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## **MANDATORY BINDING ARBITRATION -- A CORPORATE END RUN AROUND THE CIVIL JUSTICE SYSTEM**

For 30 years, the tobacco, insurance, pharmaceutical, chemical, oil and auto companies have been before Congress and state legislatures trying to take power and authority away from juries. With mandatory binding arbitration, they are accomplishing exactly the same objective -- abolishing jury trials and eliminating the American public's right to sue and hold accountable corporations that cause injuries.

Mandatory binding arbitration clauses are become standard business practice in credit card and real estate contracts, applications for bank loans and leasing cars, employment contracts and even HMO policies. In some states, they may apply broadly to insurance contracts. Consumers or small businesses who refuse to submit to mandatory binding arbitration will be unable to get credit cards, insurance, health care or jobs.

A 1925 federal law called the Federal Arbitration Act, which was originally enacted to help resolve commercial disputes between businesses, is providing the legal basis for the broad use of arbitration clauses in consumer contracts.

### **WHAT IS MANDATORY BINDING ARBITRATION?**

In cases that are forced into binding arbitration, a single arbitrator or a panel -- who are not judges -- decides disputes. Arbitrators are not required to have any legal training and they need not follow the law. They do not write or publish detailed written opinions, so no legal precedent or rules for future conduct can be established. Yet their decisions are still enforceable with the full weight of the law even though they may be legally incorrect. There is virtually no right to appeal for the consumer or employee.

Arbitrators may be biased, or even under contract with a bank or insurance company. Arbitration agreements may preclude the victim from bringing a class action, getting injunctive relief (to stop misconduct) or from collecting punitive damages or attorney fees. The parties are not entitled to much discovery, if any. Court rules of evidence and procedure, which tend to neutralize imbalances between the parties in court, do not apply. Arbitration proceedings are secretive. There is no right to public access.

While arbitration is said to be justified on the ground that it is voluntary, this is hardly true. Arbitration clauses are usually outlined in tiny print, buried in documents and paragraphs and

written in legalese that is incomprehensible to most people. Moreover, the consumer/employee has no ability to chose to go to court and preserve their right to jury trial. If they refuse to accept arbitration, they will not get job, service or product in question.

## **IS ARBITRATION UNFAIR FOR CONSUMERS?**

Yes. The proof is in the numbers. A survey by First USA, the nation's second-largest credit card company, showed that it has won in 99.6 percent of the cases that went all the way to an arbitrator. Caroline E. Mayer, "win Some, Lose Rarely?; Arbitration Forum's rulings Called One-Sided," Washington Post, March 1, 2000.

Arbitration has many built-in advantages that favor businesses. Bias is an obvious problem. Arbitrators may be on contract with the businesses against which the claim is brought. Often the company, not the victim, is allowed to choose the arbitrator. This creates inherent bias and self-interest on the part of the arbitrator -- the arbitrator is motivated to rule in a way that will attract future company business. Businesses that are frequently before an arbitrator also know from experience which arbitrators are likely to rule favorably for them.

Arbitration saves neither time nor money for the consumer/employee. There are many reports of arbitration cases taking years. See, .e.g., Michael G. Wagner, "Private Judges Arbitrate More Consumer Suits," Los Angeles Times, March 8, 1998. Whereas victims who go to court pay nothing up front, arbitration costs must generally be split between the injured victim and the insurance company, including the arbitrator's fees which can range between \$200 and thousands of dollars per hour. This can be prohibitively expensive for an injured victim who has suffered financial loss, particularly in personal injury cases. Victims who are in need of medical care, who are disabled or perhaps in pain, who can not work, whose families are disrupted and who may have major expenses, are in a substantially weaker position than their opposing party, the perpetrator of their harm or their insurers.

Arbitration also severely affects settlement negotiations with insurance companies. Often, the most compelling factor in driving an insurance company to pay a claim is the threat of litigation before a jury. The absence of the litigation threat may significantly reduce insurers' incentives to pay claims.

In a case challenging mandatory arbitration in Alabama, the late actor Christopher Reeve, who had been paralyzed after falling from a horse in a riding accident, filed an *amicus* brief in which he stated, "One of the hardest things I have had to do since my disability is to deal with insurance companies. I found them to be callous and to try to set up any roadblocks they can to keep from paying legitimate claims. ... I am totally against binding, mandatory arbitration in insurance policies."