

Commentary

Private Justice: Losing Our Day in Court

BY SANFORD M. JAFFE & LINDA STAMATO

In the early days of the dispute resolution movement—the '80s and '90s—the concern was often expressed that we were developing a system of “second-class justice” for those who couldn't afford the courts. The wealthy, of course, would continue to have access to the “first-class justice” that the public courts provided.

That prediction was a bit off. A shift did occur but it wasn't what many anticipated.

People chose alternative processes—variations on mediation and third-party decision-making—and the dispute resolution field grew. But the well-heeled and large corporate interests, seeing distinct advantages, seized and invested heavily in it. Courts were no longer the venue for the justice they were seeking.

While corporations were willing, even eager, to use mediation, arbitration and private judging as processes for managing differences, voluntarily, *between* them, they moved to restrict the choice of dispute resolution *within* their businesses—that is, with customers, clients, and employees—to mandatory arbitration, and, its corollary, prohibition of access to courts for class-action lawsuits.

The second-class justice taking shape now is arbitration with a twist. Allowing no choice—taking place in secret, with limited rights to appeal and, often, with outcomes protected by confidentiality—mandatory arbitration has been having a field day.

It has grown exponentially in the past two decades as the U.S. Supreme Court opened the floodgates with decisions like *AT&T Mobility v. Concepcion*, 130 S.Ct. 3322 (2010)(available at <http://bit.ly/2eu6jbb>). That case upheld the enforceability of these clauses, and distorted the intentions of the Federal Arbitration Act of 1925. The effect was to significantly limit rights

to class action lawsuits. See, e.g., Katherine V.W. Stone and Alexander J.S. Colvin, Briefing Paper #414, *The Arbitration Epidemic*, Economic Policy Institute (Dec. 7, 2015)(available at <http://bit.ly/2eWh0UL>).

It's a disturbing trend.

And it requires the attention of the dispute resolution profession. As the field of dispute resolution has become more formalized and institutionalized, it has spawned offspring that undermine several of the field's core principles, not the least of which is choice which fairness requires.

Hijacking a process to accomplish ends that defy core principles certainly ought to raise serious concerns in the profession where, we believe, responsibility rests for articulating and preserving the values and principles that lie at the heart of the movement.

RESULTS IN THE SHADOWS

People don't seem to know or care about mandatory arbitration until they find they have signed contracts that require them to use it when they have a dispute with their cellphone provider, bank (See Ann Carrns, *More Big Banks Are Using Arbitration to Bar Customer Lawsuits*, *N.Y. Times* at B5 (Aug. 17, 2016)(available at <http://nyti.ms/2f7FNG9>), nursing home, credit card or car rental company, investment broker, medical professional, or the providers of a wide-range of consumer services, including cable companies.

Private parties most often prefer having their cases heard in court. See *Consumers Want the Right to Resolve Bank Disputes in Court*, Pew Charitable Trusts (Aug. 17, 2016)(available at <http://bit.ly/2bxYEEYx>).

But contractual obligations can, and frequently do, leave consumers with no choice but to arbitrate. They had to agree to that process in order to get hired or make a purchase or enter a surgical facility or a nursing home.

They are prohibited also from any effort to press their claims as a class even though those

claims may be too costly or time-consuming to pursue individually. As a result, they have little bargaining power against significant, moneyed interests and repeat players.

Customers who tried to sue Wells Fargo over the fake accounts that were created in their names, for example, were blocked from the courts and forced into arbitration. Renae Merle, Wells Fargo customers won't be able to sue the bank over fake accounts, *Chicago Tribune* (Sept. 30, 2016)(available at <http://trib.in/2dcAzsH>).

The Pew Charitable Trusts reported in August in the analysis cited above that the use of arbitration clauses has risen to 72%, from 59%, at 29 big banks it studied.

Individual claims decided in secret, moreover, rarely right wrongs that affect others. See, e.g., James B. Stewart, *Secrecy of Settlements at Fox News Hid Bad Behavior*, *N.Y. Times* at B1 (Aug. 18, 2016)(available at <http://nyti.ms/2b2DJuQ>).

As Jenny Yang, chair of the U.S. Equal Employment Opportunity Commission, noted in an article a year ago that was part of a controversial series on arbitration in the *New York Times*, the process “allows ‘root causes’ to persist,” and it “keeps any discussion of discriminatory practices hidden from other workers ‘who might be experiencing the same thing.’” Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Decks of Justice*, *N.Y. Times* (Oct. 31, 2015)(available at <http://nyti.ms/1k3B5tZ>).

The outcome of an age discrimination claim, for example, would have no impact on others similarly situated—or on the community—if it is decided in arbitration.

Indeed, in its series, the *Times* reported, “Even when plaintiffs prevail in arbitration, patterns of wrongdoing at nursing homes are kept hidden from prospective residents and their families.” Jessica Silver-Greenberg and Michael Corkery, “In Arbitration, a ‘Privatization of the Justice System,’” *N.Y. Times* at A1 (Nov. 2, 2015)(available at <http://nyti.ms/1Mrb6CM>).

The Economic Policy Institute in the briefing paper discussed above reports that, on

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The authors are co-directors of the Center for Negotiation and Conflict Resolution at Rutgers University in New Brunswick, N.J. See the accompanying box on page 165 for background. This article updates and expands on the authors' Oct. 2 op-ed column in the Newark, N.J., *Star-Ledger* (available at <http://bit.ly/2enYjed>), where Stamato is a periodic contributor.

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average, employees and consumers win less often and receive much lower damages in arbitration than they do in court. Even when plaintiffs prevail in arbitration, patterns of wrongdoing are often not disclosed.

The *Times* series found people forced to arbitrate claims of medical malpractice, sexual harassment, hate crimes, discrimination, theft, fraud, elder abuse and wrongful death. It concluded that we now have an alternative system, a privatizing of the justice system, where “clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court.”

Coupled with bans on class actions—the legal means for citizens to collectively defend their rights—these contract clauses are unfair, even unconscionable. See David Horton, Federal Arbitration Act Preemption, Purposivism, and State Public Policy, 101 *Georgetown L.J.* 1217 (2013)(available at <http://bit.ly/2faD7aD>).

PUSHING BACK

Since the Supreme Court expanded the scope of the law, some state courts have been pushing back as have several federal agencies.

In New Jersey, for example, courts have reached decisions that require a strict and narrow standard for the enforceability of mandatory arbitration clauses. Providing a hopeful sign that greater judicial scrutiny may be forthcoming is a string of court cases that have found these clauses unenforceable when they conflict with public policy. See Daniela Albert, Elizabeth Heifetz & Russ Bleemer, *After Atalese*, New Jersey Opinions Are Limiting Enforcement of Arbitration Provisions, 34 *Alternatives* 114 (September 2016)(available at <http://bit.ly/2d4iLlQ>).

The 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act prohibits the use of mandatory arbitration clauses in mortgages. And, after a lengthy study echoing or presaging many of the concerns discussed about arbitration above, the Consumer Financial Protection Bureau has proposed rules that would prohibit these clauses; the CFPB’s jurisdiction includes checking accounts, credit cards and other types of consumer loans, and it targets those that preclude consumers from joining in class-action

cases. See Comments Closed on CFPB’s Consumer Arbitration Rulemaking; Wait Begins for a Class-Action Ban, 34 *Alternatives* 142 (October 2016)(available at <http://bit.ly/2eaS1eD>).

Those rules are being vigorously resisted. As are the rules issued in early October by the Baltimore-based Centers for Medicare and Medicaid Services, an agency in the U.S. Department of Health and Human Services, that prohibit requiring assent to mandatory arbitration as a

The Public’s Interest

The practice question: What’s the impact of mandatory arbitration?

The assessment: Commercial conflict resolution pioneers say the integrity of ADR is at stake, and mandatory contract requirements need to go, now.

The open issue: Trends in regulation, as well as the courts, may be reversed by the 2016 election results. Will that be good for arbitration? Or hurt its use over the long term?

condition for admission to nursing homes. (See a CMMS blog post with the details at <http://bit.ly/2epeavd>. The final rule was scheduled to go into effect late last month, but a Mississippi federal court issued an injunction against CMMS on Nov. 7. See ADR Brief on page 174 of this issue.)

Still, conflicting rulings by two U.S. Circuit Courts of Appeals underscore the roadblocks ahead. The Seventh U.S. Circuit Court of Appeals struck down an arbitration clause that barred employees from joining together as a class to sue the employer, Epic Systems Corp., a Verona, Wis., health care software provider, finding the clause to be in violation of the National Labor Relations Act, the law that gives workers the right to unionize and engage in collective action.

This decision, viewed as a major move in the opposite direction of where courts had been going after 2011, conflicts with earlier Fifth Circuit decisions. At this writing, four cases from the Seventh, Ninth, Fifth, and Second Circuits have been the subject of petitions for certiorari

to the U.S. Supreme Court, asking the Court to decide the conflict between the nation’s labor laws’ provision of access to collective action in courts, and deference to the Federal Arbitration Act. The petitions have been filed by plaintiffs in the Second Circuit, employers in the Seventh and Ninth Circuits, and by the NLRB itself in the Fifth Circuit. [For the latest on arbitration at the Supreme Court, see page 174 of this issue.]

Given that similar cases are pending in federal courts across the country, it’s likely that the subject of mandatory arbitration and prohibitions on class actions will come before the U.S. Supreme Court once again.

RESTORING CHOICE, PROTECTING RIGHTS

As a matter of policy and law, it’s vital to recognize that reliance on arbitration can obscure public interests and have the perverse effect of eroding confidence in the U.S. legal system.

Absent public scrutiny, the rigors of the adversary system—in full public view, with review and rights of appeal—the critical development of the common law, and constitutional law, over time, could be impeded.

Public awareness is growing, given the front-page coverage involving celebrities and the shocking stories occurring in institutional settings—see the James B. Stewart *N.Y. Times* column linked above—but a significant push is needed against the interests that are determined to keep mandatory arbitration the norm.

That push may be coming. The Federal Communications Commission, for example, is closing in on communication companies and their mandatory arbitration of consumer issues. See the FCC’s Oct. 27 letter at <http://bit.ly/2ekf4ae>; see also Al Franken and Mignon Clyburn, *How Your Internet Provider Restricts Your Rights*, *Time* (Oct. 23, 2016)(available at <http://ti.me/2e0hMyY>)(Franken is a U.S. Senate Democrat representing Minnesota who has long opposed mandatory arbitration, and Clyburn is one of five FCC commissioners).

The clauses are in the sights of other federal agencies as well. See George H. Friedman, *Mandatory Consumer Arbitration on the Eve of the Election*, *Securities Arbitration Commentator* (Nov. 1, 2016)(available at <http://bit.ly/2feHccg>)(discussing action on arbitration at six federal agencies). In post-election prognostication, the same author suggests that the pending rules

are not likely to be approved. George H. Friedman, *The Election is Finally Over—What Does It Mean for Arbitration?* *Securities Arbitration Commentator* (Nov. 15, 2016)(available at <http://bit.ly/2gjd6GC>). New initiatives, moreover, are likely to enhance, not weaken, the case for mandatory arbitration, putting the brakes on what was a momentum to limit or narrow its use. *Id.*

Even federal judges are looking at arbitration as an erosion of their own powers, particularly in matters that hurt consumers. Jed S. Rakoff, *Why You Won't Get Your Day in Court*, *N.Y. Rev. of Books* (Nov. 24, 2016)(available at <http://bit.ly/2fvuxTU>).

It appears that the public wants access to the court system, including the right to join and pursue class action lawsuits. Consumers, employees and patients, among others, ought to have the freedom to choose how they pursue a dispute, rather than allowing their employers, banks, hospitals, and various service providers to limit their options.

The election last month of Donald J. Trump as president and the Republicans' retention of Congressional control reduce the likelihood of further arbitration regulation in Washington. It puts the very existence of the Consumer Financial Protection Bureau at risk, as well as raises questions about the agency's still-pending arbitration-related and class-action waiver regulations.

So if Congress and federal agencies don't act, then states should fill the void. Contracts that compel arbitration deny citizens their right to a day in court.

PROFESSIONALISM, IN PRACTICE

There is something else at stake: The integrity of dispute resolution processes and the field that advocates for them.

Arbitration has its place in the justice system. That has existed for a long time. Even George Washington had an arbitration clause in his will. It is a tested and valuable process, usually generating quick, efficient resolution of disputes that need immediate resolution. Finality is a virtue.

In the field of labor relations, arbitration established its usefulness as a necessary step, in handling grievances particularly, after all negotiations, and mediation, had been tried and the parties were willing to accept a final and binding solution by their chosen arbitrator(s).

In construction, where deadlines weigh heavily on parties, a third-party arbitrator's expertise can produce a decision all can live with. The key is that arbitration is a choice by parties—an informed, voluntary, choice—as to what process will serve best and when it will be used. Outcomes are acceptable when the process is perceived as fitting and fair.

With mandatory arbitration, the process has been distorted, some say perverted. Stripping away choice has damaged its acceptance. A correction is needed so that arbitration can remain a process of choice for the right reasons, in the right situations.

The wholesale move to mandatory arbitration is a regrettable development in a field that prides itself on choice, on party determination, on procedural justice. "Forced arbitration" may not have originated "in the field," but it seems to have found a home there.

CREDITS AND BACKGROUND

Authors Sanford M. Jaffe and Linda Stamato approached the recent arbitration developments from the perspective of having been involved in the dispute resolution field for decades.

Jaffe, as a program officer at the Ford Foundation, provided support for community-based mediation, among other grants, and then invested heavily in the legal context following the April 1976 Pound Conference, held in St. Paul, Minn., which raised serious questions about the cost and effectiveness of litigation.

Increasingly interested in alternatives to litigation, the Ford Foundation, with others, provided the intellectual and financial capital that helped to develop the field.


Ford gained the support of other national foundations to create the National Institute for Dispute Resolution in order to seed the growth of the field and, later, on its own, the Fund for Dispute Resolution Research, to evaluate its impact.

Mediation sparked interest, but arbitration remained a part of the core. NIDR initially focused on the uses of negotiation and mediation in a variety of areas—healthcare, business, education and regulation—and then shifted to invest in arbitration, a move that provided an impetus to arbitration's increasing presence in the ADR field. (NIDR's successor eventually merged with

Rarely seen are misgivings about mandatory arbitration expressed by dispute resolution professionals. But we ought to be heard in the hearings and rule-making processes, and in social and print media, to support the proper use of the processes we have worked to design, develop, apply and evaluate.

We need to bring our scholarship and experience to the public forum, to defend the principles upon which this field is grounded, not the least of which is choice. We need to return to the attitudes and beliefs with which the field started decades ago, to fulfill the promises of the architects of the field.

As mandatory arbitration gains increasing scrutiny, we ought to be front and center advocating for the right use of third-party processes and arguing forcefully against their misuse.

We have an opportunity, we believe, that should not go to waste. 

other groups to create the Columbus, Ga.-based Association for Conflict Resolution.)

Stamato, a consultant to the foundation, helped to develop the agenda for the institute and prepared papers for stimulating research and practice in the field.

At the same time, the Menlo Park, Calif.-based William and Flora Hewlett Foundation, a key participant in the creation and support of NIDR, broadened its focus to fund academic centers for research, teaching and practice in more than two dozen universities around the country, one of which is the Center for Negotiation and Conflict Resolution, based at Rutgers University in New Brunswick, N.J. (website: <http://cnrc.rutgers.edu>).

Created and co-directed by the authors, and initially housed at New York University, the center expanded and moved to Rutgers in the early 1980s to work with state courts, bar associations, legislatures and not-for-profit groups in designing and implementing dispute resolution programs. Jaffe and Stamato wrote and lectured widely on developments in the field, taught at the National Judicial College, for example, and, for the New Jersey Supreme Court, laid the foundation for dispute resolution alternatives in the state's courts.

They continue to co-direct the center at Rutgers, where they teach and write on negotiation and conflict resolution, concentrating largely in public policy and planning domains. 