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## **DC ARBITRATION BILL PROVIDES MUCH-NEEDED PROTECTIONS FOR CONSUMERS AGAINST ABUSIVE ARBITRATION PRACTICES**

A bill now pending in the D.C. Judiciary Committee, B-17-050, the Arbitration Amendments Act of 2007, is a serious effort to improve the terrible environment that exists for consumers who are stuck arbitrating disputes against well-heeled corporate interests when dangerous or defective products or services harm them. As it now stands, arbitration stops consumers from enforcing rights otherwise available to them under consumer protection law, forcing them into a rigged system in which justice – for consumers – is routinely denied.

**Pre-Dispute Binding Mandatory Arbitration is Forced on Consumers Without Informed Consent.** Today, the use of binding mandatory arbitration (BMA) is fast becoming the norm in virtually every kind of *consumer* transaction. In the District of Columbia, a typical consumer likely is forced to arbitrate disputes arising from the purchase of goods like autos and homes to the purchase of services like auto insurance. BMA contracts apply to *future* disputes and often are buried in the fine print of a credit card agreement or insurance contract.

In this brave new world, district consumers have no clout to bargain over terms but must take-or-leave the contract, even for services the law requires them to purchase such as auto insurance, or for much-needed services like health insurance. Frequently, entire industries use BMA clauses – leaving consumers with no choice at all. Such unequal bargaining power in the marketplace creates a climate ripe for abuse with disastrous consequences for consumers. Consumers often have no idea they have “agreed” to arbitration until they are forced into it.

**The Arbitration Process Is Rigged Against Ordinary Consumers.** Through their far larger market power, companies, especially large corporations with national and even international presence, are aware that they can rig the arbitration process in their favor. By including BMA clauses in boilerplate consumer contracts and then by using the same arbitration service companies time and time again to arbitrate disputes with consumers, they reap the benefits of a well-demonstrated “repeat-player” bias. Arbitration providers do not bite the hand that feeds them but instead compete hard to gain and retain valuable corporate business by marketing themselves as favorable to business and ruling overwhelmingly against ordinary consumers. One recent California arbitrator examined by Public Citizen had ruled in favor of business in 526 cases out of 532 – merely 1.14 percent was for the consumer.

**The High Cost of Arbitration Prevents Ordinary Consumers from Getting a Fair Shake.** Arbitration is a private, pay-to-play system where high costs and plenty of extra *ala carte* fees tilt the process to favor corporate interests. The more you play, the more you pay. The price of this private system is often “justice denied” for consumers, many of whom cannot afford the often outrageously expensive fees charged by arbitrators for motions and other routine matters.<sup>1</sup>

**The Courts' View of the Federal Arbitration Act (FAA) Leaves Consumers in the Lurch.**

The FAA was enacted in 1925 and does encourage arbitration as an alternative forum to a court. Under the FAA, courts have applied rules governing contracts in deciding if an arbitration agreement is enforceable, which focuses on whether the parties knowingly bargained for the agreement. That makes sense for disputes between businesses or other parties of equal bargaining power, as both parties can and typically do bargain over the specific terms of each contract. Yet the courts have been blindly applying these formalistic contract rules to boilerplate consumer contracts, which are far more one-sided and never actually bargained for by both parties. This legal trend has disastrous consequences for consumers.

**The DC Bill Would Help to Protect Consumers from Binding Mandatory Arbitration.**

The bill levels the playing field in three main ways. *First*, it would eliminate the ability of insurers to use pre-dispute BMA in insurance contracts with consumers. This would benefit residents in the District, who would have the ability to hold insurers accountable in a court of law for harm for improper denial of health care coverage or a refusal to pay a claim on a homeowner's policy. *Second*, the bill makes the arbitration process itself fairer to consumers, giving them a better chance of success when they are forced to arbitrate. *Third*, the bill provides some much-needed oversight of arbitration service providers operating in the District, which currently are unregulated. The bill, which mirrors a law enacted in California, mandates public disclosure of arbitration costs and outcomes on a quarterly basis and in a searchable Web database. Such critical information would give consumers an opportunity to make a more informed decision in choosing an arbitrator and pricing their options.

**Nothing in the DC Arbitration Bill Runs Afoul of the Federal Arbitration Act (FAA).**

Even though judge-made law interpreting the FAA has stymied some state efforts to address the problems of consumer arbitrations, the FAA does not preempt all state efforts. State procedural rules cannot be preempted by the FAA. *Volt Info. Sciences, Inc. v. Bd. Of Trustees*, 489 U.S. 468, 476-477 (1989). The bill's improvements to the arbitration process are entirely consistent with the FAA. Importantly, the bill's exclusion of pre-dispute BMA in consumer insurance contracts is also, without a doubt, legally valid. Courts consistently have ruled that a federal law, the McCarran-Ferguson Act (under which states regulate insurers), permits states to regulate insurance, including banning pre-dispute arbitration clauses in insurance contracts.<sup>2</sup> Finally, the bill's oversight of arbitration service providers is not preemptive of the FAA, as it merely provides consumers with information about how arbitrators have ruled, presents potential conflicts of interest, and discloses estimated costs of arbitration.

**We urge your support of B-17-050, the Arbitration Amendments Act of 2007. Give consumers in the District the fair shake – and better deal – that they deserve.**

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<sup>1</sup> See, e.g., *Testimony of Brad Blower counsel at Relman & Dane to the D.C. Council Hearing on B17-0050 on behalf of the Give Me Back My Rights Campaign* at 1-3. At this March 23<sup>rd</sup> hearing attorney Brad Blower testified that he witnessed first-hand the exorbitant arbitration fees charged when representing a group of Afro-Americans in a discrimination suit against auto dealer Jim Koons Automotive Companies for discriminatorily high interest rates. *Id.* The estimate for each of his clients to proceed in arbitration was an eye-popping \$14,300. *Id.*

<sup>2</sup> See Letter to the Honorable Phil Mendelson from the Center for Responsible Lending (April 6, 2007) at 3, n. 6, citing to several decisions, including *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821 (8<sup>th</sup> Cir. 2001). Twenty-three states prohibit pre-dispute binding arbitration clauses in insurance contracts: Arkansas, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Washington and Wyoming. *Id.* at 5, Attach. I. Wisconsin's insurance commissioner has authority to disapprove a policy if deemed deceptive, misleading or in violation of law, under which health insurance policies with arbitration policies are routinely disapproved. *Id.*

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