



**L E G A L
S E R V I C E S**

INCORPORATED

TESTIMONY

ON

ARBITRATION

PRESENTED BEFORE:

**ASSEMBLY STANDING COMMITTEE ON
CONSUMER AFFAIRS AND PROTECTION AND
ASSEMBLY STANDING COMMITTEE ON JUDICIARY**

PRESENTED BY:

**NICOLE L. ARRINDELL
MFY LEGAL SERVICES, INC.**

FEBRUARY 10, 2016

MFY LEGAL SERVICES, INC., 299 Broadway, New York, NY 10007
212-417-3700 www.mfy.org

My name is Nicole Arrindell and I am a Staff Attorney at MFY Legal Services, Inc. (“MFY”). MFY envisions a society in which there is equal justice for all. Our mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised, or have disabilities. Our organization provides high-quality legal services to more than 10,000 poor and low-income clients every year in the areas of housing, employment, consumer, seniors, and disability rights. MFY’s Consumer Rights Project provides advice, counsel, and representation to hundreds of low-income, elderly, and disabled New Yorkers faced with a variety of consumer issues, from predatory lending practices to abusive debt collection.

The New York Times recently published a three-part investigative series on mandatory arbitration which highlighted the experiences of American families and illustrated how this corporate practice undermines consumer protection and impedes individuals’ access to justice.¹ Through our work, we see first-hand how mandatory arbitration impacts low-income consumers, nursing home residents, and low-wage workers, and our testimony today will highlight some of these issues and concerns. We commend the Assembly for taking on this issue of economic justice and for examining ways to better protect New Yorkers against unfair mandatory arbitration clauses and to improve the arbitration adjudicatory process.

Background: Mandatory Arbitration Clauses are Everywhere

Mandatory arbitration clauses are included in practically every consumer contract, including contracts for credit cards, pre-paid cards, cell phone and internet service, automobiles, nursing home admission, and non-union employment contracts. Many people are unaware that these clauses exist in contracts when they sign up for services or make certain purchases because arbitration clauses are buried in the fine print. A Consumer Financial Protection Bureau (CFPB) study found that fewer than seven percent of individuals surveyed realized that arbitration clauses

¹ Jessica Silver-Greenberg and Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice Part I, *The New York Times*, Nov 1, 2015 at A1, available at <http://nyti.ms/1RjOpoz>.

restricted their ability to sue in court.² Even if they are aware of the clauses, people may not understand the implications of arbitration, and even if they do, they have no power to negotiate these form contracts. If someone wants to purchase a cell phone or a car, they are forced to accept arbitration as a means to settle any disputes relating to those goods. Furthermore, many employees are forced to accept arbitration clauses as a condition of employment. Every day, hundreds of thousands of consumers and employees are signing away their legal rights by agreeing to settle any disputes that arise outside of the court system. While arbitration may be an effective tool for corporations to settle disputes in a business versus business context, it is a system that is inevitably biased and rigged against low-income consumers and low-wage workers. Additionally, arbitration limits consumers' ability to assert their rights through class actions, an efficient method to resolve similar claims from multiple customers.

Mandatory arbitration deprives consumers and workers of the right to seek justice in the courts, systematically favors corporations who know the arbitration rules and choose the arbitration forum, and can be financially burdensome for low-income individuals.

Mandatory Arbitration Locks Low-Income Consumers out of the Judicial Process

Access to the justice system is a fundamental right and low-income consumers have far more access to justice through the courts than in arbitration. Arbitration proceedings are fundamentally unfair to consumers because they are secret proceedings shielded from public scrutiny that provide limited or no discovery, no assurances that the arbitrator will follow the

² Consumer Financial Protection Bureau, *Arbitration Study Report to Congress* 107 (March 2015), available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. See also Jeff Sovern, Elayne E. Greenberg, Paul F. Kirg, and Yuxiang Liu, 'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 Maryland Law Review 1 (2015) ("While 43% of the respondents recognized that the sample contract included an arbitration clause, 61% of those believed that consumers would, nevertheless, have a right to have a court decide a dispute too large for a small claims court. Less than 9% realized both that the contract had an arbitration clause and that it would prevent consumers from proceeding in court.")

law, no right to a written explanatory decision, and no judicial review or right to appeal. Many participants in arbitration are also barred from ever talking about the case or the outcome.

New York has seen consumer debt cases inundate the courts over the past decade and, in response, consumer advocates and the Court system itself have made significant strides to level the playing field for self-represented litigants to defend themselves in these cases.³ Those resources and innovative solutions include: the Volunteer Lawyer for a Day Program; Civil Legal Advice and Resource Office (CLARO); standardized, *pro se* forms; educational videos; fact sheets; and online materials. All of these resources help litigants understand their rights and courtroom procedures, ensure *pro se* litigants file court papers that meet minimum legal standards for pleadings, and help prepare individuals for hearings against adversaries who are represented by experienced counsel. In stark contrast, arbitration forums provide no assistance or guidance to the self-represented participant.

Mandatory Arbitration is Inaccessible to Low-Income Consumers

Navigating the rules and procedures of arbitration is all but impossible for most consumers. Years ago, when the National Arbitration Forum was in operation and hearing consumer credit cases (and, like other arbitration forums, predominantly ruling against consumers⁴), MFY helped many consumers who were confused by the arbitration process, or lack thereof. Existing arbitration forums are no different. A quick examination of the website of the American Arbitration Association (AAA), one of the most widely used organizations for arbitration, reveals a 44-page “Consumer Arbitration Rules” document, which is

³ See, e.g., New Economy Project, *The Debt Collection Racket 3* (June 2013), available at <http://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf>.

⁴ See Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 13 (Sept. 2007), available at <https://www.citizen.org/documents/ArbitrationTrap.pdf> (“Available evidence indicates that the corporate clients of arbitration companies enjoy a truly staggering success rate – between 94 percent and 99 percent – and that individual arbitrators sometimes dispose of dozens of cases in a single day, ruling 100 percent for corporate claimants.”).

incomprehensible to the average individual, along with a list of forms to be completed without any instructions whatsoever.⁵

Consumers have no control over choosing the arbitrator or the location for the arbitration because that power is held by the corporation that the consumer arbitrates against, which is yet another strike against low-income consumers. Mandatory arbitration clauses can require that arbitration take place in a state with which a consumer has no contact, and which is far away from New York.⁶ For example, a low-income consumer who contacted MFY for help was shocked to discover that the arbitration clause in his contract with a company that advances money to people with personal injury suits would require him to travel to Texas to defend the arbitration proceeding that the company had commenced against him, even though the consumer lived in New York and had entered into the contract in New York.

The complex arbitration rules are also a deterrent to low-income consumers affirmatively bringing claims in arbitration. Therefore, even if consumers have a dispute with a business for a good or service and they can figure out how to initiate an arbitration claim, they still must be able to decipher the rules which can vary from one arbitration organization to another.

Mandatory Arbitration is Expensive for Low-Income Consumers

The claim made by arbitration proponents that arbitration is faster and cheaper than litigation fails to take into account the financial barriers that exist for low-income consumers. The high costs to file and defend a case in arbitration could preclude a low-income consumer from obtaining any relief or resolving his or her claims arising out of a contract for goods or services. For example, at the AAA, the filing fee in a consumer dispute is a non-refundable \$200 for the consumer. For a low-income consumer, this fee can be prohibitively burdensome.

⁵ American Arbitration Association website *available at* www.adr.org.

⁶ *See Duran v. Hass Group*, 531 Fed.Appx. 146, 147 (2d Cir. 2013) (finding that consumer residing in New York had to submit to arbitration in Maricopa County, Arizona).

Furthermore, if the consumer is unable to travel to the designated forum, participating via long-distance telephone could also prove financially burdensome as many low-income consumers have limited minutes on their phone plans and pre-paid calling cards. Additionally, even if the corporation bears the burden of paying arbitration expenses, some arbitration clauses have “loser pays all” provisions which could cost the consumer thousands of dollars in arbitration fees.

In comparison, there is no cost for a consumer to defend a consumer case in New York City Civil Court, which is where the vast majority of consumer credit transactions are filed. Although fees exist to litigate in Supreme Court, in our experience, low-income consumers are able to obtain fee waivers. Unlike in arbitration, consumers do not pay the judges or clerks for their time or to resolve cases.

Recommendations

We encourage the New York State Legislature to ban mandatory arbitration and to enact laws that increase transparency, fairness, and accountability in arbitration. Assembly bills such as A.108 and A.8191 take a step in this direction and serve to shed light on the secretive system of arbitration. We also support the National Consumer Law Center’s Model State Consumer & Employee Justice Enforcement Act, which includes, among other things, a prohibition against municipalities from doing business with companies that include arbitration clauses in their contracts and a provision to permit private attorneys general suits that allow consumers to represent the State’s enforcement interests in certain contexts in which the State does not have the means to enforce.

Again, MFY thanks the Assembly for recognizing the urgent need to address and protect New Yorkers from the unfair and abusive nature of mandatory arbitration. MFY is committed to working with the Assembly to strengthen consumer protection and ensure fairness for

individuals encountering these forced arbitration clauses. Thank you for holding today's hearing and for considering this important issue.

Nicole L. Arrindell
Staff Attorney
MFY Legal Services, Inc.
299 Broadway, 4th Floor
New York, NY 10007
Email: narrindell@mfy.org
Phone: 212-417-3700