

# THE CONSUMER PITFALLS OF BINDING ARBITRATION

*A Report by the Texas Watch Foundation*

## Executive Summary

Most people would think twice before they signed away their right to free speech. Many would hesitate before they agreed to waive the right to vote, and more than a few would pause before they passed on the right to freely worship the god of their choosing. The same can be said of the fundamental right to a jury trial. However, it is now simply commonplace for Texans to unknowingly sign away this cornerstone of democracy.

Everyday, folks from all walks of life—parents, homeowners, medical professionals, business executives, consumers, small business owners, and nursing home residents—unknowingly encounter binding arbitration agreements. These hidden contract clauses may pose significant pitfalls for consumers as they take conflict resolution out of the public domain of court proceedings and into private venues controlled by profit-driven arbitrators.

The first and most significant pitfall occurs as the vast majority of hard working Texans to inevitably and unsuspectingly waive their constitutional right to a jury trial<sup>1</sup>.

Other consumer pitfalls include:

- The loss of time-tested court procedures and processes designed to produce impartial and fair justice;
- Secrecy of legal proceedings;
- Limited public accountability over entities rendering decisions;
- Increased potential for bias against consumers; and
- Higher costs to consumers making claims.

“Binding arbitration” arises out of a purported agreement between two or more parties where disputes arising from a contract are to be resolved before a private judge called an “arbitrator.” A ruling by the arbitrator is by and large final, leaving unsatisfied participants with no place to turn.

By all accounts, binding arbitration has increased largely through the careful and methodical use of adhesion contracts.<sup>2</sup> Contracts of adhesion are large boiler-plate documents with a dizzying amount of fine print. By definition, adhesion contracts occur in take it or leave it scenarios, where the consumer has no other choice but to accept the terms of the contract.<sup>3</sup>

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<sup>1</sup> U.S. CONST. amend. VII (amended 1798); Tex. CONST. Art. I, Section 15 (1876)(“The right of trial by jury shall remain inviolate.”).

<sup>2</sup> “Arbitration: Happy Endings Not Guaranteed,” *Business Week*, Nov. 20, 2000.

<sup>3</sup> “Some sets of trade and professional forms are extremely one-sided, grossly favoring one interest group against others, and are commonly referred to as contracts of adhesion. From weakness in bargaining position, ignorance, or indifference, unfavored parties are willing to enter transactions controlled by these lopsided legal documents.” Quintin Johnstone & Dan Hopson, Jr., *Lawyers and Their Work* 329-30 (1967).” Black’s Law Dictionary, 7<sup>th</sup> Ed., 1999; “[C]ourts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a

At one point, binding arbitration was widely endorsed in the business community as the best way to resolve disputes in a quick, unbiased, economical manner. However, the consensus formerly endorsing binding arbitration in the business community no longer exists. Doctors<sup>4</sup>, car dealers<sup>5</sup> - even the actual arbitrators<sup>6</sup> – recognize the many pitfalls of binding arbitration.

This report is intended to serve as a comprehensive overview of arbitration in the state of Texas, including information on:

- I. History of binding arbitration and prevailing myths;
- II. Relevant law;
- III. Advocates of arbitration;
- IV. How arbitration actually harms consumers; and
- V. What consumers can do to protect themselves.

The report raises questions about the quality of justice delivered through binding arbitration between parties of different bargaining levels and documents the uneven playing field binding arbitration offers consumers and citizens seeking justice.

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party with weaker power. Some commentators have questioned whether contracts of adhesion can justifiably be enforced at all under traditional contract theory because the adhering party generally enters into them without manifesting knowing and voluntary consent to all their terms. See, e.g., Rakoff, Contracts of Adhesion: An Essay in Reconstruction, [96 Harv.L.Rev. 1173, 1179-1180 \(1983\)](#); Slawson, Mass Contracts: Lawful Fraud in California, 48 S.Cal.L.Rev. 1, 12-13 (1974); K. Llewellyn, The Common Law Tradition 370-371 (1960).” *Carnival Cruise Lines v. Shute*, 111 S.Ct. 1522, 1530-31 (1991).

<sup>4</sup> See Chapter IV *infra*.

<sup>5</sup> National Automobile Dealers Association, press release, October 4, 2000:

[http://www.nada.org/Content/NavigationMenu/MediaCenter/PressReleases/Leg\\_10\\_04\\_00.htm](http://www.nada.org/Content/NavigationMenu/MediaCenter/PressReleases/Leg_10_04_00.htm)

<sup>6</sup> Charles Ornstein, *Arbitration Provider Breaks with HMOs*, Los Angeles Times, March 11, 2002 (“Patients should have the right to forgo arbitration in health care disputes and file lawsuits directly in court, the nation’s largest arbitration provider plans to tell California lawmakers”)

## Chapter I Overview

### Historical Development

The early arbitration movement culminated in 1923, when legislation was first introduced that would make arbitration agreements enforceable in federal courts. By 1925, the Federal Arbitration Act<sup>7</sup> (FAA) became law, allowing businesses to contractually agree to private resolution of commercial disputes. The FAA, as passed, expressly endorsed arbitration of disputes arising from maritime and commercial contracts.<sup>8</sup>

Original participants in the debate did not envision that the FAA would be applied in a consumer context. Mr. W.H.H. Piatt, the American Bar Association (ABA) point person proposing the legislation, stated that the FAA would apply, “between merchants one with another, buying and selling goods.”<sup>9</sup> The bill’s authors and supporters emphasized the FAA would only apply to “merchants,” as opposed to consumers.<sup>10</sup> For over a half century, that sentiment prevailed.

Sixty years later, a new interpretation of the FAA emerged. In 1983 the U.S. Supreme Court suddenly interpreted the FAA as overcoming “longstanding judicial hostility to arbitration provisions that had existed in English common law and had been adopted by American courts and to place arbitration agreements upon the same footing with other contracts.”<sup>11</sup>

According to the Court, the FAA created a “liberal federal policy favoring arbitration,” stamping arbitration clauses with a presumption of enforceability.<sup>12</sup> This new found judicial policy preference arose in the consumer context, but was soon extended to civil rights claims by employees against employers<sup>13</sup> and statutory claims previously immune to stealth arbitration clauses.<sup>14</sup> Today, arbitration agreements dominate modern life as clauses appear in everything from credit card agreements to nursing home admission papers.<sup>15</sup>

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<sup>7</sup> 9 U.S.C. §1, *et. seq* (2001).

<sup>8</sup> 9 U.S.C. §2 (2001).

<sup>9</sup> Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration. Hearing S. 4213 and 4214 before Subcommittee of the Committee on the Judiciary, 67<sup>th</sup> Cong., Sess. 9-10 (1923).

<sup>10</sup> *Id.*

<sup>11</sup> *Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 42 (1983).

<sup>12</sup> *Id.*

<sup>13</sup> *Gilmer v. Johnson Lane Corporation*, 500 U.S. 20 (1991)(age discrimination case can go through arbitration).

<sup>14</sup> The U.S. Supreme Court originally held that claims brought under the 1933 Securities Act could not be subjected to binding arbitration. *Wilko v. Swan*, 346 U.S. 427, 435 (1953). However, the court reversed itself as it found new meaning in the FAA. *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 481 (1989).

<sup>15</sup> Mary Flood, *Arbitration Not Always Fair, Cheap for Parties in Dispute*, Houston Chronicle, April 11, 2001.

## **The Industry of Arbitration**

An entire economy of private civil justice administration provides the structure for implementing binding arbitration.<sup>16</sup> With the civil justice system in many instances privatized and displaced by rampant use of adhesion contracts, numerous arbitration firms fill the void, effectively serving as judge and jury, while providing rules of procedure. Binding arbitration provisions in consumer and employee contracts normally specify which arbitration firm will fill the vacuum and step in for the courts. Three representative firms, and selected statements from each, follow:

### **A. American Arbitration Association (AAA).**

“Most of the recent growth in contractual arbitration has been in the consumer, employment, health care and international arenas. For example, nearly 400 companies and 4 million employees worldwide turn to the American Arbitration Association to resolve workplace conflicts. To hear and resolve these cases, the AAA offers a national panel of experts – diverse in gender and ethnicity – who have significant employment law experience.”<sup>17</sup>

### **B. National Arbitration Forum (NAF).**

“Everyone, big or small, is on equal footing with the Forum. We are only compensated for administering cases. We receive this compensation in the form of filing fees and hearing fees from the parties who file a dispute with us. The arbitrators are compensated for their time, regardless of who prevails in each individual case. As a neutral arbitration administrator, the Forum has no exclusive client relationships. We do not contract with, represent or counsel our users, whether they are businesses or individuals.”<sup>18</sup>

### **C. JAMS (formerly known as Judicial Arbitration and Mediation Service).**

“Arbitration -- either entered into voluntarily after a dispute has occurred, or as agreed to in a pre-dispute contract clause -- is generally "binding." By entering into the arbitration process, the parties have agreed to accept an arbitrator's decision as final. There *are* instances when an arbitrator's decision may be modified or vacated, but they are extremely rare. The parties in an arbitration trade the right to appeal for a speedier, less expensive, private process in which it is certain there will be a resolution.”<sup>19</sup>

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<sup>16</sup> The arbitration industry is also lobby, advocating for expansion of arbitration. See Chapter IV.

<sup>17</sup> AAA Overview <http://www.adr.org/>

<sup>18</sup> NAF “How Is The Forum Compensated,” <http://www.arb-forum.com/about/questions.asp#20>

<sup>19</sup> JAMS Ethics Guidelines for Arbitrators [http://www.jamsadr.com/ethics\\_for\\_arbs.asp](http://www.jamsadr.com/ethics_for_arbs.asp)

**Differences Between Courts and Private Arbitration**

Arbitration advocates, including the arbitration firms listed in the previous section, argue that the distinctions between arbitration and civil court make binding arbitration a more desirable avenue for dispute resolution. However, opponents of binding arbitration argue that the policy goals of arbitration are rarely met, and that arbitration inherently favors repeat defendants, as opposed to our civil courts. The following chart lists the inherent traits of public court proceedings as opposed to private binding arbitration.

<b><u>Things Inherent to Public Court Proceedings:</u></b>	<b><u>Things Inherent To Binding Arbitraion:</u></b>
Right to an appeal	Very limited ability to appeal <sup>20</sup>
Development of case law/precedent	No case law/precedent
Public proceedings	Private proceedings <sup>21</sup>
Public records	Private records
Mandatory record of proceedings	No mandatory record of proceedings
Injunctive relief	No injunctive relief
Discovery	Limited discovery
Trial by jury/peers	Trial by privately paid for judge
Rules of evidence	Rules of evidence optional
Class actions	No Class actions <sup>22</sup>

These differences present several issues for parties to consider before they enter into binding arbitration:

- Limited discovery in the course of arbitration, for example, can limit the ability of a plaintiff to establish what went wrong if there is a product failure;
- Lack of evidentiary rules in arbitration can allow hearsay and other typically inadmissible evidence to come into play with no way of appealing their submission to the arbitrator;
- The secrecy of arbitration can permit a biased arbitrator to rule with impunity;
- Arbitrators cannot force bad actors to cease harmful acts through injunctive relief;
- The absence of an appeal makes an arbitrator’s decision final;
- The absence of case law can make a proceeding unpredictable for consumers; and
- The absence of class actions makes it impossible for consumers who suffered serious harm unable to band together and seek redress in an economically efficient manner.

<sup>20</sup> See, e.g., Major League Baseball Players Association v. Garvey, 532U.S.504,509 (2001); United Transportation Union v. Gateway Western Railway Co., \_\_F3d\_\_, 2002 WL437949 (7<sup>th</sup> Cir. March 21, 2002) (Posner, J.) (Felony conviction of arbitrator while proceedings are pending is not grounds to vacate later award.

<sup>21</sup> See, e.g., National Arbitration Forum, Code of Procedure Rule 4 (entitled “Confidentiality”) (“Arbitration proceedings are confidential unless all parties agree otherwise. A party who discloses confidential information shall be subject to sanctions.”).

<sup>22</sup> See, e.g., Champ v. Siegel Trading Co., 55F.3d269 (7<sup>th</sup> Cir. 1995).

## **Policy Objectives Of Arbitration—Failed Promises**

The peculiarities of arbitration can serve the needs of parties of equal bargaining strength who voluntarily agree to private dispute resolution. In such circumstances, the objectives of arbitration - quick, unbiased, economical resolution of disputes – may be attained. However, in numerous arenas, binding arbitration fails to achieve the goals its advocates tout.

### **A. “Arbitration Is Quick”**

One of the biggest draws to arbitration is the purported speedy nature of proceedings. Advocates of arbitration argue that the industry of arbitration provides a more rapid resolution of grievances. However, a wide array of business interests with first hand knowledge of binding arbitration now agree that arbitration is not as quick as thought.

For example, in an interview with the Houston Chronicle, Bryan Whitworth, Executive Vice President of Phillips Petroleum, stated. “Arbitration may seem like it is an easy single way to solve problems. But, we’ve found time delays; it’s not saving expenses; and the courts offer just as good an opportunity.”<sup>23</sup> Whitworth stated that Phillips Petroleum hopes to keep arbitration clauses out of most future contracts.<sup>24</sup>

On the opposite end of the business spectrum, arbitration agreements in trial attorney contracts with clients are no longer widely endorsed because of time delays. For example, in Harris County, arbitration cases run an average of “nine or more months,” which is about the same time it takes a case to work through the civil justice system in the greater Houston area.<sup>25</sup>

To be sure, there are those occasions where arbitration may run more quickly than a civil court proceeding. However, that is in large part because arbitration proceedings can vastly limit discovery. By limiting discovery, bad actors easily avoid liability, for the consumer never can prove how the bad act occurred. For example, by withholding documents revealing the faulty engineering of a car tire or the blueprints of a shoddily assembled living structure, manufacturers can prevent consumers from proving the validity of their claims, no matter how egregious the harm.<sup>26</sup>

### **B. “Arbitration Is Unbiased”**

Arbitration firms confront conflicts of interest far exceeding those faced by the courts. In many instances arbitration firms contract with major corporations to handle all consumer disputes. Arbitrators then feel pressure to rule in favor of the corporation in order to retain the business for their firm.<sup>27</sup> The NAF handled collection disputes for the bank First

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<sup>23</sup> Mary Flood, *Arbitration Not Always Fair, Cheap for Parties in Dispute*, Houston Chronicle, April 11, 2001.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> David F. Bragg, *Binding Arbitration: A Wolf In Contract Clothing*, 2001.

<sup>27</sup> Carolyn E. Mayer, *Win Some, Lose Rarely? Arbitration Forum’s Rulings called One-Sided*, Washington

USA. First USA paid NAF several million dollars as a result of the contract, and First USA won 99.6% of the cases out of 50,000 total.<sup>28</sup>

At times it can be hard to distinguish arbitration firms from major clients. The AAA has held shares in AT&T, Bank of America, Aetna, Cigna Corp., General Electric - all of which the AAA has resolved disputes for. General Electric and Sprint corporate officers have sat on the AAA board. In 2000, the AAA received 2.1 million dollars in membership fees from GE Industrial Systems, Aetna, and other corporate interests.<sup>29</sup>

Arbitrators must also grapple with the “repeat player” phenomena, where one arbitrator is repeatedly chosen to hear a company’s disputes. Once a company wins a dispute before a certain arbitrator, the company may repeatedly choose the arbitrator.<sup>30</sup> This gives the arbitrator the financial incentive to rule for the company. According to Michael Young, co-chair of JAM’s Committee on Professional Standards and Public Policy, “the risks of the repeat player advantage are real and can be disturbing.”<sup>31</sup>

### C. “Arbitration Is Economical”<sup>32</sup>

Advocates of arbitration claim that arbitration saves money.<sup>33</sup> However, a simple examination of the filing fees and price of a private judge show otherwise. The high price of arbitration actually dissuades injured parties from seeking redress, in turn encouraging bad actors to persist in their negligent, if not dangerous, behavior.

For example, if the homeowner of a \$110,00 house sued a homebuilder because of a cracked slab foundation, the homeowner would face a potential cost of \$3,500 for a two day arbitration hearing under the AAA. The \$3,500 includes a mandatory \$2000 filing fee, the fees for the arbitrators on the panel, and room rental. The cost of \$3,500 does not cover the cost of attorneys or expert witnesses.<sup>34</sup> This is more than ten times the \$300 filing fee if the homeowner were allowed to go to court.<sup>35</sup>

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Post, March 1, 2000.

<sup>28</sup> Reynolds Holding, *Private Justice: Can Public Count On fair Arbitration? Financial Ties To Corporations Are Conflict Of Interest*, Critics say, October 8, 2001.

<sup>29</sup> *Id.*

<sup>30</sup> The inverse is true as well. When an arbitrator rules for a plaintiff the defendant will not rehire the arbitrator. In a study of HMO disputes in California, arbitrators who awarded damages exceeding \$1 million for the plaintiff did not hear additional HMO cases. Marcus Nieto & Margaret Hosel, *Arbitration In California Managed Health Care Systems*, 22-23 (2000).

<sup>31</sup> *Id.*

<sup>32</sup> Arbitration advocates discuss this point at length. However, Texans everyday pay for the upkeep of state courts via state taxes. Therefore, when someone is forced into a private court, they are paying twice – once for the public court, and once for the private court.

<sup>33</sup> It is probably cheaper for a large corporate defendant to use arbitration as opposed to individual consumers. However, as consumers increasingly challenge the validity of binding arbitration in court, the economic advantage for institutional defendants may cease to exist.

<sup>34</sup> See *Ting v. AT&T*, 182F.Supp.2d 902,917 (N.D. Cal. 2002) (citing studies showing average filing costs and arbitrator’s compensation).

<sup>35</sup> David F. Bragg, *Binding Arbitration: A Wolf In Contract Clothing*,” 2001.

Furthermore, arbitration clauses often specify the venue for the arbitration. For example, the online auction service E-Bay mandates all disputes must go to an arbitrator in San Jose, California.<sup>36</sup> This automatically elevates the cost for people traveling from Texas.

With the policy objectives of binding arbitration in question it is hard to understand why courts repeatedly find a strong policy toward enforcement of murky binding arbitration clauses hidden in fine print. One could surmise that courts may seek to employ arbitration as a mechanism for lightening the docket, allowing for quicker resolution of other cases. What follows is a brief synopsis of relevant case law.

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<sup>36</sup><http://pages.ebay.com/help/basics/f-agreement2.html#13>

“Section 17. Arbitration. Any controversy or claim arising out of or relating to this Agreement or our services shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. Any such controversy or claim shall be arbitrated on an individual basis, and shall not be consolidated in any arbitration with any claim or controversy of any other party. The arbitration shall be conducted in San Jose, California, and judgment on the arbitration award may be entered into any court having jurisdiction thereof. Either you or eBay may seek any interim or preliminary relief from a court of competent jurisdiction in San Jose, California necessary to protect the rights or property of you or eBay pending the completion of arbitration.”

## Chapter II

### The Law of Arbitration

The law of binding arbitration is perhaps best explained by the hypothetical purchase of an “Acme Computer.”<sup>37</sup> Assume Acme Computer is a national computer manufacturer with distributors here in Texas. Assume you buy an Acme Computer and after 120 days a major defect with the hard drive caused by faulty engineering wipes all stored information off your unit. You feel that you just blew \$1,500 and want to see what recourse you have. You scour all the documentation that came with the system and find a pamphlet. On the front, the pamphlet states:

“NOTE TO THE CUSTOMER:

This document contains Acme’s Standard Terms and Conditions. By keeping your Acme computer system beyond five (5) days after the date of delivery, you accept these Terms and Conditions.”

The notice is in emphasized type and is located inside a printed box, which sets it apart from other provisions of the document. The “Standard Terms” referenced above are four pages long in ten-point font and contain sixteen numbered paragraphs. Paragraph Ten provides the following arbitration clause:

DISPUTE RESOLUTION. Any dispute or controversy arising out of or relating to this Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of the American Arbitration Association. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. The parties to this agreement agree that use of classes is prohibited. Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction. Illinois law will apply.

#### A. Which law applies?

As a consumer the first question you are confronted with regarding binding arbitration is which law applies - state or federal law. This question could have great ramification and determine whether or not you actually waived your right to a jury trial. However, keep in mind that both the U.S. Supreme Court and the Texas Supreme Court consistently hold that there is a strong policy favoring binding arbitration.<sup>38</sup> The U.S. Supreme Court premises this conclusion upon the FAA, while the Texas Supreme Court recognizes such a policy via the FAA as well as the Texas General Arbitration Act (TAA).<sup>39</sup>

The TAA actually provides greater protection for Texas consumers. For example, in disputes involving \$50,000 or less, the consumer can only enter into binding arbitration if

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<sup>37</sup> For the most part, binding arbitration is a creature of contract. All defenses against binding arbitration are basic contract law arguments.

<sup>38</sup> *Southland Corp. v. Keating*, 456 U.S. 1, 104S.Ct. 852 (1984); *Green Tree Financial v. Randolph*, 531 U.S. 79 (2000); *Capital Income Properties v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992).

<sup>39</sup> TEX. CIV. PRAC. & REM. CODE §§171.001-.023.

both the consumer and the consumer’s attorney sign the contract.<sup>40</sup> This same basic protection applies to arbitration agreements pertaining to personal injury.<sup>41</sup>

Unfortunately, the vast majority of consumer transactions fall under the Interstate Commerce Clause of the U.S. Constitution.<sup>42</sup> Whenever a transaction falls under the commerce clause it is subject to the provisions of the FAA, as opposed to the TAA.<sup>43</sup> Parties to a contract can specify that they would like the TAA to apply, as opposed to the FAA.<sup>44</sup>

Pursuant to the terms of your Acme Computer purchase, you would be subject to the terms of the FAA and forced to forgo the limited protections found in the TAA. If the TAA applied, the binding arbitration agreement would probably be declared void. However, your Acme Computer cost under \$50,000. Your computer would also be considered part of interstate commerce. As such, the FAA would apply. Hence, federal law would dictate that you probably waived your right to a jury trial.<sup>45</sup>

### **B. Is there a voluntary agreement to enter into binding arbitration**

The next question is a matter of contract law – did you voluntarily agree to the arbitration agreement discussed above. Both federal courts<sup>46</sup> and Texas courts<sup>47</sup> provide minimal protection to consumers in this area.

A good example of Texas courts’ hostility to consumers attempting to argue they did not voluntarily agree is *Emerald Texas, Inc. v. Peel*.<sup>48</sup> In *Emerald* a Texas court held that a homeowner entered into binding arbitration with a homebuilder, despite all evidence

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<sup>40</sup> Tex. Civ. Prac. & Rem. Code §171.002(a)(2).

<sup>41</sup> Tex. Civ. Prac. & Rem. Code §171.002(c).

<sup>42</sup> *In re First Merit Bank*, 52 S.W.3d 749, 754 (Tex. 2001).

<sup>43</sup> *Jack B. Anglin v. Tipps*, 842 S.W.2d 268 (Tex. 1992)

<sup>44</sup> *Hearn v. Gonzalez*, 18 S.W.3d 684,688 (Tex. App. – Houston [14] 2000).

<sup>45</sup> In the housing context it is especially hard to escape the FAA and seek the protection of the TAA in order to protect oneself from binding arbitration. Permanent dwellings in Texas normally cost over \$50,000. As such, even if one were to argue the transaction did not involve interstate commerce, the TAA would not apply for the transaction would exceed the \$50,000 cap. When manufactured homes are involved it is possible to stay below the \$50,000 cap. However, in that scenario the commerce clause would force coverage by the FAA, thus eliminating the protection of the TAA.

<sup>46</sup> On the federal side the Fifth Circuit established some vague parameters for assessing whether an actual agreement to arbitrate exists in the context of an adhesion contract. In the case of an investor trying to avert binding arbitration forced upon him by a brokerage firm, the Fifth Circuit attempted to establish how one would show a contract was not voluntary:

A party to an arbitration agreement cannot obtain a jury trial merely by demanding one. *Saturday Evening Post Co. v. Rumbleseat Press*, 816 F.2d 1191, 1196 (7<sup>th</sup> Cir. 1987) Our case law has not established the precise showing a party must make. We have, however, suggested that the party must make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true. In addition he must produce at least some evidence to substantiate his factual allegations. *T&R Enterprises v. Continental Grain Co.*, 613 F.2d 1271, 1278 (5<sup>th</sup> Cir. 1980).

<sup>47</sup> *In re American Homestar*, 50 S.W.3d 480 (Tex. 2001).

<sup>48</sup> *Emerald Texas, Inc. v. Peel*, 920 S.W.2d 398 (Tex.App. – Houston [1st Dist] 1996, no writ).

indicating the homeowner knew nothing about the arbitration agreement, had no understanding of what the agreement meant, and no experience in real estate deals.<sup>49</sup> The home-buyer tried to argue he was forced to sign the agreement, and that the contract was "unconscionable." Still, the court ruled in favor of the homebuilder because "Texas law favors arbitration" and the best proof of whether the waiver of a jury trial was voluntary "is the contract" itself.<sup>50</sup>

Based on the poor case law developed in Texas and relevant federal courts, you would most probably have found that you "voluntarily agreed" to engage in binding arbitration. The court would probably come to this conclusion even if you did not know what binding arbitration meant. Even the fact that you did not read the agreement until well after the purchase of the product would be considered irrelevant. According to current law, the mere purchase of the product indicates that you voluntarily agreed to binding arbitration.

### **C. Does the dispute fall outside the scope of the arbitration agreement?**

The next question is whether the parties intended to address the Acme Computer failure via binding arbitration. Put another way, does the dispute fall outside the scope of the contract? For example, if your Acme Computer blew up and caused severe burns to your body, you may be able to argue such events were not contemplated by the binding arbitration clause.

This level of analysis offers minimal recourse to consumers seeking to avoid binding arbitration.<sup>51</sup> Texas and federal courts broadly interpret binding arbitration clauses. Both have repeatedly held that any doubt about the scope of arbitrable issues should be resolved in favor of binding arbitration.<sup>52</sup>

As such, you would have to accept that a failure of your hard drive would undoubtedly fall within the scope of the arbitration provision discussed above. Alas, you and your faulty Acme Computer would probably end up in binding arbitration. Pursuant to the terms of the arbitration agreement, you would be unable to band together with other aggrieved consumers and bring a class action. Furthermore, you would probably be unable to take

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<sup>49</sup> Another example is *In re Oakwood*. In that case the state's high court articulated its resistance to homeowners overcoming arbitration agreements, even if the agreement was not voluntary: In support of their claims of unconscionability and duress, the Brandons contend the Agreement "is a classic example of a contract of adhesion where one party had absolutely no bargaining power or ability to change the contract terms." Even if this contention is true, however, adhesion contracts are not automatically unconscionable or void. See *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir.1992), cert. denied, 506 U.S. 1079, 113 S.Ct. 1046, 122 L.Ed.2d 355 (1993) (citing 6A ARTHUR CORBIN, CONTRACTS § 1376, at 20-21 (1962) & 7-9 (Supp.1991)). Moreover, "there is nothing per se unconscionable about arbitration agreements." *EZ Pawn*, 934 S.W.2d at 90; see *Emerald Tex., Inc. v. Peel*, 920 S.W.2d 398, 402-403 (Tex.App.--Hous. [1 Dist.] 1996, no writ) (holding that to find the arbitration provision unconscionable under the evidence presented would negate the public policy in favor of arbitration). *In re Oakwood Mobile Homes, Inc.* 987 S.W.2d 571, 573 (Tex. 1999).

<sup>50</sup> *Id.* at 403.

<sup>51</sup> *In re Oakwood* at 573; *In re Delta Homes, Inc.*, 5 S.W.3d 237, 239 (Tex. App. Tyler 1999, orig. proceeding).

<sup>52</sup> *In re American Homestar* 50 S.W.3d 480, 484 (Tex. 2001); *Moses H. Cone Mem. Hosp. V. Mercury Constr. Corp.*, 460 U.S. 1,24-25 (1983).

advantage of key consumer protection provisions found in the Texas Deceptive Trade Practices Act. In the end, it would cost you much more to challenge Acme on your own than it would cost to buy another computer. In the end, you will have lost \$1500 and all the information stored on your hard drive. Your inability to legally challenge the faulty engineering of the Acme Computer would encourage Acme to continue to produce the faulty system.

**D. A Case Study**

Texas courts exhibit a great deal of hostility toward consumers seeking relief from the stranglehold of hidden arbitration provisions. A telling example is the recent Texas Supreme Court case involving the De Los Santos family. *In re First Merit Bank*, 52 S.W.3d 749, 754 (Tex. 2001). The De Los Santos family bought a mobile home for their daughter and son-in-law. The home was defective and the family sued to be removed from the bank contract after the manufacturer refused to repair the defects. However, the De Los Santos family soon found out that they were not going to have their day in court. Illustrating the extent of the uneven playing field, an arbitration provision waived judicial relief for all disputes “relating to the loan” for the home. Ironically, the clause stated the bank—and not the family—could still go to court! Below are defenses the De Los Santos family asserted to be exempted from the arbitration clause.

<b>De Los Santos Defense Against Arbitration Clause</b>	<b>De Los Santos Argument</b>	<b>Texas Supreme Court Holding</b>
The Federal Arbitration Act does not apply.	Purchase of a mobile home in Texas does not involve interstate commerce.	As long as the transaction somehow “relates” to interstate commerce, the FAA applies.
The dispute falls outside of the scope of the arbitration provision.	The defects to the mobile home did not “relate to the loan” for the home.	The buying of the home, and the home itself, “relate to the loan,” and are therefore within the scope of the provision.
The arbitration clause was not voluntary and it was “unconscionable.”	The De Los Santos family was in a very weak position—either sign contract or forfeit home—and had no choice but to sign the agreement and waive their right to the courts, despite the bank’s ability to still seek judicial redress.	This type of agreement is the industry standard. Therefore, it is not “unconscionable” for the bank to have access to the courts, while the De Los Santos family would not.
Arbitration in this case would cost a substantial sum, and is “unconscionable.”	The provision calls for three arbitrators for a total of \$250 each day and an additional \$2000 filing fee.	Part of the arbitration agreement which the De Los Santos family signed stated “that arbitration is a less expensive method of dispute resolution that decreases servicing costs of this loan . . . .” Therefore, without more specific facts, the family could not argue the provision was unconscionable due to substantial costs.

## Chapter III Advocates of Arbitration

Arbitration advocates argue in the legislature that private dispute resolution allows for the quick, economical, unbiased resolution of conflict to the benefit of all involved. This is the premise used by arbitration advocates in seeking to prevent any possible roll back of arbitration through legislation.<sup>53</sup> However, as noted in Chapter II, these policy goals are often times not met.

In reality, some speculate that arbitration advocates argue for private dispute resolution because it is better for a company’s bottom line.<sup>54</sup> For example, private judges are not likely to be familiar with the policies and nuances behind consumer protection statutes.<sup>55</sup> In turn, even when a plaintiff wins in an arbitration proceeding, damages are typically much lower than what would be awarded in a court of law.<sup>56</sup>

As discussed in Chapter II(B), arbitration places an inherent “thumb on the scale” for defendants. This stands in stark contrast to the neutrality found in juries.<sup>57</sup> While consumers would favor a jury’s attempt to do “justice,” arbitration advocates would prefer an arbitrator’s sympathetic predisposition. In turn, arbitration advocates vehemently fight against any and all rollbacks in the legislative process presumably because they place value in a system of dispute resolution providing consistent favorable outcomes. In the eyes of certain industries, even if the plaintiff prevails in arbitration, the award will presumably be smaller.<sup>58</sup> For the most part, the primary legislative presence working for arbitration in Texas is the business group Texans for Lawsuit Reform (TLR).

### Texans for Lawsuit Reform

This past session Texans for Lawsuit Reform actively opposed House Bill 1862. HB 1862 created a stir when it passed both chambers yet was vetoed by Governor Rick Perry. HB 1862, also referred to as the “prompt pay” bill, would have guaranteed doctors payment by health maintenance organizations (HMOs) in a certain amount of time. The bill would also have prohibited the use of binding arbitration in resolution of disputes between doctors and HMOs. The bill’s prohibition on binding arbitration prompted TLR into a full court press seeking the veto of HB 1862. In an effort to obtain the veto, TLR members

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<sup>53</sup> It is more common to see legislation dealing with rolling back arbitration, as opposed to expanding arbitration. This is because federal and state statutes have already been determined to broadly allow arbitration. Hence, there is not a pressing need for arbitration advocates to pursue additional legislation.

<sup>54</sup> Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 Wash U.L.Q. 637, 683-84 (1996).

<sup>55</sup> *Id.*

<sup>56</sup> Schwartz, *Enforcing Small print to Protect Big Business: Employee and Consumer Rights In An Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 60-61,

<sup>57</sup> Juries in Texas cannot have an affiliation with either party in a case. In fact, it is grounds for mistrial if a juror even accepts aspirin from one of the parties. *Occidental Life Ins. Co. v. Duncan*, (Tex. App. – San Antonio 1966, writ ref’d n.r.e.). On the other hand, arbitration is systematically riddled with conflicts calling into question the ability of arbitrators to impartially hear a case. See Chapter II (B).

<sup>58</sup> Schwartz, *supra*.

appeared to flood Governor Perry with campaign cash.<sup>59</sup> In the end, HB 1862 was vetoed to the chagrin of doctors across the state.

Another bill worth noting is SB 1706 introduced by Senator Leticia Van de Putte. This bill would have restricted when binding arbitration could be employed. It also would have established certain requirements pertaining to the neutrality of arbitrators. However, unknown dynamics behind the scenes prevented the bill from obtaining a hearing.

### **Health Maintenance Organizations (HMOs)**

Health Maintenance Organizations firmly endorse arbitration. HMOs apparently played a role in the veto of HB 1862. While it is hard to say what HMOs directly did behind the scenes to successfully obtain the veto, the link between HMOs and TLR are strong.

Alan Shivers is a prominent member of TLR and a former spokesperson for that organization. Just recently Shivers also headed up Texans for Quality Healthcare, an HMO front group.<sup>60</sup> In addition, Mr. Shivers sits on the board of The Institute of Rehabilitation and Research (TIRR) with other active TLR supporters. TIRR has numerous links to the managed care industry. At the very least, this leaves the impression that the agenda of HMOs and TLR came together in the pursuit of the veto of HB 1862.

### **Homebuilders**

Permanent homebuilders advocate for binding arbitration with great enthusiasm. Builders of manufactured homes are just as vigorous in their advocacy, if not more so. In part, this may be because permanent homebuilders are not subject to the protections found in the Texas Deceptive Trade Practices Act, while manufactured home builders are.<sup>61</sup>

Much of the debate for manufactured home interests has largely been fought in the courts.<sup>62</sup> This industry consistently produces *amicus* briefs for the Texas Supreme Court to consider. For example, in two recent Texas Supreme Court cases argued in 2001 (*In re First Merit Bank* and *In re Homestar*), the Texas Manufactured Housing Association (TMHA) filed *amicus* briefs with the Court defending the use of binding arbitration.

Permanent homebuilders figure prominently in TLR. This may explain TLR’s commitment to binding arbitration. TLR President Dick Weekley is the brother of David Weekley of David Weekley Homes. Richard Weekley is a major contributor to the efforts of TLR, contributing \$126,000 to the TLR agenda in 2000 alone.<sup>63</sup> The Weekley brothers like to use arbitration in their contracts.<sup>64</sup>

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<sup>59</sup> Wayne Slater, *Suits-limit group is Perry Top Donor*, Dallas Morning News, August 19, 2001.

<sup>60</sup> “Texans for Quality Health Care, an association of business interests set up to fight the 1997 law [creating liability for an HMO for denial of coverage] and headed by [Allan "Bud" Shivers Jr.](#), a Bush Pioneer (a title given to a person who raised at least \$100,000 for Bush's presidential campaign), no longer exists. But the group was housed by the Texas Association of Business and Chambers of Commerce. <http://www.salon.com/politics/feature/2001/07/17/patient/>.

<sup>61</sup> The DTPA does not apply to permanent structures. Tex. Prop. Code Ann. §27.002 However, the DTPA does apply to manufactured homes. Recall FN 47. Hence, arbitration becomes an easy way to thwart basic consumer protection statutes.

<sup>62</sup> See *In re Homestar*; *In re First merit Bank*.

<sup>63</sup> Texans for Public Justice, *Texans for Lawsuit Reform: How the Texas Tort Tycoons Spent Millions in the*

### **Financial Institutions**

One bill that did not gain the attention of TLR, but did gain the attention of the financial community, was SB 1581. SB 1581 introduced by Senator Royce West originally prohibited binding arbitration in the home-lending context. Anyone who has ever taken out a mortgage is well aware of the many dotted lines one must sign at closing. Often arbitration provisions are slipped in to the dismay of the consumer. SB 1581 sought to halt such practices.

SB 1581 was amended on the floor of the Texas Senate, removing the prohibition against binding arbitration in prime and sub-prime mortgages. Senator Carona lead the charge in stripping this provision. Actively testifying against the bill before it reached the floor were numerous lending institutions and affiliated trade groups. These included the Texas Mortgage Bankers Association, the American Bankers Insurance, and the Texas Financial Services Association.

## **CHAPTER IV CASE STUDIES AND EXAMPLES OF ARBITRATION ABUSES**

The following case studies document instances in which arbitration poses an unbalanced bargaining position for individuals seeking justice against corporate entities.

### **Doctors v. HMOs**

As a whole, doctors are harmed incessantly by binding arbitration agreements in contracts with Health Maintenance Organizations (HMOs). Doctors often encounter HMOs which refuse to promptly pay medical bills submitted by doctors, despite HMOs’ obligation to both doctor and insured. The amount of money in question for each doctor is too small to make it economically efficient to bring a lawsuit against an HMO in a court of law. However, if doctors banded together in a class action lawsuit, then perhaps they could gain relief from miserly HMOs. However, HMOs routinely employ arbitration clauses with doctors, and these clauses, among other things, typically preclude the use of class action lawsuits.

In a recent story by Texas Medicine writer Walt Borges, several medical professionals discussed the difficulties imposed by HMOs’ use of binding arbitration and why doctors view courts as an essential avenue of recourse.<sup>65</sup> For example, Dr. David Rogers, an Allen, Texas Gynecologist, discussed how binding arbitration places doctors on an uneven playing field with powerful HMOs. Dr. Rogers stated, “Physician can’t afford to go to arbitration over small, individual claims. In the courtroom, we can join together many similar issues for a common solution. Both arbitration and litigation may be lengthy and costly, but ultimately class action suits ought to be more efficient when it comes to hundreds of thousands having the same problems.”<sup>66</sup>

Dr. Rogers also noted that in binding arbitration, “the insurer can draw things out,” and that “arbitration doesn’t set precedents and it doesn’t change behavior.” In other words, noted Dr. Rogers, “That means whatever solution comes out of binding arbitration doesn’t help other doctors or patients.”<sup>67</sup>

In another recent interview Dr. Rogers emphasized that in the area of medicine “contracts are take it or leave it documents.” Dr. Rogers elaborated by stating, “If we have a dispute we are forced to go to an arbitration proceeding where it is a David and Goliath scenario.” He added, “Any kind of situation where the playing field is not level can be bad for consumers.”<sup>68</sup>

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<sup>65</sup> Walt Borges, *In a Bind: Binding Arbitration Not Always Preferable to lawsuits*, Texas Medicine, Sept. 1, 2001.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Interview with Dr. David Rogers, March 25, 2002.

TMA General Counsel Donald Wilcox also recently described how arbitration thwarts effective discovery and therefore precludes doctors from proving HMO malfeasance. Mr. Wilcox stated, "Physicians should watch for arbitration contracts that prohibit discovery and provide unreasonable limits on the amount of damages that can be awarded against an insurance company."<sup>69</sup>

Laura Kabay, executive director of Preferred Independent Physicians Association (PIPA) stated in the same piece, "There are lots of reasons not to go into arbitration. It's not cheap – that's the biggest one. It can be faster [than litigation], but it can also be drawn out." Ms. Kabay further elaborated by describing PIPA's one experience with arbitration. She stated, "Just invoking arbitration created considerable expense. Choosing the arbitrator alone took a long time and considerable attorney involvement and expense."<sup>70</sup>

### **Homeowners v. Homebuilders**

Dawn and Scott Richardson, along with daughters Alexa and Erica, thought they were having their dream home built by David Weekley Homes. Instead, they purchased a dangerous nightmare. Within weeks of moving into their newly built home shoddy construction would lead to water leaks and the development of black mold. Not only did the mold pose a serious health threat, but also many of the building materials used in the construction process were releasing high levels of carcinogens, including formaldehyde and benzene.

All members of the family suffered severe reactions to the mold and the air bound carcinogens. Perhaps most disturbing was that two-year old Erica lost all expressive speech. Despite the obvious, Weekley Homes was non-responsive, and made little effort to remedy the hazardous situation the homebuilder created. The Richardson's decided to sue, but are now faced with being forced into binding arbitration.

Dawn and Scott are both electrical engineers and highly educated. They had read the contract with Weekley Homes and had no idea they were signing away their right to a jury trial. As Ms. Richardson stated, "We read the contract and did not know what arbitration meant on a legal level. There must be a lot of people like us who innocently and unknowingly sign away their constitutional rights."<sup>71</sup>

Ms. Richardson feels that homebuilders rely on stealth arbitration provisions because they realize it is economically inefficient for homeowners to fight poor and hazardous workmanship in the course of the arbitration process. Ms. Richardson is very concerned that her family will not even have a fighting chance in the impending arbitration proceedings "to overcome the inequities inherent to the arbitration process."

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<sup>69</sup> Walt Borges, *In a Bind: Binding Arbitration Not Always Preferable to lawsuits*, Texas Medicine, Sept. 1, 2001.

<sup>70</sup> *Id.*

<sup>71</sup> Interview with Dawn Richardson, February 19, 2002.

Ms. Richardson also states, “The proceedings are stacked against the homeowner as a result of the repeat player phenomena and the close relationship between the homebuilder and the arbitrators. Even worse, there is no way for us to research how the arbitrator previously ruled. There is no precedent for us to examine, while Weekley is apparently well aware of the arbitrators’ previous rulings and reasoning.”

Ms. Richardson also states that arbitration is cost prohibitive in the pursuit of justice against homebuilders. Ample evidence supports Ms. Richardson’s position. For example, a family from Houston, Texas bought a new home from the Ryland Homes. Upon moving in, the family found numerous defects including faulty roofing and electrical wiring. The contract with Ryland contained a hidden arbitration clause forcing arbitration. The family lost their claim, and the total cost just to pay for arbitration was \$12,576.<sup>72</sup>

Another example is a family from Austin, Texas. They entered into a contract with Number One Custom Homes to build a house. Third party experts verified numerous construction defects. However, the family was forced into arbitration as well. While the family ultimately prevailed in the arbitration proceeding, they still expended an enormous amount of money. The total cost just to engage in the arbitration proceeding was \$13,068.<sup>73</sup>

Ms. Richardson is very disturbed that she has been forced to waive her right to a trial before her peers. She states, “It offends me that I am being deprived of my right to a trial before my peers, after Weekley Homes hurt my family so badly. It is bad enough that we were all harmed by the terrible construction of the house. It was further insult to injury when I learned we were deceived out of our constitutional right to seek justice in the courts.”

### **Credit Card Holders v. Banks**

Almost all Texans are vulnerable to abusive practices on the part of credit card companies. Credit card companies are able to nickle and dime card holders into oblivion via deceptive fee arrangements and annual percentage rates. Sadly, when a single consumer has been bilked out of \$100, it is very difficult for them to seek recourse in a court of law. It is simply not worth the effort. However, \$100 is a lot of money to most people, and the ability of consumers to use class action lawsuits to obtain a refund ensures that large and anonymous financial institutions will not cheat cardholders a few dollars at a time. Consumers throughout the state are vulnerable to this sort of abuse unless consumers can come together as a class and protect themselves from deceptive practices on the part of credit card companies.

The key weapon for consumers is the threat of a class action against bullish credit card companies. However, arbitration service providers are aggressively soliciting major corporations and credit card companies encouraging them to use their services as a means

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<sup>72</sup> See soon to be released Public Citizen report, “The Cost of Arbitration.”

<sup>73</sup> *Id.*

to escape responsibility to the public. By using arbitration, credit card companies can forbid the use of class actions.

In a recent interview, Edward Anderson, Managing Director of the National Arbitration Forum, discussed “do it yourself” civil justice reform through the use of arbitration. Mr. Anderson states, “[N]ow is the time for corporate counsel to reexamine the use of the arbitration tool to accomplish their own civil justice reforms.”<sup>74</sup> In other words, according to Mr. Andersen, corporations can avoid responsibility to its customers by using arbitration. In the context of credit cards, Andersen argues financial institutions can have clients assent to arbitration by simply using the credit card in question.<sup>75</sup>

The disturbing fact of the matter is that hundreds of thousands of Texans are at risk when credit card companies unilaterally impose arbitration on customers, terminating the public’s ability to seek recourse via class actions. If it were not for class actions, Texans would have never seen justice in the following cases of credit card company abuse:

- \* A \$45 million settlement to consumers by Citigroup as a result of the company assessing finance charges and higher interest rates when payments were received after 10:00 a.m. on a given due date;
- \* A \$105 million settlement to consumers by Provident Financial for, among other things, charging “no annual fee,” yet requiring card holders to buy a \$156 annual credit protection plan; and
- \* A \$84.9 million settlement to consumers from First USA for promising a fixed annual rate, but increasing it nonetheless.

However, now that arbitration clauses are quickly becoming a part of all credit card agreements, consumers can expect to see these types of abuses to increase. Not only does arbitration deprive consumers of the chance to have their day in court, it can also create an environment vulnerable to manipulation and deception.

### **Nursing Home Residents v. Nursing Homes**

Perhaps the most vulnerable members of our state are nursing home patients. For obvious reasons, nursing home residents and their families can be taken advantage of.

There have been recent reports of facilities requiring patients to sign arbitration agreements as a condition of continued treatment or as part of the terms of being admitted to a facility.

Nursing home residents often have very few choices in terms of facilities to choose from. Furthermore, nursing home patients are often in crisis and not in a position to question what they are being asked to sign. However, some nursing home patients in Texas have been confronted with “Dispute Resolution Plans” that state:

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<sup>74</sup>*Do an LRA: I* No. 8, August 2001.

<sup>75</sup>*Id.*

“This Plan spells out the only way to deal with any and all disputes or differences between the nursing home and its residents. Residents cannot sue in a court of law the nursing home or its officers, directors, employees, or agents...”<sup>76</sup>

Such coercive agreements threaten the health and safety of nursing home patients. The ability of nursing home patients to seek recourse in a court of law serves as a deterrent to neglect and abuse. Beth Ferris of Texas Advocates for Nursing Home Residents states, “Large corporations do not understand some of the fines and sanctions imposed by the state of Texas. They are not meaningful and do not deter bad conduct. However, some of the suits force nursing homes to take notice.”<sup>77</sup>

Ms. Ferris’s statement is well founded. Other states around the country are witnessing the growth of arbitration in the nursing home context, and how arbitration can be conducive to an abusive environment. For example, in a case involving the molestation of forty-five year old woman with a severe head injury in a New Mexico nursing home by a nursing home employee, the nursing home is invoking an arbitration agreement signed at the time the patient was admitted to the facility, effectively depriving the victimized woman of her day in court.<sup>78</sup>

There are approximately 1,140 nursing homes in Texas. It is difficult to assess how many actually use arbitration agreements. However, John Willis, State Ombudsman for the Texas Department on Aging recently stated, “While these agreements may be legal and voluntarily entered into, families should examine them very carefully before signing.” Willis continued, “Often, their main purpose is to preclude legal action against nursing homes. And if they’re required as a condition of admission or continued stay, they’re inappropriate and unethical.”<sup>79</sup>

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<sup>76</sup>Representative nursing home arbitration agreement obtained from Texas Department on Aging.

<sup>77</sup>Interview with Beth Ferris, March 19, 2002.

<sup>78</sup>Ziva Branstetter, *Nursing Home Sues Family*, Tulsa World, March 1, 2002.

<sup>79</sup>Interview with John Willis, March 26, 2002.

## Chapter V

### What Can Consumers Do To Protect Themselves?

Unfortunately, there is little consumers can do to avoid waiving their right to a jury trial. That is ultimately the dilemma we all face. We may need to purchase certain goods or services on the one hand, but on the other hand we are being asked to waive a constitutional right in order to do so. However, here are some basic things to keep in mind that may help:

- Consider avoiding businesses using binding arbitration.
- Read everything and understand what you are being asked to waive. For example, if you suffer harm and the arbitration clause prohibits class actions, there is the outside chance the clause is unenforceable.<sup>80</sup>
- If in doubt, do not sign anything if you are worried about waiving your right to a jury trial.
- Cross through a contract provision demanding binding arbitration, and see if the transaction can still be completed. If you cannot eliminate the arbitration provision, document the event. This could be evidence illustrating the contract was one of adhesion.
- For significant purchases, consider consulting a lawyer. While this may be an additional cost to the transaction, it could help preserve the right to a jury trial and a fair shake in the legal system.
- Seek passage of fundamental reforms in the state legislature. For example, SB 1706 was an attempt to minimize the bias inherent to arbitration in Texas. Comprehensive reforms in other states are currently being debated and could be explored in the Texas Legislature as well.<sup>81</sup>

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<sup>80</sup> *Ting v. AT&T*, F.Supp. cite not published (court held prohibitions against class actions was unenforceable as unconscionable).

<sup>81</sup> Kevin Livingston, Taking On Arbitration: California Assembly Members Introduce Package of Reforms Aimed at ADR,” *The Recorder*, March 13, 2002. (“If passed, the bills introduced Monday would preclude arbitration companies from engaging in repeat player activity -- the process of having the same neutrals handle repeat cases for specific companies. Proposed legislation would also do away with immunity from malpractice suits for ADR providers, force the industry to reveal arbitration results, put an end to financial conflicts between ADR providers and the companies that use their services, and halt loser pay provisions that often leave consumers picking up the tab.)

## **Glossary**

**Adhesion Contract:** Standardized contract offered to consumers of goods and services on essentially “take it or leave it” basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to terms.

**Alternative Dispute Resolution (ADR):** Dispute resolution by means other than civil judge and/or jury. Among other things this can include arbitration or mediation.

**Amicus Curiae Brief:** Means, literally, friend of the court. A person or organization with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.

**Arbitration:** A form of dispute resolution conducted before a private and purportedly impartial third party

**Arbitrator:** A private and purportedly impartial judge employed during arbitration

**Binding Arbitration:** The decision to use arbitration in the context of a contract prior to the dispute actually arising. In the event a dispute does arise, parties to the contract must engage in arbitration unless one of very few exceptions applies.

**Constitutional Right:** A right guaranteed to citizens by the Constitution and so guaranteed as to prevent legislative interference therewith.

**Discovery:** Pre-trial devices used by one or both parties to obtain facts and information about the case from opposing parties to assist in the preparation of trial. Among other things, this may include depositions, production of documents and written questions.

**Injunctive Relief:** An enforceable order from a court of law requiring a party to refrain from, or perform, certain acts.

**Jury:** A certain number of men and women selected according to law, and sworn to impartially inquire of certain matters of fact, and declare the truth upon evidence.

**Mediation:** A device often used prior to civil trial where parties discuss their concerns with a neutral person (the mediator) in hopes of settling before going to court.

**Rules of Evidence:** Framework for introducing facts to a jury.