

JUSTICE FOR ALL

ARBITRATION – ADDING INSULT TO INJURY

We all make mistakes. That is one of the reasons we have a judicial system. Whether they would readily admit it or not, judges also make mistakes – that is why there are various safeguards built into our legal system. Should a judge or jury make a mistake, our judicial system allows for one or more appeals to be filed. The end result should be a decision that accurately reflects the evidence offered at trial and properly applies the law.

OVERVIEW

This issue of *Justice for All* addresses arbitration, a procedure that bypasses the traditional legal process and, in its place, provides a method for resolving legal disputes without many of the safety nets that are fundamental to our traditional judicial process. It is hoped that by reading the following you will be better educated as to the numerous differences between litigation and arbitration and how to avoid being placed in a situation where you are forced, unwillingly, to arbitrate a dispute.

WHAT IS LITIGATION (TRIAL BY JURY)?

Simply put, litigation is a lawsuit, which could result in a trial, with or without a jury. The United States Constitution guarantees a right to trial by jury in most criminal proceedings and civil actions (lawsuits). A similar provision in the Alabama Constitution also protects such rights.

In general, when a lawsuit is filed, the case may ultimately be settled before trial or be tried, with or without a jury. If a jury is requested in a lawsuit filed in Alabama state court, the case will be decided

by *at least* 13 people – a judge and a minimum of 12 jurors. Should the jury make a “bad decision” (not supported by the facts or the law), the trial court judge has an obligation to correct the jury’s verdict. This could result in the jury’s verdict being rejected in its entirety or the amount of the verdict being reduced or even increased by the trial court judge, thereby correcting any resulting perceived error.

In the event that the trial court judge fails to correctly apply the law, an appeal can be filed. A panel of 3 to 9 appellate judges then reviews the decision to determine if it is consistent with the law. Ultimately, the case *may* (in some instances) be appealed to the United States Supreme Court.

As you can see, this system, which has been in place in our country for over 200 years, is designed to ensure that the ultimate outcome is supported by both the evidence offered at trial and the applicable law.

WHAT IS ARBITRATION?

Arbitration is an “alternative” procedure that is permitted pursuant to a federal law – the Federal Arbitration Act (FAA). Under this system, both parties (or sometimes just one party) to a dispute waive their right to a trial (with or without a jury). Instead, one person (sometimes three) decides the entire case. This person, called an arbitrator, acts as a substitute for the trial court judge, the jury, the appellate court, and even the United States Supreme Court. The arbitrator’s decision is final and no appeal or other review of his or her decision is likely permitted. Consider the significance of the prior sentence – *one person, without any accountability to anyone, decides everything*. Placing such authority

in one person circumvents all of the basic principles of our judicial system. The results, as discussed later herein, will probably astonish you.

WHAT TYPES OF DISPUTES ARE SUBJECT TO ARBITRATION?

Arbitration agreements are becoming more and more common in a variety of situations. It is virtually impossible to buy a new automobile or have a loved one admitted to a nursing home without signing an arbitration agreement. If you have a credit card, any dispute must be resolved by arbitration. The same is likely true if you have listed your home with a realtor, have a mortgage on your house, rent an apartment or commercial property, or have financed anything. The frequency with which such “agreements” are being used has reached almost epidemic proportions.

HOW DO YOU KNOW IF THERE IS AN ARBITRATION AGREEMENT?

It is unlikely that you have been or ever will be “asked” to sign a document that is entitled “Binding Arbitration Agreement.” Such language is frequently buried in the fine print of an application or other document. Very seldom are you even made aware of the fact that you have “agreed” to arbitrate a dispute or waive your right to a trial by jury. Nonetheless, in many instances, such hidden arbitration agreements have been found to be enforceable.

WHY ARE ARBITRATION AGREEMENTS SO COMMON?

One of the reasons frequently offered by businesses to support arbitration is that it “supposedly” provides a quick and efficient method for resolving disputes. In a sense, this is true. Resolving a dispute by arbitration is, in some instances, faster than filing a lawsuit and trying a case before a jury. The same could be said for simply flipping a coin or challenging someone to a duel. The problem is that a fair result that is factually and legally supported is often sacrificed.

In fact, the real underlying reason for arbitration is businesses know that an arbitrator is far more likely to rule in their favor than a jury. Additionally, the results of arbitration are almost always subject to

a confidentiality agreement, meaning that no one is allowed to discuss the outcome.

Studies have shown that arbitrators rule in favor of businesses and against individuals a disproportionate percentage of the time. For instance, in one such study involving arbitration of disputes relating to credit card late fees and interest charges, it was determined that the credit card company won 94.5% of the time.

IS KNOLOGY YOUR CABLE PROVIDER?

If, like me, you have Knology cable at your home, you recently received a legal size piece of paper entitled “Notice to customers regarding policies, complaint procedures and services.” Many of you likely paid little, if any, attention to this document. In my opinion, it fairly well illustrates the current problems involving arbitration.

The document, which has print so small that it is difficult for just about anyone to read, contains an arbitration agreement, which prohibits any of us from filing a lawsuit against Knology for any reason. Instead, we must submit any such claims to arbitration and pay the required filing fees. This “agreement” further prohibits an arbitrator from awarding punitive damages or attorney’s fees. Additionally, if we should proceed with arbitration and lose, Knology reserves the right to recover fees and expenses that it incurred as a result of the arbitration.

Please realize that none of us ever signed this document or otherwise “agreed” to waive our right to file a lawsuit against Knology for any damage that they might cause to our televisions, home, yard, or anything else. In fact, you probably thought this was just some junk mail and threw it away when you received it. I suspect that is exactly what they wanted you to do. Nonetheless, by receiving this document and continuing to use Knology, you have, in all likelihood, agreed to arbitrate any disputes with Knology.

I believe that the most important part of this document is what claims are *not* subject to arbitration. Knology, which drafted this “agreement,” has excluded from arbitration any claims that it might maintain against us for attempting to collect any debts that we allegedly owe them. This is not a typographical error – *Knology*

can sue us, but we can not sue them. If arbitration is such a quick, inexpensive, and “fair” system for resolving disputes, then why is Knology reserving the right to sue us?

I don’t know about you, but I am looking into other options, whether it be another cable provider or satellite television. I am also notifying Knology of the reason for my action.

WHAT IF YOU ADMIT A LOVED ONE INTO A NURSING HOME?

If you have ever admitted (or are considering admitting) a family member into a nursing home or assisted living facility, chances are that you will be provided a document containing an arbitration agreement.

More accurately stated, at the time of admission, you were (or will be) handed about a hundred pages of documents that must be signed in several places. One of these documents did (or will) contain a binding arbitration agreement. Much like any arbitration agreement, it probably was (or will be) buried in the fine print or somewhere on the second or third page of another document, sometimes labeled an “Admission Agreement.” It is unlikely that anyone at the nursing home or assisted living facility did (or will) explain to you that the document contains an arbitration agreement or that, by signing the document, you have waived your loved one’s right to file a lawsuit against the facility.

Based on my experience, in many instances, the arbitration agreement is one-sided. Thus, the nursing home or assisted living facility can still file a lawsuit against the resident or you, but your claims are subject to binding arbitration. The document also likely refers to rules and regulations regarding arbitration, but a copy of these critical documents were (will) not be provided to you for review. Additionally, the person responsible for admissions probably has either no or only very limited knowledge regarding how arbitration works. Therefore, he or she is unable (or unwilling) to answer any questions you might have regarding this process and the effect of signing such a document.

WHAT ARE THE RESULTING COSTS OF ARBITRATION vs. LITIGATION?

Although the filing fees vary from county to county, in general, the cost of filing a lawsuit in Alabama (and making a demand for trial by jury) is about \$400.00.

In contrast, arbitration filing fees vary depending upon the amount of money being sought. In one case that I currently am handling, the filing fees alone for the *privilege* of arbitrating a claim are over \$5,000.00. My client is also responsible for various additional administrative fees and one-half of the arbitrator’s hourly fee (and related expenses). The anticipated overall cost to my client of filing fees and paying the arbitrator will likely be between \$10,000.00 and \$15,000.00. Please note that these are merely filing fees and the arbitrator’s fee and do not take into account all the other costs and expenses otherwise associated with arbitrating or litigating a claim. Compare this to the estimated average cost of \$400.00 to file a lawsuit. Obviously, arbitration is not “more economical.”

WHAT CAN YOU DO TO AVOID MANDATORY ARBITRATION?

Admittedly, it is becoming more and more difficult to contest the enforceability of an arbitration agreement and avoid this costly and one-sided process. However, I would suggest that you consider the following when faced with an arbitration agreement:

1. Do not sign anything without first reading and understanding it. If in doubt, ask what the document means. If still in doubt, don’t sign it and simply walk away.
2. Ask the person who has provided you with the document whether there is an arbitration provision. If so, have them explain to you how this process works and what the resulting costs will be.
3. Ask whether you are *required* to sign the arbitration agreement. *If not, then don’t.* The person providing you with the paperwork *must* tell you whether it is mandatory. If the company will not sell you the product or provide you with the services unless you sign the arbitration agreement, it is less likely to be deemed enforceable by a Court.

4. If you think that you might have already signed an arbitration agreement, read it as soon as possible. You may have the right to revoke (withdraw your acceptance of) it. This normally must be done in writing and within 30 days of the date on which you signed it. This is most common in the nursing home and assisted living facility context.
5. If in doubt, contact an attorney and ask for advice *before* you sign any document that appears to contain an arbitration agreement.
6. Contact your Congressman and both of our United States Senators and express your support for the **Arbitration Fairness Act of 2007** (which would render most pre-dispute arbitration agreements between consumers and businesses unenforceable) and the **Fairness in Nursing Home Arbitration Act of 2008** (which would prohibit binding pre-dispute arbitration in relation to nursing home patient care). I consider these to be two of the most important pieces of legislation ever before Congress relating to arbitration in the history of the United States.

The contact information for our two Senators and Congressman (for most of us) is as follows:

Senator Richard Shelby: 1000 Glenn Hearn Blvd., Box 20127, Huntsville, AL 35824; (256) 772-0460; senator@shelby.senate.gov.

Senator Jeff Sessions: Regions Bank, 200 Clinton Ave., Huntsville, AL 35801; (256) 533-0979; senator@sessions.senate.gov.

Congressman Bud Cramer (5th Congressional District): 200 Pratt Ave., Suite A, Huntsville, AL 35801; (256) 551-0190; budmail@mail.house.gov.

Again, I sincerely believe that it is in your best interest to contact all of these gentlemen and voice your support for both of these bills.

CONCLUSION

Arbitration is a wolf in sheep's clothing. Signing an arbitration agreement is typically an involuntary and unknowing waiver of your Constitutionally-protected right to a trial by jury. When, as in many instances, the arbitration agreement applies only to claims that you might maintain, but not any claims of the other party, there is no logical argument in support of such a process. ***The bottom line – do not sign an arbitration agreement unless, under the circumstances, you have no other viable choice. If in doubt, contact an attorney for advice.***

© 2008 The Ryder Law Firm, P.C.

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.