



May 20, 2009

Edmund G. Brown Jr.
Attorney General's Office
California Department of Justice
Attn: Public Inquiry Unit
P.O. Box 944255 Sacramento, CA 94244-2550

Dear Mr. Brown:

Public Citizen recently published the enclosed report (“Home Court Advantage: How the Building Industry Uses Forced Arbitration to Evade Accountability”) on the home building industry’s use of mandatory binding arbitration. In our research, we discovered that three private arbitration firms that commonly administer arbitration cases concerning home construction are routinely violating California Code of Civil Procedure § 1281.96, which requires disclosure of certain facts pertaining to arbitration cases.

In exceedingly few instances do the American Arbitration Association, Construction Arbitration Services or DeMars and Associates fully comply with the statute’s requirements. In many cases, reports are so inadequate that they preclude readers from discerning the most basic facts about outcomes.

AAA

To analyze AAA’s reports, Public Citizen commissioned a computer programmer to convert a massive and highly irregular .pdf file into a usable database. Although the size of the file and the inconsistency of its contents preclude us from drawing conclusions with absolute precision, we are confident that our findings are essentially accurate. Their records are available here (<http://www.adr.org/sp.asp?id=22042>). Our analysis showed the following:

- AAA discloses whether the prevailing party was the consumer or the business in just 4.3 percent of the cases in which an award was issued (and 1.6 percent of all cases).
- In the 959 cases in which AAA reports a prevailing party, the firm names the consumer the prevailing party in every single instance. This reporting, absurd on its face, is contradicted by other studies of AAA’s results. For example, the Searle Center on Law, Regulation and Economic Growth was granted access to AAA’s files. A Searle study published in March found that businesses won some relief in 83.6 percent of AAA cases they initiated, receiving 93 percent of the

amount they sought. Consumers, meanwhile, received nothing in 46.7 percent of cases they initiated.

- AAA's failure to identify the initiating and prevailing parties makes it impossible for readers to determine which party received an award when one was issued. This deficiency renders AAA's entire body of reports virtually worthless.

Construction Arbitration Services

The number of cases reported by Construction Arbitration Services appears to be incomplete. The company reports having administered 102 cases between 2003 and 2007 and has not issued a report for 2008 or 2009. A CAS official said in 2005 that the company handles 60 housing arbitrations per month nationwide. At this rate, based on California's population, CAS would have handled more than 400 cases in California over a five-year period, if its caseload in California is representative.

CAS's individual case reports also lack details required by the statute. For example, in 2006, CAS reported that it handled 25 cases. In not a single case did CAS report the amount claimed. This shortcoming is significant because the absence of an amount claimed makes it impossible to determine the level of success of the prevailing party. CAS compounds this shortcoming by declaring consumers victorious "if any part of their claim [sic] was awarded." Thus, if a \$1 million dollar house collapsed due to a faulty foundation and the consumer was granted a \$50 award, CAS would declare the consumer victorious. In the absence of data on the amount sought, readers would be none the wiser.

CAS reports are available at http://www.cas-usa.org/ca_statistics.php.

DeMars and Associates

DeMars and Associates reports that consumers prevailed in eight cases between 2006 and 2008. DeMars does not report the award amounts sought or received, although it indicates in each of the eight purported consumer victories that the consumer was granted "repair." DeMars reports are difficult to find on the firm's Web site. They are available at <http://online.demarsassociates.com/caphome/files/CA%20Stats%20for%20Home.pdf>.

The derelict reporting by arbitration firms not only violates California law; it also has important policy implications because it facilitates selective use of data. For example, the California Dispute Resolution Institute in 2004 studied Web site reports pursuant to § 1281.96 and found that consumers prevailed in 72 percent of the cases in which arbitration firms declared a prevailing party. In CDRI's defense, it also reported that the prevailing party could not be determined in 86 percent of all cases. But the data generated by the slim minority of cases in which arbitration firms declared a winner provided ammunition for proponents of forced arbitration. The U.S. Chamber of Commerce submitted a report to Congress in 2008 in which it summarized the CDRI study as showing "that arbitration produced positive results for consumers." Given that the CDRI

study's methodology included results from AAA, with its preposterous consumer win rate of 100 percent, the study's reported win rate likely bore no resemblance to reality.

We urge you to investigate the accuracy of arbitration firms' reporting and to use all means at your disposal to compel compliance with the law, including the California Unfair Competition Law. *See CAL. BUS. & PROFESSIONS CODE § 17200 et seq.*

Sincerely,

A handwritten signature in black ink, appearing to read "David J. Arkush". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Arkush
Director
Public Citizen's Congress Watch Division

CC:

Rocky Delgadillo, City Attorney, Los Angeles
Richard Doyle, City Attorney, San Jose
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