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MANDATORY ARBITRATION: BANE OR BOON?

By THEODORE J. ST. ANTOINE

Buy a new car that turns out to be a lemon and you may find you can't sue. Fine print in the sales contract often restricts you to arbitration. That means presenting your case before a private person instead of a judge and jury. And the arbitrator may be someone drawn from a panel compiled by the car seller.



Something similar can happen if you enter a hospital for an operation. You waive your rights to sue for malpractice and have to arbitrate if you're injured. And many companies won't hire you unless you agree to arbitrate any future job disputes -- including charges that the employer discriminated against you because of race, sex, age or disability. Once again you've lost your chance to go to court with a legal claim.

All of this sounds outrageous. But is it?

Many scholars, professional groups like the National Academy of Arbitrators and the U.S. Equal Employment Opportunity Commission (EEOC) have condemned so-called mandatory arbitration arrangements. The reasons are obvious. Congress or state law has created specified rights for consumers, patients and employees. Statutes generally spell out the available procedures and remedies if there are violations. Yet private parties -- the retailer, the hospital, the employer -- seem bent on frustrating the legislative or judicial design. They even try to deprive consumers and others of the hallowed right to a jury trial. They are substituting private decision-makers who could be

biased in favor of the business or organization over the individual. On the face of it, that looks like a blatant affront to public policy.

But there is another side to the story. While mandatory arbitration is subject to numerous theoretical objections, as a practical matter it may well offer persons with small monetary claims a better opportunity to secure a remedy than a traditional legal action. In making my argument, I'll rely on experiences in my own field of labor and employment law, but I believe the lessons learned there apply to other areas as well.

your job and back pay. A rank-and-file employee rarely has much in wages at stake. Lawyers working on a contingent fee basis (they must win to be paid) don't find it worth investing time and money to prepare a case unless big bucks are involved. Plaintiffs' lawyers say they accept only one out of 20 employees who seek representation. For the top attorneys, that figure is closer to one out of 100. The EEOC isn't the answer, either. It's under-funded and too overloaded with work to try anything but major cases.

Arbitration is cheaper, faster and more informal than court litigation. Consequently, lawyers are willing to help a client in an arbitration proceeding when they would not be willing to devote the time and effort to get ready for a federal court appearance. Even without a lawyer, employees can make a reasonable presentation on their own, or with the assistance of a friend, in the much less intimidating atmosphere of arbitration.

If claimants are able to sue in court, there is no reason to think they will be better off than in arbitration. All the studies show that employees actually prevail more often in arbitration than in court. The American Arbitration Association in one study found a winning rate of 63 percent for arbitral claimants. In a much-criticized system operated by the securities industry, employees still prevailed 55 percent of the time, according to the U.S. General Accounting Office. By contrast, claimants' success rates in separate surveys of federal court and EEOC cases were only 15 percent and 17 percent, respectively. As might be expected, *successful* plaintiffs obtain larger awards from judges or juries. But claimants as a group recover more in arbitration.

Experts agree that to ensure fairness to employee claimants, arbitration systems must provide certain procedural safeguards. These would include:

- a neutral arbitrator who knows the law, jointly selected by the parties;
- a simple, adequate "discovery" process, enabling access to needed information;
- representation by a person of the employee's choosing;
- remedies equal to those provided by law;
- a written opinion with reasons, as well as an award; and
- the availability of limited judicial review, focused on legal issues, not fact-finding.

A court should not enforce an arbitration agreement without such due process guarantees for the individual. With these guarantees, however, many employees will find that the practical benefits of mandatory arbitration outweigh its theoretical disadvantages.

Ideally, of course, all agreements to arbitrate would be truly voluntary. For the weaker party in these transactions -- the individual consumer and patient as well as the employee -- that probably

means an agreement entered into *after* a dispute has arisen. Until then the individual is under pressure to sign on for arbitration in order to get the job, obtain the car or have the surgery. Unfortunately, once the dispute occurs, the employer or other organizational party is unlikely to offer arbitration to individuals with small claims. It knows that most of them won't be able to find lawyers to take their cases and they will quietly disappear. What the employer wants is a pre-dispute arbitration agreement covering the entire workforce, which will prevent the employee with a potential six- or seven-figure claim from getting before an emotionally aroused jury. So, for most employees with modest monetary claims, the choice is likely to be arbitration on the basis of a pre-dispute clause -- or nothing.

Future empirical studies might challenge the figures reported here. Otherwise, a surprising conclusion is inescapable: mandatory arbitration, imposed on employees and other individuals regardless of their desires, may be a blessing in disguise. It may not only save their employer, retailer or hospital the time and expense of lengthy court proceedings and the occasional crushing jury award. Mandatory arbitration may also provide rank-and-file workers, customers and patients the easiest and surest way to vindicate their rights.

Theodore J. St. Antoine is the James E. and Sarah A. Degan Professor Emeritus of Law at the University of Michigan, and was President of the National Academy of Arbitrators in 1999-2000. The Academy officially opposes mandatory arbitration.