The New Forced Arbitration

Even Worse Than The Old Forced Arbitration

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The Association for Trial Lawyers

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Highlights

Corporations have developed new tactics to make the chances of winning a claim through forced arbitration lower than ever, including:

- Forcing consumers into forced arbitration without an agreement.
- Adding pre-dispute hurdles before a forced arbitration can be filed.
- Refusing to pay fees so forced arbitration cannot begin.
- Changing the rules, and even the referee, midway through disputes.
- Arbitrarily grouping claims together and dismissing them en masse.

If you don't like the rules, change the game.

Corporations hate being held accountable. That's why the business community has embraced forced arbitration. There are nearly a billion forced arbitration clauses covering all manner of consumer and employee matters.[1] These forced arbitration clauses strip the constitutional rights of every American to hold a wrongdoer accountable in a court of law and, instead, funnel their claims into a secret system controlled by the wrongdoers. The fraction of injured and cheated consumers and employees who do take their claims to forced arbitration rarely win—a consumer is more likely to be struck by lightning than win a monetary award in forced arbitration.[2]

But it turns out that is not enough for corporations. In the last few years, these companies, their law firms, and the forced arbitration providers who serve them have developed new tactics to make the chances of winning a claim—or even bringing a claim—even lower, including:

Forcing consumers into forced arbitration even when there was no contract or agreement

When consumers made claims against Experian for inaccurate credit reports, Experian argued those consumers were bound by forced arbitration agreements, even though those agreements were with other companies, such as credit monitoring programs.[3] Similarly, when Wells Fargo was caught opening sham accounts in its customers' names, often forging signatures to do so, it claimed the forced arbitration agreements the customers had agreed to on their genuine accounts also covered the sham accounts.[4]

Adding another layer of pre-dispute requirements before a forced arbitration can even be filed

Corporations are using Kafkaesque-sounding "pre-dispute dispute requirements (PDDR)," to create additional hurdles to filing a claim. These PDDR clauses can require consumers go through a pre-dispute process in which the corporation gets to decide if the claim is valid or not and throw it out on its own.[5] Or they can require consumers provide proof of a claim before forced arbitration, giving the company a sneak peek at the claims against them.[6] Naturally, in these situations the corporation is not required to provide any of the documents a consumer might need to make their case.[7]

Coinbase's burdensome PDDR rules illustrate the problematic and abusive nature of such requirements. Before even being able to proceed with forced arbitration, customers must complete a two-step PDDR process: first, they must contact Coinbase's support page to "resolve any such dispute amicably" (a highly subjective standard), and second, they must complete a complaint form that will be evaluated *by a Coinbase employee*. If these steps aren't fulfilled to Coinbase's satisfaction, the consumer's "claim or action must be dismissed from arbitration or small claims court." This extreme language appears to allow a company unilateral authority to throw out any and all consumer claims without oversight.[8]

Refusing to pay fees, so forced arbitration cannot begin

To make forced arbitration sound fair, corporations originally promised to pay all the arbitration fees. Now, many of these same corporations are backing out of that promise.[9] Corporations such as Uber, Intuit, Postmates, and Zelle have refused to pay arbitration fees as required by their own contracts when faced with multiple claims.[10] The appeals court in the Intuit case noted that "Intuit is now seeking to push the claims out of arbitration and into oblivion… [parties like Intuit] have not just been forum shopping; they have been on a veritable shopping spree."[11]

Changing the rules, and even the referee, midway through disputes

Corporations are not just changing the rules, they are changing the rules, and even referees, in the middle of disputes. After the cryptocurrency exchange Gemini realized that it had entrusted $900 million in customer funds to an investment fund that was about to tank, it began repeatedly changing its dispute resolution provisions, adding nearly 2,000 words that imposed extensive administrative hurdles and complex consolidation procedures as conditions to initiate a forced arbitration.[12]

Live Nation Entertainment, and its subsidiary Ticketmaster, changed arbitration providers midway through an antitrust dispute with Taylor Swift fans, who had accused the company of inflating ticket prices in violation of antitrust and consumer protection laws.[13] Their new arbitration provider—New Era ADR—was a start-up company that relied on Live Nation for a large percentage of its revenue.[14] It also changed the rules, so that consumers had to pay 100% of the marginal cost and prove their case in the face of extreme limitations on documents that can be submitted (10 total), briefing page lengths (5), witnesses (2-3), and discovery (none).[15]

Similarly, DoorDash attempted to change forced arbitration providers in the middle of an ongoing lawsuit—then collaborated with the new provider to rewrite the rules.[16] The collaboration was only uncovered when the presiding judge ordered the unsealing of emails between the arbitrator and the corporation.[17]

Grouping claims together arbitrarily, then dismissing them all at once or delaying indefinitely

Verizon tried to thwart multiple claims that it was charging fake fees by grouping them into "batches" of 10 at a time, effectively delaying claims for years until they were eventually barred by statutes of limitations.[18] Similarly, Ticketmaster's rewritten rules also allowed its chosen provider to group cases arbitrarily. The arbitrator could then treat a case as a "bellwether" and then reject it and all similar cases in one stroke.[19]

Conclusion

The corporate attorneys who originally weaponized forced arbitration against consumers and employees have not been shy about their desire to make the process even more business-friendly. No matter how consumers, employers, and their attorneys adapt, the goalposts will continually be moved. For forced arbitration has never been about efficiency or justice; it's one true goal is, always has been, and always will be corporate immunity.

ENDNOTES

1 Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, UC Davis Law Review, February 2019, https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf; *Unchecked corporate power*, Economic Policy Institute (EPI), May 20, 2019, https://www.epi.org/publication/unchecked-corporate-power/.
2 *The Truth About Forced Arbitration*, American Association for Justice, September 2019, https://www.justice.org/resources/research/the-truth-about-forced-arbitration.
3 *Soriano v. Experian Info. Sols., Inc.*, No. 2:22-CV-197-SPC-KCD, 2022 WL 6734860 (M.D. Fla. Oct. 11, 2022), objections overruled, No. 2:22-CV-197-SPC-KCD, 2022 WL 17551786 (M.D. Fla. Dec. 9, 2022).
4 Michael Corkery and Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, The New York Times, 12/6/2016, https://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html.
5 See Coinbase user agreement, Provision 7, "Customer Feedback, Queries, Complaints, and Dispute Resolution," https://www.coinbase.com/legal/user_agreement/united_states#appendix-5-arbitration-agreement; *In re Centurylink Sales Practices & Sec. Litig.,* MDL No. 17-2795 (MJD/KMM) (D. Minn. Dec. 4, 2020).
6 See Terms for "Klarna Shopping Service, Initial Dispute Resolution, Provision 6," published February 13, 2023, https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/user#mandatory-disputes).
7 See Memorandum of Points and Authorities In Support of Plaintiffs' Opposition to Defendant's Motion to Compel Arbitration, *Mosley et al. v. Wells Fargo & Co. et al.*, No. 3:22-cv-01976-DMS-AGS (S.D.Cal. March 3, 2023).
8 See Coinbase user agreement, Provision 7, "Customer Feedback, Queries, Complaints, and Dispute Resolution," available at https://www.coinbase.com/legal/user_agreement/united_states#appendix-5-arbitration-agreement (last accessed on Feb. 15, 2023); Brief for American Association for Justice, National Consumer Law Center, and Center for Responsible Lending as Amici Curiae in Support of Plaintiff-Appellee, B*ielski v. Coinbase, Inc.*, No. 22-15566 (9th Cir. Oct. 3, 2022), https://www.justice.org/resources/research/bielski-v-coinbase.
9 See Cal. Code Civ. Proc. 1281.97 – material breach for failure to pay fees before arbitration can proceed; 1281.98 – failure to pay fees and costs during pendency of proceeding; 1281.99 -Sanctions. These statutes apply to employment or consumer arbitration agreements, imposing stiff penalties on businesses that default on arbitration payments beyond 30 days of their due date.
10 *Postmates Inc. v. 10,356 Individuals*, No. CV202783PSGJEMX, 2021 WL 540155 (C.D. Cal. Jan. 19, 2021); *Uber Technologies Inc. v. American Arbitration Association Inc.*, case number 655549/2021, in the Appellate Division of the State of New York, First Judicial Department; AAA's self-reported data reveal that Intuit was a defendant in the greatest number of arbitrations against financial services companies over a five-year period from 2017-2021. See *Forced Arbitration and Big Banks: When Consumers Pay to be Ripped Off*, American Association for Justice, Septem-

ber 2022, https://www.justice.org/resources/research/forced-arbitration-big-banks.
11 *Intuit Inc. v. 9,933 Individuals*, No. B308417, 2021 WL 3204816, at *8 (Cal. Ct. App. July 29, 2021).

12 See *Complaint, Picha et al. v. Gemini Trust Company, LLC et al.,* No. 1:22-cv-10922-NRB (S.D.N.Y. Mar. 17, 2023). See also *Nguyen v. OKCoin USA Inc.,* No. 22-cv-06022-KAW, 2023 WL 2095926 (N.D. Cal. Feb 17, 2023) (granting the cryptocurrency company's motion to compel arbitration although it adopted revised forced arbitration clause two months after collapse of a company in which customers were invested).
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17 Vin Gurrieri, *Gibson Dunn Helped Craft Arbitration Provider's Rules*, Law360, February 28, 2020.
18 *MacClelland et al. v. Cellco P'ship et al.*, No. 21-CV-08592-EMC, 2022 WL 2390997 (N.D. Cal. July 1, 2022), appeal filed, No. 22-16020 (9th Cir. July 13, 2022). See also Brief for American Association for Justice as Amicus Curiae in Support of Plaintiffs-Appellees, *MacClelland, et al. v. Cellco P'ship, et al*., No. 22-16020 (9th Cir. Mar. 24, 2023).
19 New Era ADR Rules and Procedures are available at https://www.neweraadr.com/rules-and-procedures/.

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