether individual arbitrations are fair to consumers, or more efficient and less expensive, effectively eliminating courts from the development of consumer law is the most egregious aspect of the widespread use of pre-dispute consumer arbitration. Our courts serve the role of providing remedies for those injured or wronged by others, often supplementing our justice system through the creation of common-law rules and principles. It is the judicial system in the United States that protects the individual from the unreasonable exercise of legislative power, provides a forum for those who lack the ability to exercise significant influence over the legislative process, and provides a mechanism for an individual to seek redress from abuses in the marketplace. As Justice Marshall long ago recognized in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), "the very essence of civil liberty certainly consists in the rights of every individual to claim the protection of the laws, whenever he receives an injury." The common-law tradition of this country is inconsistent with universal arbitration. Many consumer doctrines such as unconscionability, strict products liability, habitability, and good and workmanlike performance have been created, modified, limited, and extended by our courts to protect consumers and ensure a fair bargain. Arbitrators cannot create or modify the common law. Arbitrators decide only the case before them, creating no precedent, binding no subsequent arbitrator faced with the identical facts. To the extent they are bound by law, arbitrators follow existing legal doctrine, essentially freezing the common law of consumer transactions, denying courts the ability to develop and adapt the law. Even worse, the fact that arbitrators decisions are generally secret

and not subject to appeal means that consumers with identical claims and circumstances may be treated differently, by arbitrators unable to create precedent or establish consistent legal doctrine. Forced consumer arbitration is simply contrary to our basic system of government and fundamental fairness.

#### A Simple Solution

The real issue is simple: Should the more powerful party to a certain category of transactions be able to deny the other party access to the courts? The answer, as Congress has recognized in the case of the Motor Vehicle Franchise Fairness Act, and the Servicemembers Access to Justice Act of 2008 is clearly "no." Steps must be taken to insure consumers retain the right to voluntarily decide whether to pursue a claim in court or through arbitration. Business should not be allowed to simply opt-out of the judicial system. The most direct way to do this is through enactment of the Arbitration Fairness Act. The Act prohibits the use of pre-dispute binding arbitration clauses in consumer and employment contracts.

For many years we have recognized the importance of alternative methods of dispute resolution. The concept of "alternative dispute resolution," however, assumes that the civil justice system is the *primary* method of resolving disputes, and that *alternatives* should be established and encouraged. In light of the widespread, continued and increased use of arbitration, enactment of the Arbitration Fairness Act or similar legislation is the most effective way to insure that consumers have alternatives, and that one of them is the civil justice system. Consumers and businesses that wish to enter into post-dispute arbitration agreements should be encouraged to do so, but compelling all consumers to give up their right to a fundamental branch of government is inconsistent with our current system of government.

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