

Mandatory Imposition of Arbitration Requirements and Danger Thereof

OVERVIEW

Financial institutions are engaging in an assault on the rights of consumers to secure the protections afforded them under law through the use of mandatory, binding arbitration clauses unilaterally inserted in adhesion contracts with consumers, without negotiation or consent. All across the country, banks, financial institutions and even automobile dealers are including standardized terms in contracts of adhesion which provide that consumers agree to resolve any disputes by arbitration and waive their rights to trial by judge or jury. The purpose and intent of such clauses is to insulate unlawful, unfair, or deceptive practices from any meaningful review by making it difficult to obtain discovery, impairing consumers' ability to proceed on behalf of a class, and to reduce compensatory and punitive damage awards.

The arbitral forum can be very unfair to consumers and is deficient in a number of ways: discovery is not available as a matter of right, the proceedings are secret, the arbitrator need not follow precedent or explain the reasons for his or her decision, and the decision is immune from judicial review, except on very narrow grounds, even if it is wrong as a matter of fact and law and results in manifest injustice. It can also be inordinately expensive. Although it may be faster than litigation, there is no public policy served by a process which results in speedy injustice.

The Dangers of Mandatory Arbitration Clauses

Consumer protection in this country is in jeopardy, in particular in the extremely important areas of credit and finance. All across the country, banks, financial institutions and even automobile dealers are including standardized terms in contracts of adhesion which provide that consumers agree to resolve any disputes by arbitration and waive their rights to trial by judge or jury. The purpose and intent of such clauses is to insulate unlawful, unfair, or deceptive practices from any meaningful review. In arbitration, it is difficult to obtain discovery, and consumers may not be able to proceed on behalf of a class, obtain injunctive relief against unlawful practices, or receive awards of punitive damages.

Arbitration is supposedly favored as a method of resolving disputes. But that preference is derived from a series of Supreme Court cases between commercial entities that had bargained for the speed and efficiency of arbitration, so the court was merely enforcing their contractual agreement. Some courts are now using that supposed preference to require arbitration in cases involving consumers who did not know about, negotiate, or accept the clause.

There simply is no public policy favoring arbitration as a mechanism of dispute resolution but only a policy favoring the enforcement of the parties' freely negotiated agreements. The arbitral forum can be

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H.R. 2258 provides the solution to the problem by prohibiting pre-dispute arbitration clauses in consumer contracts. That preserves the consumer's ability to choose whether or not arbitration is desirable for resolving a particular dispute after the dispute has arisen.