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Contracting away your right to sue: What you need to know about arbitration

Most consumers unaware they've waived right to sue

By Ramona L. Lampley, For the Express-News



Photo: Getty Images /Getty Images

Arbitration agreements that typically accompany credit cards obtained and other services can work well — or work disastrously. More transparency is needed in such agreements.

Consider an all-too-real hypothetical situation: You have a dispute with your credit card company over the high fees charged for a late payment. The company refuses to refund the fees. Meanwhile, the amount you owe increases. Reaching no resolution with the customer service representative, you say, “Fine, I’ll see you in court!”

Not so fast. What many consumers do not realize is that in numerous everyday interactions with banks, employers and retailers, you have waived your right to sue in court, individually or as part of a class action.

Though there have been examples of organizations using the leverage of arbitration to abusive ends, other clauses can aid the consumer in finding a resolution at a lower cost than taking a case to court. But a recent study by the [Consumer Financial Protection Bureau](#) shows that most

consumers do not know how to use arbitration — or even that they have agreed to it. Greater transparency is needed to ensure this is a fair process.

More and more consumers and employees are required to agree to mandatory pre-dispute arbitration in the terms and conditions of the products or services we buy or in our contracts for employment.

Arbitration is a private way of resolving disputes or claims outside of court. For example, instead of suing your bank in court, you would file an arbitration demand and a private arbitrator (who might be a judge, a lawyer or a nonlawyer) would decide the outcome of your case. Usually there's no appeal process.

Arbitration is thought to be cheaper and quicker than a court case, because so many of the complicated court rules do not apply unless the parties agree to those rules.

If the parties have not agreed to an arbitrator or a process by which the arbitrator will be selected, some arbitration-service providers say they will select the arbitrator for the parties.

Some companies include confidentiality provisions that prohibit the public from learning valuable information about claims and the process.

This same study shows that more than 50 percent of consumer credit card loans and about 44 percent of checking account agreements are subject to binding pre-dispute arbitration.

What's more, the [Texas Supreme Court](#) recently held that the Federal Arbitration Act renders Texas state laws, which give patients certain protections from arbitration agreements, unenforceable. This means that hospitals and nursing homes can pre-emptively ask patients to waive their right to sue in court or as a member of a group of other similarly situated consumers.

Given the lack of consumer familiarity with arbitration, there is an inherent fear and distrust of the system often referred to either as alternative dispute resolution or private dispute resolution.

Some of that public fear and distrust of this alternative dispute resolution rubric is well-founded. We know that private dispute resolution poses the opportunity for business to potentially take advantage of consumers or employees with little bargaining power.

In 2009, the Minnesota attorney general filed suit against the [National Arbitration Forum](#), which was then a leading provider of debt collection arbitration services. The suit alleged that the NAF positioned itself as an impartial arbitration provider while having ties to key members of the debt collection industry — the very creditors whose debt collection claims it was deciding.

Within days, the NAF entered into a settlement with the Minnesota attorney general that required it to cease arbitrating consumer debt collection cases. The NAF case shows that without transparency and vigilance on behalf of consumers, employees and government agencies, private dispute resolution can be a hidden chasm for abusive practices.

But the assumption that arbitration is always bad, or that consumers or employees will always lose in arbitration, is not correct.

There are some scenarios in which arbitration can be quite good for the nonbusiness entity. Take, for example, an arbitration agreement from a national cellphone provider, AT&T.

Any person using AT&T wireless services agrees to this arbitration agreement. The agreement, of course, requires arbitration of any dispute that might arise out of wireless cellphone services or billing, and it requires you to waive your right to be part of a class action in court.

But the agreement also provides that if you and AT&T cannot resolve your dispute, AT&T will reimburse you for the arbitration fees if your claim is for less than \$75,000. This means that as long as your claim is not frivolous, you essentially get to have your dispute decided for free.

Compare this to a small claims court filing and service fee of about \$120, or \$272 for filing a civil suit in Bexar County, and arbitration begins to look like a good deal.

This particular arbitration clause also contains what is known as an “incentive.” It says that if you win your arbitration and the arbitrator awards you more than AT&T’s last settlement offer, AT&T will pay you at least \$10,000, double attorney’s fees to your lawyer (if you have one) and reimburse any costs associated with pursuing your claim.

This kind of incentive can work to a consumer’s benefit. First, if AT&T wrongly refuses to settle, the plaintiff stands to win a large amount of money, attorney’s fees and costs for what could be a low-value meritorious claim. But this clause also provides an incentive to AT&T to settle your dispute fairly to avoid having to pay in excess of \$10,000. That’s a pretty good shot at free and fair resolution of a claim outside of court.

But not all agreements are so consumer-friendly.

Under some arbitration agreements, the consumer could still have to pay a great deal to arbitrate his or her claim. Even if the agreement is consumer-friendly, we actually know very little about what happens in arbitration. Incentive clauses like the one above are meaningless if the arbitrator is biased.

We must know more about this privatized dispute resolution process to which so many of our consumer, employment and health care claims are headed. We must encourage our government to require greater transparency in the process. And we, as a public, must educate ourselves more about what arbitration agreements mean and how to use them.

Government should require arbitration providers and businesses that impose arbitration to report data on arbitration claims and their resolution. We should also encourage government to require that each arbitrator publish a brief statement of decision, explaining the applicable law in the dispute and applying the facts of the case to that law.

The presence of arbitration agreements such as AT&T's, in which the business pays, could be a win-win situation for both businesses and stakeholders (consumers and employees). Both parties avoid expensive court-monitored litigation. Both parties have an avenue for meaningful resolution of claims, and the consumer pays very little.

But to know if arbitration really is a fair alternative, we need more transparency in the process.

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<http://www.mysanantonio.com/opinion/commentary/article/Contracting-away-your-right-to-sue-What-you-need-6237974.php>