Fair Arbitration NOW

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WHAT PEOPLE ARE SAYING ABOUT MANDATORY BINDING ARBITRATION

I. Experiences of *Individuals* Who Have Faced Mandatory Arbitration

"I did everything I could to keep my right to go to federal court, but **the courthouse doors were closed** when I got there."

- Fonza Luke, a hospital nurse-practitioner from Princeton, Alabama, who after nearly 30 years' employment was forced to arbitrate her claims of age and race discrimination, despite having explicitly refused to sign the hospital's arbitration clause[1]

"It seems as if [**the company** I worked for] has discovered that imposing stacked-deck mandatory arbitration programs on their employees means that they **can act with virtual immunity** from employment laws. At least, that's what happened in my case."

– Mary Kay Morrow, a 20-year employee from Kansas City, Missouri, who faces a legal Catch-22: she can't bring her age discrimination and retaliation suit to court because of a mandatory arbitration program, but she can't take it to arbitration because of the extremely short statute of limitations her employer wrote into the program[2]

"I just think **the little guy has no chance** in arbitration."

– Connie Nagrampa, a San Francisco Bay-area small business owner who was forced into arbitration in *Boston* when her direct-mail franchise failed – and ended up with an unexplained award against her of more than twice what the franchisor initially said she owed it[3]

"We never knew how precious our constitutional rights were until they were stolen from us by a binding mandatory arbitration clause."

– Deborah Williams, a small business owner from Annapolis, Maryland, who lost hundreds of thousands of dollars after being forced into arbitration with the Coffee Beanery[4]

"**I had no idea such a system existed…I had an immediate flashback to the Soviet Union.** I thought: this is impossible. I was so proud to become a citizen of this country… because I knew that … this … country … is run by law."

– Anastasiya Komarova, victim of mistaken identity pursued for the debts of another person[5]

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[1] *Luke v. Baptist Medical Center-Princeton*, No. 03-14342 (11th Cir. 2004). A write-up of Ms. Luke's experience was attached to Congressional testimony presented by NELA Mandatory Arbitration Co-Chair Cathy Ventrell-Monsees on October 25, 2007. Testimony of Cathy Ventrell-Monsees On Behalf of the National Employment Lawyers Association Before the Subcommittee on Commercial and Administrative Law, House Judiciary Committee, Regarding the Arbitration Fairness Act of 2007, H.R. 3010 (October 25, 2007) p. 23, http://www.judiciary.house.gov/media/pdfs/Ventrell-Monsees071025.pdf [hereafter, "Ventrell-Monsees Testimony"].

[2] The Court of Appeals for the Western District of Missouri subsequently granted Ms. Morrow's appeal of the order permanently dismissing her claims. A write-up of Ms. Morrow's experience was attached to the Ventrell-Monsees Testimony at p. 21. Her story was also reported on in the *Kansas City Business Journal* on March 19, 2004.

[3] Berkowitz, "*Is Justice Served?*" *West* (LA Times Sunday Magazine), October 22, 2006, downloaded at http://www.hobb.org/index.php?option=com_content&task=view&id=1371&Itemid=197&mosmsg=Item+successfully+saved on November 25, 2007 [hereafter, "*Is Justice Served?*"]. At the time the article was published, Ms. Nagrampa's case was on appeal. The author of the article, Eric Berkowitz, was legal editor of the *Los Angeles Daily Journal.*

[4] Ms. Williams testified about her experience before the Subcommittee on Commercial and Administrative Law, House Judiciary Committee, on October 25, 2007, http://www.judiciary.house.gov/HearingTestimony. aspx?ID=601.

[5] Testimony of Public Citizen's Congress Watch Division Director Laura MacCleery Before the Subcommittee on Commercial and Administrative Law, House Judiciary Committee, Regarding the Arbitration Fairness Act of 2007, H.R. 3010 (October 25, 2007), http://judiciary.house.gov/media/pdfs/ MacCleery071025.pdf, *citing* "Rights at Risk with Binding Arbitration," ABC-7 KGO-TV, Sept. 27, 2007.

"[T]his land of pay and play, called arbitration…is the most disheartening, disgusting, and disillusioning thing we have ever been through.... Arbitration is **like a metastasizing cancer,** spreading throughout this country, infecting our lives and our families…. [S]oon we will have no need for a court system. In some way, we are all bound by arbitration already.... If you do not give up your rights, you … cannot buy a home, a car, have a credit card, bank account, or even a cell phone. **All the big businesses have adopted this cursed clause. The arbitration companies have more power over us than the Supreme Court….** The jury system has numerous safeguards to overturn any verdict … if it is excessive. **In arbitration, there are no safeguards. … What was wrong with … corporate responsibility?"**

> – Jordan Fogal, whose Houston home was defective and uninhabitable due to the builder's negligence and fraud, and who lost her home and hundreds of thousands of dollars in mandatory arbitration of her years-long dispute with her builder.[6]

II. Experiences of *Lawyers* Who Have Represented Individuals in Arbitration

"[Arbitration is] **by its nature corrupt.** [Any arbitrator] knows that whatever he rules, [the repeat player] is going to look at it and decide whether they're going to use him again. It's as simple as that."

> – Russell Kussman, attorney who represented a brain-damaged infant born in a Kaiser Permanente hospital in California[7]

"Virtually every time you go to a doctor now in California, you are asked to sign a mandatory arbitration agreement… Most of the time you don't even know it. You are signing a bunch of papers on a clipboard and you are being put into **a system with no transparency and tremendous ethical issues**."

> – Cynthia Lebow, a Los Angeles attorney who regularly represents patients in medical disputes[8]

"The agreement for binding mandatory arbitration is commonly sandwiched toward the end of [a 50-60 page admissions packet] and is explained, if at all, in the briefest of terms and in the most soothing of tones. Prospective new [nursing home] residents … [r]arely … have the capacity to understand the significant and complex documentation … E**quality of bargaining position** between the nursing home and the resident or their family **does not exist. …** The terms of the binding mandatory arbitration agreement are often as unconscionable as the circumstances under which the agreement is executed. … Not surprisingly, ... arbitration awards are usually substantially lower than … jury verdicts. **The … system … creates a playing field that is tilted … against frail, vulnerable residents** who suffer terribly at the hands of their caregivers".

> – Ken Connor, attorney who represents nursing-home residents who have been the subject of negligent or intentionally harmful treatment by the nursing homes that are entrusted with their lives and care[9]

[6] Specifically, according to Ms. Fogal, the arbitrator found that the builder of her home had committed common fraud, but awarded the Fogals only about $41,000 – an amount Ms. Fogal characterized as "an insult" in light of the total $368,000+ cost of her home and the estimated $200,000 of necessary repairs. The arbitrator also charged the Fogals approximately $14,000 for the *builder's* attorneys' fees and costs, finding that they had breached the initial contract by trying to litigate the dispute in court. The remainder of the award did not even cover the cost of arbitration. Fogal Testimony; *see also,* R. Patterson, "Home Sour Home," *Mother Jones* (July/August 2005), http://www.motherjones.com/news/feature/2005/07/ home_sour_home.html.

[7] *Is Justice Served?, Los Angeles Times, 10/22/06.*

[8] H. Weinstein, "UCLA Law School joins others to pry into judicial secrecy," *LA Times.com* (Nov. 3, 2007), http://www.latimes.com/news/nationworld/politics/scotus/la-me-secrecy3nov03,1,2297657.story?coll=la-news-politics-supreme_court&ctrack=1&cset=true.

[9] Mr. Connor testified about his experiences before the Subcommittee on Commercial and Administrative Law, House Judiciary Committee on October 25, 2007, http://www.judiciary.house.gov/HearingTestimony. aspx?ID=602. In addition to having represented nursing-home residents and their families around the country for more than 25 years, Mr. Connor is the founder and Executive Director of the Center for a Just Society; served as counsel to Governor Jeb Bush in *Bush v. Schiavo;* was President of the Family Research Council, one of the nation's leading pro-family public policy organizations, from 2000-2003; served as President and Chairman of the Board for Florida Right to Life; was appointed to Florida 's Task Force on the Availability and Affordability of Long Term Care; and has served as Chairman of the State of Florida Commission on Ethics.

"With arbitration clauses, I have to tell [my clients] that you're not going to recover anything if you have to be made whole through arbitration…. It's like your family dies in a rollover and you have to try your claim in front of the National Association of Tire Manufacturers."

– Securities attorney Jonathan Kord Lagemann[10]

III. Experiences of Current and Former *Arbitrators and Mediators*

"I have had an insurance company that very noticeably did not hire me further after I ruled against them in arbitration. **You would have to be unconscious not to be aware that if you rule a certain way, you can compromise your future business**."

– Richard Hodge, arbitrator and retired Alameda County, CA, trial judge[11]

"[T]he tidal wave of arbitration has spawned a plethora of new arbitration forums. Some such forums are industry-specific and the quality of the "neutral" arbitrators, as well as **the fairness of the procedures** employed by such forums, **are often suspect**…"

–Joseph Matthews, arbitrator, trial lawyer representing businesses, and member of the board of directors of the American Arbitration Association[12]

"[A]rbitrators can rule on the basis of the tea leaves. The fact is that arbitrators make mistakes . . . and there is no appeal if I make a stupid or diabolical mistake, or one that is made in bad faith. The parties are on their own."

– Richard Hodge, arbitrator and retired Alameda County, CA, trial judge[13]

"There's an inclination on the part of 'neutrals' to know where their bread is buttered. **They're going to be neutral, but they'll be more neutral for some than others**."

– Unidentified arbitrator quoted in *Is Justice Served?, Los Angeles Times, 10/22/06*

"Our current system of arbitration has allowed business to effectively 'opt-out' of our civil justice system and replace it with a system of private justice it controls."

\- Dean Richard Alderman, University of Houston Law Center[14]

"In my experience, the value of employees' claims drops by a factor of five if arbitration is required. The system is fundamentally corrupt."

\- Daniel Klein, Buckley & Klein, LLP, and a mediator on the American Arbitration Association's panels[15]

"[U]pon whom do the arbitration companies depend for their revenue? That's … right, the miserable, Godless bloodsucking banks and other professional litigants. Whom, then, are all the procedures designed to accommodate? Right again, the **professional bloodsuckers who have set the system up to screw the consumer."**

– Retired West Virginia Supreme Court of Appeals Chief Justice Richard Neely, after acting as an arbitrator for the National Arbitration Forum[16]

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[10] *Quoted in* Maiello, "Don't Cry For Justice," *Forbes.com* (October 31, 2008), http://www.forbes.com/intelligentinvesting/2008/10/30/Intelligent-Investing-Arbitration-Securities-Law-Advisers-Panel.html.

[11] *Is Justice Served?, Los Angeles Times, 10/22/06.*

[12] Matthews, "Are Florida Courts Really Parochial When It Comes To Arbitration? A Rebuttal," 81 *Florida Bar Journal* 28 (December 2007), http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/9219aad39f67f1698525739f004bee46?OpenDocument#topofpage [hereafter, "Matthews Rebuttal"].

[13] *Is Justice Served?, Los Angeles Times, 10/22/06.*

[14] Testimony to the Subcommittee on the Constitution, United States Senate Judiciary Committee, on "S. 1782, The Arbitration Fairness Act of 2007" (December 12, 2007), p. 2 of manuscript copy.

[15] Telephone Conversation with NELA Legislative Director Donna Lenhoff, December 2008.

[16] R. Neely, "Arbitration and the Godless Bloodsuckers," Sept./Oct. 2006 *The West Virginia Lawyer* 12, 13 (2006).

"[A] fundamental policy flaw … flows from **the decisions of the Supreme Court** extending the FAA [Federal Arbitration Act] to consumer, employment, and other areas where there is a disparity in the bargaining power of the parties… [These] decisions … **have permitted business interests in this country to use mandatory arbitration** as another path to … preempt class actions and jury trials …. It will be a shame if truly legitimate principles of arbitration are sacrificed to the selfish interests of some businesses that have co-opted this method … **to effect a change in the balance of power between corporate America and consumers**."

> – Joseph Matthews, arbitrator, trial lawyer representing businesses, and member of the board of directors of the American Arbitration Association[17]

"My own experience over the past two decades as an arbitrator has led me to conclude that in many instances corporate players are in fact benefitting from a system of purchased justice in both the employment and the consumer credit areas. … [T]here is a very real risk that the NAF [National Arbitration Forum] pool of arbitrators is overwhelmingly stacked against the consumer, with arbitrators either being removed as I was because they have decided a case for the consumer, or arbitrators being pressured into always ruling for the repeat player companies out of fear of being removed from cases."

> -- Harvard Law School Professor, civil rights lawyer, and arbitrator Elizabeth Bartholet, testifying before the U.S. Senate Judiciary Committee about her experience being barred from the NAF arbitrator roster after having ruled for the consumer for the first time in the 20th case that she handled for NAF.[18]

IV. Experiences of *Judges* Who Have Observed Mandatory Arbitration

"[Mandatory arbitration is] a **two-track system of justice**—one for people who can decide which trial service they want and which judge they will pick [while] others stand at the end of the line."

> – California Supreme Court Chief Justice Ronald George[19]

"I see **a two-tier system** [in which well-heeled litigants opt for private judging rather than waiting for their cases to be heard in federal courts.]"

> – United States District Judge Terry J. Hatter, Jr. (Central District of California)[20]

"Private judging is an oxymoron because those judges are businessmen. They are in this for money. In this state, there are tens of thousands, probably hundreds of thousands and, for all I know, millions of disputes that are being resolved by **decision makers who are not truly independent."**

> – California state appellate justice Judge Anthony Kline[21]

"It used to be … that to give up the right to trial by jury required a knowing, intelligent, voluntary and case-by-case waiver. Not **when arbitration is in play**. Do … you trade on the New York stock exchange? You've given up your rights. Do you have long distance phone service? You've given up your rights. Do you use cell phones? You've given up your rights. **Work for Circuit City or other major employers? You've given up your rights to trial by jury**."

> – United States District Judge William G. Young (District of Massachusetts)[22]

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[17] Matthews Rebuttal.

[18] Witness Statement of Professor Elizabeth Bartholet, *Senate Judiciary Committee,* hearing on "Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations" (July 23, 2008), http://judiciary.senate.gov/testimony.cfm?id=3485&wit_id=7313.

[19] *Is Justice Served?, Los Angeles Times, 10/22/06.*

[20] H. Weinstein, "UCLA Law School joins others to pry into judicial secrecy," LA Times.com (Nov. 3, 2007), *http://www.latimes.com/news/nationworld/politics/scotus/la-me-secrecy3nov03,1,2297657.story?coll=la-news-politics-supreme_court&ctrack=1&cset=true*. Judge Hatter has been on the federal bench for nearly 30 years.

[21] *Is Justice Served?, Los Angeles Times, 10/22/06.*

[22] Judge William G. Young Speech at Judicial Luncheon The Florida Bar's Annual Convention in Orlando June 28, 2007, "*The Florida Bar News* (July 15, 2007), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/5d3d1e61610d7e5c852573150051920d?OpenDocument

"[V]irtually all consumer transactions, no matter the size or type, now contain an arbitration clause. And with every reinforcing decision, these clauses become **ever more brazenly loaded to the detriment of the consumer** – who gets to be the arbitrator; when, where, how much it costs; what claims are excluded; what damages are excluded; what statutory remedies are excluded; what discovery is allowed; what notice provisions are required; what shortened statutes of limitation apply; what prerequisites even to the right to arbitrate are thrown up – not to mention the fairness or accuracy of the decision itself. The drafters have every incentive to load these arbitration clauses with such onerous provisions in favor of the seller because the worst that ever happens, if the consumer has the resources to go to court, is that the offending provisions are severed. *The state courts, demoralized by the United States Supreme Court's disapproval, have too often allowed these overreaching provisions to succeed*. **Most consumers can't read them, won't read them, don't understand them, don't understand their implication and can't afford counsel to help them out.** *It is the role of the state courts to determine whether an arbitration provision is unconscionable and it is time that we take that responsibility seriously*."

-- Florida District Judge Jacqueline Griffin[23]

[23] *Mercedes Homes, Inc., v. Colon*, FL Dist. Ct. App., 5th District, (August 10, 2007) (Griffin, J., dissenting, slip opinion at 18-19).