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Arbitration More Expensive Than Court – So Costly That Many Victims of Consumer Fraud, Employment Discrimination Give Up

Sens. Kennedy and Feingold Unveil Arbitration Bill to Protect Workers

WASHINGTON, D.C. – Arbitration, although widely billed as a low-cost alternative to court, is actually far more expensive for consumers and employees who seek redress for discrimination, fraud and malpractice, a new Public Citizen [report](#) reveals. In fact, arbitration costs are so high that many people drop their complaints because they can't afford to pursue them, Public Citizen found.

Arbitration is a private legal system in which, practically speaking, no appeals are allowed. Arbitrators tend to favor businesses, and arbitration awards tend to be much lower than jury verdicts, because arbitrators often favor companies that will provide them future business.

Mandatory arbitration clauses are increasingly being written into everything from basic equipment purchase forms to employment contracts. If consumers use a credit card or cell phone, or have health insurance, they likely have signed or received a form with fine print prohibiting them from suing the company and instead requiring them to take disputes to arbitration. Employees, too, are increasingly finding out too late that they have given up their right to sue, and instead must submit disputes with their employers to an arbitrator instead of a judge.

Public Citizen unveiled the report at a Law Day press conference at which Sens. Edward M. Kennedy (D-Mass.) and Russ Feingold (D-Wis.) introduced legislation protecting employees from arbitration clauses.

According to the report, the cost of initiating an arbitration case is almost always higher than the cost of filing a lawsuit. For instance, an \$80,000 consumer claim brought in the Circuit Court of Cook County, Ill., would cost \$221, versus \$11,625 at National Arbitration Forum (NAF), a 5,260 percent difference. The American Arbitration Association (AAA) would charge the plaintiff up to \$6,650, and Judicial Arbitration and Mediation Services (JAMS) would charge up to \$7,950, amounting to a 3,009 percent and 3,597 percent difference in cost, respectively. In requiring payment of these high fees up-front, arbitration destroys the benefits of attorney contingency fee arrangements, which allow plaintiffs to pursue cases without advancing funds.

"Congress, the courts and the public have been victims of a disinformation campaign, portraying arbitration as an inexpensive and impartial alternative to the public courts," said Joan Claybrook, Public Citizen president. "Today, we authoritatively debunk this myth. The grim fact is that for people who are victims of consumer rip-offs and workplace injustices, arbitration costs much more than litigation — so much more that it becomes impossible to vindicate your rights."

People caught in arbitration's net include home buyers complaining of shoddy workmanship, employees pursuing discrimination cases, patients seeking redress for poor care from their HMOs, small business owners in dispute with franchisors and consumers who are improperly billed.

Los Angeles resident Stephanie Paul had to arbitrate a malpractice claim against her lawyer. She was charged \$5,000 for filing the claim – a fee the arbitration association refused to waive even though she was unemployed. Each fiscal quarter, the association charged her \$150 for processing fees. When the law firm filed a motion to have the case dismissed, Paul was charged \$2,425 for the time the arbitrator spent handling it. More fees were added over time. Finally, when the bill hit \$10,474, Paul dropped her claim because she could no longer afford to pursue it.

In another case, the Malkani family of Austin, Texas, had to take its dispute with a homebuilder to arbitration. The Malkanis were charged \$3,500 as an initial administrative fee, followed by \$1,375 in other miscellaneous fees. In the end, the family was awarded \$18,819; however, the builder didn't have to pay the family's attorney fees or administrative fees. The arbitration fees cost the family \$13,069 – not counting attorney fees.

The report also found that:

- Arbitration costs are high under pre-dispute arbitration clauses because there is no price competition among providers. Clauses in contracts lock consumers in to a specific arbitration firm. Companies that want to use arbitration to prevent consumers and others from asserting their legal rights have no incentive to arrange low-cost arbitration. Instead, it is to their advantage to seek out the most expensive providers.
- Arbitration costs will probably always be higher than court costs because the expenses of a private legal system are so substantial. The same support personnel that expedite cases at a courthouse, such as file clerks and court administrators, are also needed to manage arbitration cases. While it costs the Clerk of the Circuit Court of Cook County an average of \$44.20 to administer a case, AAA's administrative cost per case averages \$340.63, about 700 percent more.
- Arbitration saddles claimants with a plethora of extra fees that they would not be charged had they gone to court. For example, the NAF charges \$75 to issue a subpoena, which is provided for free by courts. The NAF also charges fees for discovery requests (\$150) and continuances (\$100), which are also free in court.

"We challenge Corporate America and the arbitration apologists to rebut this report," said Jackson Williams, legislative counsel for Public Citizen, who prepared the report. "Show us your substantiation for the claim that arbitration is cheaper."

[Click here](#) to view the executive summary of the report.

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Executive Summary Below

Cost of Arbitration: Executive Summary

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"The speed and affordability of arbitration are perhaps its most discussed benefits... "

-U.S. Chamber of Commerce

"Arbitration can save parties 70-80% of the cost of litigating these cases."

-Ed Anderson, National Arbitration Forum

"Arbitration still costs less than litigation"

-The Wall Street Journal

"Less costly"

-AT&T Broadband

"Cost-effective"

-Sen. Jeff Sessions

"Usually it is quicker, less expensive, and more informal than litigation. Not always... "

-Florence Peterson, American Arbitration Association

Remarkably, although the claim is frequently made that arbitration costs less than litigation, no research has ever been undertaken to substantiate it. No interest group has commissioned a study. No Member of Congress has asked for a General Accounting Office report.

Writing in 1992 about court-annexed ADR, Stanford law professor Deborah Hensler cautioned, "Whether alternative dispute resolution procedures will reduce private litigation costs is still an open question. Court-administered arbitration has shown mixed results in this regard." Recently she repeated her caveat about a paucity of empirical research, explaining, "Because public support for ADR is so frequently justified on cost savings grounds, program administrators especially fear cost-benefit assessments."

Here, Public Citizen presents the first comprehensive collection of information on arbitration costs. We find:

- The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that *forum costs*- the costs charged by the tribunal that will decide the dispute- can be up to five thousand percent higher in arbitration than in court litigation. These costs have a deterrent effect, often preventing a claimant from even filing a case.

Public Citizen's survey of costs finds that, for example, the forum fee for a \$60,000 employment discrimination claim in the Circuit Court of Cook County, Illinois is \$221. The forum fees for the same claim before the National Arbitration Forum (NAF) would be \$10,925, 4,943% higher. An \$80,000 consumer claim brought in Cook County would cost \$221, versus \$11,625 at NAF, a 5,260% difference. These high costs are not restricted to NAF; for the same \$80,000 claim, the American Arbitration Association (AAA) would charge the plaintiff up to \$6,650, and Judicial Arbitration and Mediation Services (JAMS) would charge up to \$7,950, amounting to a 3,009% and 3,597% difference in cost, respectively.

- Arbitration costs are high under a pre-dispute arbitration clause because there is no price competition among providers. Companies that want to use arbitration costs as a barrier, to prevent consumers and others from asserting their legal rights, have no incentive to arrange low-cost arbitration services. Instead, it is to their advantage to seek out the highest-cost arbitration providers. While experience has shown that many lawyers are willing to serve as arbitrators for nominal fees, the market provides no mechanism to match volunteer arbitrators to cases in which they are needed the most.

The mandatory arbitration clause's negative effect on price competition can be seen in AAA's handling of insurance claim arbitration. From 1989 to 2000, in cases submitted to AAA on a *post-dispute* basis, AAA charged each party a total of only \$300 for administration and arbitrator fees. But cases arising under a *pre-dispute clause* were governed by AAA's Commercial Rules, with much higher filing fees and regular hourly arbitrator fees. For example, a health insurer's denial of coverage for a bone marrow transplant, submitted post-dispute under the Insurance Claims Procedures, would cost the consumer \$300. But for a case governed by a pre-dispute clause, AAA charged a much higher fee. Tammy Sharpton, who arbitrated such a case in 1997, was charged \$5,290.23, *eighteen times* what AAA would have charged had it been competing with other arbitration providers and the courts.

- Arbitration costs will probably always be higher than court costs in any event, because the expenses of a private legal system are so substantial. The same support personnel that expedite cases at a courthouse, such as file clerks and court administrators, are also necessary to manage arbitration cases. But because arbitration provider organizations handle fewer cases over larger geographic areas, the economy of scale in a court clerk's office cannot be achieved, increasing the administrative cost per case. Thus, while it costs the Clerk of the Circuit Court of Cook County an

average of \$44.20 to administer a case, AAA's administrative cost per case averages \$340.63, about 700 percent more.

- Arbitration saddles claimants with a plethora of extra fees that they would not be charged if they went to court. For example, the National Arbitration Forum charges \$75 to issue a subpoena. A lawsuit litigant can obtain a subpoena form for free from the court, oftentimes downloading it off the Internet. NAF also charges fees for discovery requests (\$150) and continuances (\$100), occurrences so ubiquitous in litigation that they must be viewed as inevitable. The American Arbitration Association (AAA) charges extra fees for use of a hearing room.
- Taking a case to arbitration does not guarantee that a consumer or employee will stay out of court, making arbitration still more costly. First, a plaintiff bound by a *one-way arbitration clause*, the most common type, may be forced to go to court to litigate the same issues that are being decided in the arbitration. This is because the other party to the clause has retained its right to sue in court. Second, if crucial documents or testimony must come from a third party, court litigation is necessary to enforce subpoenas. In fact, due to a quirk in arbitration law, sometimes two different federal lawsuits are necessary to enforce one subpoena. Third, if a plaintiff wins a case in arbitration but the defendant refuses to honor the award, the plaintiff must ask a judge to enforce the award.
- The costs of arbitration are so high that even some businesses that choose to include arbitration clauses in contracts with consumers and farmers have refused to pay the fees.
- High arbitration costs can also be used to bludgeon an adversary. For instance, the party being sued can file a motion to dismiss or a motion for summary judgment. The claimant must then advance additional funds to pay the arbitrator to decide the motion, even if the motion has no merit. The defendant can also refuse to provide discovery information, in which case the claimant must advance funds to the arbitrator to decide the discovery dispute. In one case, for which we have reproduced copies of the arbitration bills, the claimant was unable to pay and had to abandon the case.
- The oft-cited benefits that arbitration can offer in exchange for higher fees will seldom benefit consumer litigants. Not only is there is no evidence that arbitration reduces the overall *transaction costs of litigation* (e.g. witness fees, attorney fees, discovery costs), but nobody has expounded a coherent theory to explain how arbitration *could* reduce such costs except in a few categories of cases. Indeed, Public Citizen's careful examination of the cost savings claim demonstrates that in the vast majority of cases, arbitration will necessarily *increase* the transaction costs of litigation.

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