

Fair Arbitration NOW

End Forced Arbitration – www.FairArbitrationNow.org

Mr. William K. Slate II
President
American Arbitration Association
1633 Broadway, 10th Floor
New York, N.Y. 10019

September 14, 2009

Dear Mr. Slate,

In the wake of Minnesota Attorney General Lori Swanson's investigation of and lawsuit against one of the largest forced arbitration companies in the country, the National Arbitration Forum (NAF) settled the lawsuit by agreeing to exit the consumer arbitration industry. Attorney General Swanson sent you a letter on July 19, 2009 requesting that the American Arbitration Association (AAA) do the same. While AAA's decision to implement a moratorium on consumer debt collection arbitration is a step in the right direction, it does not come close to solving the many problems of forced arbitration. We agree wholeheartedly with Attorney General Swanson that pre-dispute mandatory arbitration is fundamentally unfair. The undersigned organizations ask that you take a leadership position in the industry and stop taking all consumer, franchise, and employment arbitrations arising out of pre-dispute mandatory arbitration provisions. In addition, we ask that you cease all lobbying efforts against the consumer protection legislation working its way through Congress, the Arbitration Fairness Act of 2009.

The bylaws of the American Arbitration Association state that its mission is to administer "voluntary" forms of dispute resolution. And at various times you have issued statements and press releases acknowledging that arbitration works better when it is voluntary. The AAA also made public their policy to not administer predispute mandatory arbitrations in the health care field in recognition of the unfairness of the process in that setting.

Attorney General Swanson's letter outlines numerous reasons why individual parties do not get a fair shake in forced arbitrations against corporate parties. Pre-dispute mandatory arbitration "agreements" are forced on consumers, employees, and franchisees who have no real bargaining power. Corporations design the entire process (including the selection of an arbitration company) and individuals are presented with take-it-or-leave-it contracts. Corporations hold all the bargaining power and individuals are forced to give up important rights in order to purchase a basic product or service, take a job, or open a business. Often these provisions are buried in lengthy contracts or even sent out separately in disclosure notices or envelope stuffers. Many people do not even realize they are subject to mandatory arbitration. Because of these considerations, the undersigned organizations believe that mandatory arbitration clauses forced upon an individual before a dispute arises can never be voluntary and should be prohibited by Congress.

Your July 20, 2009, letter to Attorney General Swanson identified the “legitimate concerns” with debt collection arbitration as you see them: lack of notice to consumers, lack of arbitrator neutrality, the inadequate amount and type of evidence presented against consumers, consumers’ inability to defend against claims resulting from identity theft, and others. These concerns result from the characteristics of all arbitrations between large corporations and individuals, not just consumer debt collections.

Your letter also suggests that AAA intends to return to debt collection arbitration when appropriate procedural safeguards have been implemented to remedy problems associated with debt collection arbitration. Procedural reforms will not fix the inherent bias that results when one party can impose a private system on the other party. When mandatory binding arbitration is permitted, providers will compete for business by favoring any party that has the power to select a forum and impose it on others. No procedural protections can ensure that this system is fair to parties with vastly inferior bargaining power. The repeat player advantages will always remain.

AAA already has Due Process Protocols in place that do not solve these problems. The Protocols are insufficient because they are vague, have no enforcement mechanism, are crafted solely by the corporation, do not require decisions be published, and prohibit judicial review. Further, despite the existence of even the best protocols, as long as companies can unilaterally select the arbitration provider, they will have incentives to select those providers who are willing to tip the scales in their repeat users’ favor to keep the business.

No form of dispute resolution can ever succeed without the perception of fairness. The mere act of forcing a process on someone who doesn’t expect or understand it is inconsistent with the perception of fairness that is necessary for it to succeed. Additionally, it should be plain at this point that, because of well-documented abuses, the practice of mandatory arbitration has lost the perception of fairness. As you know, mandatory arbitration has been at the top of our list of anti-consumer practices for some time. And in recent months, even the President’s proposals for regulatory reform have identified mandatory arbitration as a practice that should be restrained.

In the interest of consumer protection, the undersigned organizations request that you encourage *voluntary, post-dispute* arbitration by ceasing all consumer, employment, and franchise arbitrations arising out of pre-dispute mandatory arbitration provisions. If you are willing to join us in our efforts to restore credibility and fairness to the alternative dispute resolution process, we would be happy to work with you to help design and encourage the widespread use of a voluntary dispute resolution process that can truly accomplish our shared goals of efficiency and justice.

Sincerely,

Americans for Fairness in Lending (AFFIL)
American Association for Justice

Consumer Action
Consumers Union
Home Owners for Better Building
Homeowners Against Deficient Dwellings
National Association of Consumer Advocates (NACA)
National Consumer Law Center (on behalf of its low income clients)
National Employment Lawyers Association
NCCNHR: The National Consumer Voice for Quality Long-Term Care
Public Citizen
Take Back Your Rights PAC
U.S. PIRG
Workplace Fairness

On behalf of the Fair Arbitration Now Coalition (www.fairarbitrationnow.org).

The organizations of the Fair Arbitration Now coalition represent millions of individual members interested in protecting the rights of all Americans - particularly the rights of consumers, employees, homeowners, and the elderly, as well as preserving our hard-won civil rights. We support ending the predatory practice of forced arbitration in consumer and non-bargaining employment contracts.