Case No. 09-CV-900

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

PAMELA B. STUART,
Appellant,

v.

BARBARA J. WALKER,
Appellee.

DISTRICT OF COLUMBIA,
Intervenor.

On appeal from the District of Columbia Superior Court

On rehearing *en banc*

UNOPPOSED MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE AS AMICUS CURIAE SUPPORTING THIS COURT'S JURISDICTION AND SUPPORTING NO PARTY

Adina H. Rosenbaum (Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Public Citizen, Inc., hereby moves for leave to file an amicus curiae brief supporting jurisdiction over this appeal. All parties have consented to Public Citizen's participation.

Public Citizen, a non-profit consumer advocacy organization with more than 225,000 members and supporters nationwide, works for enactment and effective enforcement of laws protecting consumers, workers, and the general public. As forced arbitration provisions have become increasingly common in consumer contracts, Public Citizen has grown increasingly concerned that forced arbitration deprives consumers of the chance to hold corporations accountable in court. Arbitration proceedings are often costlier than court, provide fewer procedural protections, and may be structurally tilted in favor of corporate interests. Accordingly, where consumers are forced into arbitration, not only may corporate defendants evade justice in the courts, they may evade justice altogether. Because mandatory binding arbitration is detrimental to consumers' ability to hold corporations accountable when they violate the law, Public Citizen advocated before the D.C. Council for the passage of the provision of the D.C. Code at issue in this appeal. *See* J.A. (en banc) 71 (Letter from Public Citizen to Councilmember Mendelson, Apr. 5, 2007).

Public Citizen is very knowledgeable about the impact of arbitration on consumer litigation. In addition to its other briefs and testimony on this issue over the years, Public Citizen has published several reports on forced arbitration. Two of these reports, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sep. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf, and *Forced Arbitration: Unfair and Everywhere* (Sep. 2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf, document how arbitration affects the adjudication of cases pitting consumers against corporations and help provide context for the passage of the D.C. Code provision at issue in this case.

For these reasons, this Court should permit the filing of the attached brief and the participation of Public Citizen as amicus curiae.

Date: September 14, 2011

Respectfully submitted,

_____

Adina H. Rosenbaum (Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2011, a copy of this motion was mailed, postage prepaid, to:

Pamela B. Stuart
1750 N Street NW
Washington, DC 20036

Barbara J. Walker
311 Prince Street
Alexandria, VA 22314

James C. McKay, Jr.
Office of the Attorney General for the District of Columbia
Office of the Solicitor General
441 Fourth Street NW, 6th Floor South
Washington, DC 20001

_____

Adina H. Rosenbaum (Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St. NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

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DISTRICT OF COLUMBIA,
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BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN SUPPORTING THIS COURT'S JURISDICTION AND SUPPORTING NO PARTY

Adina H. Rosenbaum (Bar. No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

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INTEREST OF AMICUS

Public Citizen, Inc., a non-profit consumer advocacy organization with more than 225,000 members and supporters nationwide, appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws protecting consumers, workers, and the general public. Public Citizen supports legislative efforts to reform mandatory arbitration because forced arbitration, which has become ubiquitous in consumer transactions, deprives consumers of the chance to hold corporations accountable if they violate the law or their contracts with their customers.

To protect consumer interests, Public Citizen urged the D.C. Council to pass the provision of the D.C. Code at issue in this appeal. *See* J.A. (en banc) 71 (Letter from Public Citizen to Councilmember Mendelson, Apr. 5, 2007). Additionally, in the last five years Public Citizen has published several reports on the issue of arbitration, including two, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sep. 2007),[1] and *Forced Arbitration: Unfair and Everywhere* (Sep. 2009),[2] that document how arbitration affects the adjudication of disputes between consumers and corporations. The reports help provide context for the passage of the D.C. Code provision at issue in this case.

BACKGROUND

Prior to 2007, under the D.C. Code, only denials of motions to compel arbitration—but not grants of such motions—could be immediately appealed. *See Hercules & Co. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1071 (D.C. 1991) (under then-effective D.C. Code § 16-4317(a)(1), *denial* of motion to compel arbitration immediately appealable); *Am. Fed. of Gov't Employees,*

[1] *Available at* http://www.citizen.org/documents/ArbitrationTrap.pdf.

[2] *Available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf.

AFL-CIO v. Koczak, 439 A.2d 478, 480 (D.C. 1981) (under then-effective D.C. Code § 16-4317(a)(1), *grant* of motion to compel arbitration *not* immediately appealable).

Public Citizen urged the Council to eliminate this asymmetry because it placed the party opposing arbitration at a disadvantage regarding choice of forum. Although the instant appeal involves a consumer—here, a consumer of legal services—*seeking* to arbitrate a dispute, in most instances, the entity trying to compel arbitration is a corporation and the party resisting arbitration is a consumer. Individuals in the District and throughout the country regularly sign consumer contracts—such as contracts to open a bank account, buy a cell phone, or receive a credit card—that contain clauses forcing them to waive their right to a day in court in favor of binding mandatory arbitration. Forced arbitration clauses appear in consumer contracts used by the vast majority of major providers in the credit card, banking, cell-phone service, brokerage, and home building industries: A Public Citizen report from 2007 found that forced arbitration clauses were used by 89% of surveyed businesses in these five industries, including by large corporations such as Citibank, Capital One, American Express, Discover, SunTrust, Verizon, AT&T, Sprint-Nextel, Charles Schwab, Wells Fargo, Morgan Stanley, Prudential, Merrill Lynch, and Fidelity.[3] As Public Citizen explained in a letter to Councilman Mendelson,

> in virtually all cases the party desiring arbitration is a business, not a consumer. The awful reality is that consumers are caught up in predispute binding mandatory arbitration agreements that they know nothing about and have not bargained for. A one-way rule that only permits appeals from court orders denying arbitration unreasonably disadvantages consumers in that situation (which is the norm) and elevates arbitration above all else.

[3] Public Citizen, Forced Arbitration: Unfair and Everywhere 9, 11, 13, 21, 22 (Sep. 2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf; *see also* Jonathan D. Glater, *Companies Unlikely To Use Arbitration With Each Other*, N.Y. Times, Oct. 5, 2008 (noting University of Michigan study finding mandatory arbitration clauses in 75% of the consumer contracts used by 21 telecommunications and financial services companies).

J.A. (en banc) 71.

In 2007, the Council eliminated the appellate asymmetry between orders compelling and orders denying arbitration: Under the new law, "[a]n appeal may be taken from [a]n order denying *or granting* a motion to compel arbitration." D.C. Code § 16-4427(a)(1) (emphasis added).

ARGUMENT

BECAUSE IT QUALIFIES AS A "FINAL ORDER," AN ORDER COMPELLING ARBITRATION MAY BE APPEALED CONSISTENT WITH TITLE 11 OF THE D.C. CODE AND THE HOME RULE ACT.

The question in this case is whether permitting appeals of orders compelling arbitration violates the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774, § 602(a)(4), *codified at* D.C. Code § 1-206.02(a)(4) (hereinafter "Home Rule Act"), which prohibits expansions of jurisdiction beyond what is provided in Title 11 of the D.C. Code. The answer is no, because of the nature of orders compelling arbitration and the D.C. courts' long history of flexibility and practicality in considering appellate jurisdiction. Under all but the most formalistic interpretation, an order compelling arbitration fits comfortably within the definition of a "final order" that may be appealed under Title 11. *See* D.C. Code § 11-721(a)(1). A contrary answer would cause an abrupt upheaval in this Court's appellate jurisprudence, with the result that numerous well-settled rules of appellate review would be either cast into doubt or logically (if not explicitly) overruled.

A. This Court Has Taken A Practical View Of What Constitutes A "Final" Order.

"The District of Columbia Court of Appeals has jurisdiction of appeals from [] all final orders and judgments of the Superior Court of the District of Columbia." D.C. Code § 11-721(a). Appellate review of an order granting a motion to compel arbitration is well within Title 11's grant of jurisdictional authority, because an order compelling arbitration is a "final order."

Although it is often repeated that "a final order is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment," *Stuart v. Walker*, 6 A.3d 1215, 1216 (D.C. 2010) (citations and internal quotation marks omitted), *vac'd on rehearing en banc*, ___ A.3d ___ (D.C. July 8, 2011), the U.S. Supreme Court has recognized that "appellate review [is not limited] to those final judgments which terminate an action"; instead, "the requirement of finality is to be given a practical rather than a technical construction." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 171 (1974) (internal citations, quotation marks and ellipsis omitted). Accordingly, this Court has found that "[s]ome trial court rulings that do not conclude the litigation nonetheless are sufficiently conclusive in other respects that they satisfy the finality requirement of our jurisdictional statute." *Rolinski v. Lewis*, 828 A.2d 739, 746 (D.C. 2003). The Supreme Court has identified one such group: "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* (quoting *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949)).

This Court has recognized others, such as orders adjudicating compensation of individuals involved in the administration of a will, orders determining lineage for the purpose of administering a will, orders denying visitation rights in child-custody disputes, and orders staying enforcement of child support. *See, respectively, In re Delaney*, 819 A.2d 968, 993-94 (D.C. 2003); *Murphy v. McCloud*, 650 A.2d 202, 203-06 (D.C. 1994); *In re D.M.*, 771 A.2d 360, 364-66 (D.C. 2001); *Wilkins v. Bell*, 917 A.2d 1074, 1078 (D.C. 2007). Most germane to the present context, this Court has repeatedly treated orders *denying* motions to compel arbitration as

final orders. *See, e.g., 2200 M Street, L.L.C. v. Mackell,* 940 A.2d 143, 147 n.2 (D.C. 2007); *Benefits Communic'n Corp. v. Klieforth,* 642 A.2d 1299, 1301 n.10 (D.C. 1994); *Hercules & Co. v. Beltway Carpet Serv., Inc.,* 592 A.2d 1069, 1071 (D.C. 1991). For the reasons that follow, orders compelling arbitration should likewise be deemed final by this Court.

B. An Order Compelling Arbitration Is "Sufficiently Conclusive" In Nature Because It Diverts The Entire Dispute Onto A Different Adjudicative Track With Different Procedures And Characteristics.

An order compelling arbitration, like an order denying arbitration, is "sufficiently conclusive," *Rolinski*, 828 A.2d at 746, that it should be deemed final for the purpose of appeal. Although it does not dispose of the entire matter, an order compelling arbitration conclusively adjudicates a significant right—whether the parties may remain in court—and as a result brings about a sea change in the manner in which the underlying dispute will be resolved.

Arbitration differs from litigation in fundamental respects and provides fewer procedural and structural protections to the parties. For instance, discovery procedures and subpoenas are available only at the discretion of the arbitrator.[4] The right of appeal is restricted to very limited circumstances.[5] Costs are structured differently, with high up-front fees to initiate dispute resolution—fees that can be five to 30 times greater than filing fees in federal or state trial courts—along with additional fees for certain types of procedures (such as discovery) for which

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[4] *See* Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 38 (Sep. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf (hereinafter "Public Citizen, Arbitration Trap"); *see also* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 Notre Dame L. Rev. 1247, 1276 (2009) (noting that for plaintiffs in complex cases "it can be essential to have a process that allows not only the casting of a wide net of inquiry, but also a progressive, sequenced investigation in which leads can be pursued to reveal further leads. Arbitration's discovery limitations constrict the ability to conduct such an investigation.").

[5] *See* Public Citizen, Arbitration Trap at 8, 39-40; *see also* Schwartz, *Mandatory Arbitration and Fairness*, 84 Notre Dame L. Rev. at 1281 ("Arbitration's 'final and binding' quality is buttressed by rules that limit the grounds for appeal and restrict the scope of appellate review to a deferential standard.").

a court would charge no additional fees.[6] And the arbitration system as a whole generally lacks characteristics, such as the recognition of past cases as precedential authority and the ability to obtain relief across a class of complainants, that serve in the judicial system to foster transparency in the dispute-resolution process and facilitate the righting of systemic wrongs.[7]

Because of these vast differences between arbitration and litigation, the decision to compel arbitration significantly affects the likely outcome of a case by changing many of the ground rules. The Supreme Court has "long recognized that the choice of forums inevitably affects the scope of the substantive right to be vindicated." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974) (citation and internal quotation marks omitted). A party forced into arbitration and unable to appeal that decision might well be motivated to accept a smaller settlement or drop the case altogether rather than pay arbitration fees to participate in a process that provides fewer opportunities to discover relevant facts, a circumscribed right of appeal, and less transparency and predictability. Therefore, the decision to compel arbitration fits comfortably with other decisions—such as temporary child support decisions and will-administration decisions—that this Court has deemed final.

Moroever, an order *compelling* arbitration cannot be meaningfully distinguished from an order *denying* arbitration, which this Court has permitted to be immediately appealed. *E.g.*, *Hercules,* 592 A.2d at 1071. Both types of order, though falling short of disposing of an entire matter, conclusively determine the forum and manner in which it will be adjudicated. The only

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[6] *See* Public Citizen, Arbitration Trap 8, 36.

[7] *See id.* at 4, 7, 43; *see also* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017, 1042 (1996) ("A related problem with mandatory arbitration of statutory rights is that statutory disputes are being decided in private tribunals which generate no publicly available norms to guide actors or decisionmakers in the future. . . . This will mean that arbitrators who want to interpret the statutes correctly will have no authoritative statutory interpretations to look to for guidance." (footnote omitted)).

reason this Court previously treated these two types of orders differently is because the D.C. Code did so. *See Am. Fed. of Gov't Employees, AFL-CIO v. Koczak*, 439 A.2d 478, 480 (D.C. 1981). Now that the Code treats them the same, *see* D.C. Code § 16-4427(a)(1), this Court should do likewise.

Given the significant consequences that follow from orders compelling arbitration, it is unsurprising that numerous other jurisdictions—including Maryland, whose decisions are "accorded the most respectful consideration by [D.C.] courts," *In re Estate of Turpin*, 19 A.3d 801, 808 n.11 (D.C. 2011)—have treated orders compelling arbitration as final orders. *See Town of Chesapeake Beach v. Pessoa Const. Co.*, 625 A.2d 1014, 1017-19 (Md. 1993); *Horsey v. Horsey*, 620 A.2d 305, 311 (Md. 1993); *see also, e.g.*, *Kremer v. Rural Community Ins. Co.*, 788 N.W.2d 538, 549 (Neb. 2010); *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026, 1034 (Miss. 2010); *Wein v. Morris,* 944 A.2d 642, 650 (N.J. 2008); *Okla. Oncology & Hematology P.C. v. U.S. Oncology, Inc.*, 160 P.3d 936, 943 (Okla. 2007); *Cabrini Med. Ctr. v. Desina*, 479 N.E.2d 217, 219 n.* (N.Y. 1985). Decisions holding otherwise tend to rest on the fact that the governing statutes at issue—unlike the provision of the D.C. Code at issue here—have not rendered this particular type of order appealable. *See, e.g., Muao v. Grosvenor Properties*, 122 Cal. Rptr. 2d 131, 134 (Cal. Ct. App. 2002); *Chem-Ash, Inc. v. Ark. Power & Light Co.*, 751 S.W.2d 353, 354 (Ark. 1988); *Sch. Comm. of Agawam v. Agawam Educ. Ass'n*, 359 N.E.2d 956, 957 (Mass. 1977).

When courts order arbitration, in some instances they *stay* the underlying action while arbitration proceeds; in other cases, courts *dismiss* the underlying action entirely. Although the Superior Court in the instant case stayed the action in favor of arbitration rather than dismissing the action in favor of arbitration, this should not affect the determination of finality: As the New

Jersey Supreme Court has explained, "When the parties are ordered to arbitration, the right to appeal should not turn on whether a trial court decides to stay the action or decides to dismiss the action. Rather, the same result should apply in either case. In that way the parties will know with relative certainty that the order is appealable as of right." *Wein,* 944 A.2d at 650; *accord*, *Kremer*, 788 N.W.2d at 548; *Sawyers*, 26 So. 3d at 1034. And as Judge Steadman noted in his dissent from the panel decision in this case, treating orders compelling arbitration differently depending on whether the underlying action is stayed or dismissed would permit trial courts to choose by means of a label whether their arbitration decisions will be immediately appealable or not. *See Stuart*, 6 A.3d at 1222-23 (Steadman, J., dissenting).

C. Rejecting Jurisdiction Here Would Cast Doubt on Numerous Settled Points of D.C. Law Regarding What Types of Decisions May Be Appealed.

As noted above and in Judge Steadman's dissent from the panel opinion, this Court has in several contexts recognized a class of particularly significant orders as "final" even though they do not dispose of an entire case. *See Stuart*, 6 A.3d at 1221-22 (Steadman, J., dissenting). Denying jurisdiction in this case would draw into question all of those precedents, spanning at least two decades and a variety of contexts, from family law to probate to arbitration. It would prevent several groups of litigants from protecting important interests—such as the interest in seeing one's children during the pendency of family court proceedings—from erroneous determinations at the trial-court level. *See, e.g., In re D.M.*, 771 A.2d 360, 364-66 (D.C. 2001) (permitting appeal on this issue). And it would overrule the D.C. Council's decision to authorize appeals of *denials* (as well as grants) of motions to compel arbitration, *see* D.C. Code § 16-4427(a)(1), because a holding that orders *compelling* arbitration are non-final, and therefore unappealable, would apply with

equal or even stronger force to orders *denying* arbitration, which do not change the manner of dispute resolution but instead allow the litigation to continue.

This Court should not cast doubt on so many of its prior decisions, but rather afford the concept of finality a "practical rather than a technical construction," *Eisen,* 417 U.S. at 171 (citations and internal quotation marks omitted). Accordingly, this Court should assert jurisdiction over the instant appeal.[8]

CONCLUSION

This Court should hold that D.C. Code § 16-4427(a)(1) is consistent with the Home Rule Act, and that the Court has jurisdiction to hear this appeal.

Date: September 14, 2011

Respectfully submitted,

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Adina H. Rosenbaum (Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St. NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

[8] If this Court concludes that such an order is not final, it should nonetheless hold that an order compelling arbitration is appealable as an "interlocutory order[] . . . granting, continuing, modifying, refusing, or dissolving or refusing to dissolve or modify [an] injunction[]," D.C. Code § 11-721(a)(2)(A), for the reasons advanced by the District of Columbia in its brief.

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2011, a copy of this brief was mailed, postage prepaid, to:

Pamela B. Stuart
1750 N Street NW
Washington, DC 20036

Barbara J. Walker
311 Prince Street
Alexandria, VA 22314

James C. McKay, Jr.
Office of the Attorney General for the District of Columbia
Office of the Solicitor General
441 Fourth Street NW, 6th Floor South
Washington, DC 20001

_____

Adina H. Rosenbaum (Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St. NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org