The 7th Amendment's Demise

By Jane Santoni

When the founders of this country signed the Declaration of Independence, they were hopping mad at King George for taking away their basic human rights. The Declaration of Independence states: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world."[i]

The drafters then listed a total of eighteen "Facts", the thirteenth Fact having nine subparts. The thirteenth Fact said: "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation." The signers then listed nine ways King George did this, including: quartering armed troops, cutting off trade, taxation without representation, and: "***For depriving us in many cases, of the benefits of Trial by Jury.***"[ii]

Thus, a war of independence was fought, and a new country created due to a total of eighteen grievances and nine sub-grievances, and ***one of them was the failure to allow trial by jury***.

It shouldn't be surprising then, that when the Constitution's Bill of Rights was enacted, it contained not one, but three separate Amendments addressing the right to a trial by jury. Amendment V guarantees the right to a grand jury, Amendment VI guarantees the right to a jury in criminal cases, and Amendment VII (7) guarantees the right to a jury trial in civil matters. The specific language of the 7th Amendment is: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[iii]

The State of Maryland's Constitution also contains a right to a jury trial in civil actions, and currently grants this right where the amount in controversy exceeds $25,000.[iv]

Despite these Constitutional protections, in 2022 it is nearly impossible to get a jury trial for many disputes. Why? Arbitration.

This article will address what arbitration is, the rise of arbitration, including the role that the U.S. Supreme Court and business interests have played in that rise, why arbitration is so dangerous to Plaintiffs' rights and what is being done to restore the Constitutional right to a jury trial.

What Is Arbitration?

"Arbitration" is defined as, "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding." Basically, arbitration is a way of resolving disputes without a jury, without a trial, without an appeal, and without a public record. As this article discusses, it is often neither agreed to, nor resolved by neutral parties. It is almost always binding.

The Rise Of Arbitration

While it is likely that "alternative methods to resolve disputes" have been around for millennia, (perhaps even predating King Solomon's decision to split a baby in half in the Old Testament, I Kings 3: 16-28 (NIV)), the Federal Arbitration Act (FAA), codifying arbitration in the United States, was enacted in 1925.[vi]

Professor Myriam Gilles in "*The Demise of Deterrence: Mandatory Arbitration and the 'Litigation Reform' Movement*"[vii] discusses the history of the FAA. She states:

> Enacted in 1925 to promote arbitration among equally sophisticated parties in commercial and maritime contracts, the FAA provided that an arbitration agreement "written in any maritime transaction or contract evidencing a transaction involving commerce" was enforceable, subject only to "such grounds as exist at law or equity for the revocation of any contract." For over fifty years after the FAA was enacted, arbitration remained a niche practice, deployed primarily by business interests seeking ways to channel disputes out of the traditional litigation system and into less expensive and more private forms of alternative dispute resolution (ADR). By waiving the right to a formal judicial hearing, these parties voluntarily submitted their disagreements to experts in the field, with limited rights of appeal and the promise of complete confidentiality. Over these years, arbitration became the norm for resolving complex, commercial disputes arising under collective bargaining agreements, international trade contracts, and certain other large-scale commercial arrangements.
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> Throughout this period, the Supreme Court repeatedly affirmed its view that the FAA encouraged the arbitration of claims between equally-sophisticated parties, rejecting efforts to impose arbitration upon guileless consumers or employees via standard-form contract."[viii]

In fact, this remained the general attitude toward arbitration until the 1980's.[ix] Around the same time period, a movement was brewing which would have a direct and negative effect on Plaintiffs' rights: The "anti-lawsuit" movement.[x] As Prof. Gilles explains:

> By the early 1980's, the United States was—at least in the view of conservatives—in the midst of a full-blown "litigation crisis." There was too much law, too many lawsuits, too many legal rights, too many lawyers. Whether grounded in truth or anecdote, the anti-lawsuit movement had, by this point, been hugely effective in its public relations efforts, and its message that litigation was a plague that had to be controlled had broadly permeated public perceptions of litigants, lawyers, judges, and lawsuits. The moment was ripe for a broad, federal intervention aimed at limiting lawsuits.[xi]

Numerous attempts were made, starting with the Reagan administration, and continuing with each administration through George W. Bush's, to severely limit Plaintiffs' legal rights, including limiting attorneys' fees, defunding legal services corporations (such as Legal Aid), imposing loser-pays laws, placing caps on punitive damages and non-economic damages, enforcing strict discovery limits, federally "reforming" products liability law, and abolishing joint and several liability. Most of these attempts required Congressional approval, and they were largely unsuccessful.[xii]

There was, however, more than one way to skin a cat. What Congress would not do, an increasingly conservative Supreme Court began to do, under the guise that contract formation trumps Constitutional rights. As described in a 2021 Chicago Kent Law Review Article:

> (B)y the mid-1980s, the Supreme Court began to reinterpret the FAA in service of the ideologically conservative goal of allowing corporations to compel arbitration and eliminate access to courts and juries.
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> "In case after case, the Court gave this statute an increasingly prominent role in shaping dispute resolution, applying it to a wide range of disputes far beyond what its drafters intended." These decisions empowered large corporate actors to force arbitration on consumers, employees and other weaker contractual counterparties lacking the ability to bargain for or even comprehend the rights that they were giving up. Over time, arbitration clauses have been used to eliminate class actions, shorten statutes of limitation, restrict discovery, and force litigants to waive a variety of rights and remedies."[xiii]

Forces other than the Supreme Court were at work, too. Around the same time the Supreme Court was beginning to shift,

> "an idea was hatched by a group of corporate defense lawyers and arbitration marketers. These lawyers were tired of defending their corporate clients from 'frivolous' class actions brought by entrepreneurial plaintiffs' lawyers, earning staggeringly high fees; and the arbitration marketers wanted to expand the sale of private dispute-resolution services. Working together, this brain trust devised a startlingly simple idea: rewrite all standard-form consumer and employment contracts to require that any disputes be resolved in one-on-one, private arbitral proceedings. In other words, these agreements would contractually prohibit class actions and other aggregate litigation, starving entrepreneurial lawyers of fees and shunting all these disputes into arbitral proceedings before private judges whose livelihoods depend on the repeat business of large corporate actors. In response to any argument that class-banning arbitration clauses might deter small-dollar litigants from individually arbitrating their disputes, these corporate lawyers suggested that companies offer "bounties" to pay the attorneys' fees of successful litigants."[xiv]

Thus began the insertion of arbitration clauses with class action bans in everything from credit card agreements to car purchases, cell phone contracts, nursing home agreements, student loans, employment contracts, and the permission forms for the YMCA children's moon bounce.

The 4th Circuit in 2002 succinctly summarized the changed attitudes of the courts toward arbitration when it said:

> "The FAA reflects 'a liberal federal policy favoring arbitration agreements.' *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Underlying this policy is Congress's view that arbitration constitutes a more efficient dispute resolution process than litigation. *Hightower v. GMRI, Inc.*, 272 F.3d 239, 241 (4th Cir.2001). Accordingly, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475–76, 109 S.Ct. 1248, 103 L.Ed.2d 488 [(1989)].[xv]

This combination of simple contract insertions and court blessings exploded the use of arbitration and closed the courthouse doors for millions.[xvi]

Consumer protection lawyers were experiencing this shift in Maryland as well. For several years at the trial level, we were able to overcome arbitration demands and class action bans in car disputes based on the "single document rule". This is a COMAR regulation which provides that "[e]very vehicle sales contract or agreement shall be evinced by an instrument in writing containing all of the agreements of the parties."[xvii] Often there was an arbitration clause in the document called the "Buyer's Order" but not in the final sales document, the "Retail Installment Sales Contract (RISC)." Maryland's Transportation Article requires that "A contract for the sale of a vehicle by a dealer shall contain ... [t]he principal amount charged for the vehicle; [and] any interest charged on the principal amount[.]"[xviii] Thus, the argument was that the RISC alone serves as the "vehicle sales contract," because the RISC contains both the principal amount and interest charged. If the RISC didn't contain an arbitration clause, there was no arbitration.

In 2012, however, the Fourth Circuit affirmed the opinion of the U.S. District Court for the District of Maryland holding that the FAA applied to any action involving interstate commerce, including if financing was coming from a different state than the state of the car purchase.[xix,xx] The court went on to say that the party seeking to invoke arbitration need not provide evidence of an interstate transaction, but the party challenging it must. Financing in most automobile purchases comes from out of state. In Rota-McLarty, because the party challenging the arbitration clause obtained financing from out of state, the FAA applied to her vehicle contract.[xxi] The *Rota-McLarty* Court also rejected the "single document rule" and found that a Buyer's Order and RISC and all other sales and financing documents were part of a single transaction and should be read together. If one of those documents contained an arbitration agreement, arbitration applied.[xxii] The courts essentially blessed the business practice of burying arbitration agreements in a series of numerous documents which many consumers were discouraged from reading.

The Maryland Court of Appeals adopted the holding in *Rota-McLarty* in the case of *Ford v. Antwerpen*, 443 Md. 470, 117 A.3d 21 (2015), significantly hindering the ability to try individual and class action car cases (and other cases involving contracts with arbitration clauses) before a jury.

Why Arbitration Is So Dangerous To Plaintiffs' Rights

It is somewhat baffling why, given that a right to trial by jury is in the Constitution, it has been so easily decimated. I will proffer that it is doubtful that a buried contract provision giving up a right to bear arms would be as successful. Legalizing the denial of court access is a testament to prolonged efforts by powerful and well-funded interests. And if the goal of arbitration is to prevent Plaintiffs from recovering for corporate wrongdoing, it has been wildly successful.

In 2019 the American Association of Justice issued the following statistics:

Claim Elimination:

It is estimated that more than 800 million arbitration provisions permeate our everyday lives. However, the American Arbitration Association (AAA) and JAMS, the two most dominant consumer arbitration providers, recorded only approximately 30,000 consumer arbitrations over five years (2014-2018), an average of just 6,000 per year. In contrast, there are more than 2 million small claims cases filed in court every year. Despite having millions of customers — all subject to forced arbitration agreements — corporations such as Amazon (101 million Prime subscribers but just 15 forced arbitrations over five years), GM (8 million vehicles sold a year but just 5 forced arbitrations over five years), and Walmart (275 million customers a week but just 2 forced arbitrations over five years) rarely face any claims.

Consumer Winners:

Only 1,909 consumers won a monetary award over the five-year period. On average, approximately 382 consumers won a monetary award each year — less than the number of people struck by lightning each year in the United States. Only 6.3% of cases arbitrated at either AAA or JAMS resulted in consumers winning a monetary award over the five years. Over the last five years, no corporation has used forced arbitration more than AT&T. Nearly 1,000 consumers attempted to go through the forced arbitration process between 2014 and 2018, claiming more than $440 million in damages. Seventeen consumers won a monetary award, collecting a total of just $376,251.

Nursing Home Forced Arbitration:

Forced arbitration clauses allow nursing homes to avoid accountability for everything from negligent care to sexual assault. Over five years, consumers pursuing a nursing home claim with wither AAA or JAMS won a monetary award in only four cases. In one case, the corporation, The Rehabilitation & Nursing Center at Greater Pittsburgh, was awarded $20,000 more than it had claimed. The arbitrator in that case was a former human resource counsel to a large hospital system in Ohio.

Employment Forced Arbitration:

Of the 60 million employees subject to forced arbitration, only 11,114 — 0.02% — tried to pursue a dispute in forced arbitration. Just 282 of these employees were awarded monetary damages over the five-year period, an average of 56 workers per year — less than one-ten-thousandth of one percent of covered workers. The corporation with the most employment arbitration cases at AAA was Darden Restaurants, owners of the Olive Garden and Longhorn Steakhouse chains. Since 2005, Darden has paid over $14 million to settle lawsuits filed in court over reprehensible working conditions. However, in forced arbitration, Darden faced just 329 claims. Employees won an award in just eight cases, for a total of $73,961.

Forced Arbitration Involving Credit Cards and Banks:

Consumers pursued 6,012 forced arbitrations involving financial claims, claiming at least $3.7 billion in damages. They won monetary awards in just 131 cases (2.2%), totaling $7.4 million — 0.2% of the claimed damages. Corporations pursued 137 financial claims through arbitration, but remarkably won monetary awards in twice as many as they initiated, winning $5.4 million in 314 cases. No bank used forced arbitration more than Spain-based Santander. Consumers initiated 848 arbitrations against the corporation, claiming $44 million in damages. Only three consumers won a monetary award, for a total of $10,978, equivalent to 0.000002% (two one-hundred-thousandths of one percent) of the corporation's $315 billion in revenues.

Data Manipulation:

AAA, the country's largest consumer arbitration provider, deletes data every quarter in a way that significantly distorts arbitration results. AAA deletes cases by filed date, instead of closed date, even though this is a database of closed claims. This has the effect of systematically scrubbing claims that take a long time from its database. The longer a case takes, the quicker it is purged from the database. All research claiming that arbitration is faster than litigation has been skewed by this data elimination. The oldest known filed case was filed in August of 2009 — a business-initiated residential construction case — and was closed four and half years later in March 2014. However, because the case was pending it did not appear in any published database until the second quarter of 2014, and then was deleted in the very next quarter because of its early filing date.[xxiii]

In a follow up report from October 2021, AAJ showed things have only gotten worse, when it found, "just 577 Americans won a monetary award in forced arbitration in 2020, a win rate of 4.1%--below the five-year-average win rate of 5.3%. More people climb Mount Everest in a year (and they have a better success rate) than win their consumer arbitration case."[xxiv]

These statistics accurately reflect my personal experience as a consumer protection attorney. I used to be able to tell a dishonest car dealer that he would have to explain to a jury what he did to my clients. The case would either settle, or a jury would award damages. With the rise of arbitration clauses, the car dealers had little to fear, and most arbitrators, deciding similar facts as my juries, would often find that it was "buyer's remorse" or award only contract damages (with no non-economic damages or attorney's fees, despite that the law allowed them). One particularly heart-breaking case was documented in the New York Times 2015 video "Beware the Fine Print."[xxv,xxvi]

Efforts To Fix The Problem Of Arbitration

Given the current make-up of the Supreme Court and the long string of cases now supporting arbitration (and class action bans) in almost all cases[xxvii], it is unlikely that 7th Amendment rights will be restored by the judiciary.

In 2017 the Consumer Financial Protection Bureau (CFPB) attempted, after a lengthy study, to use its rule-making authority to prohibit class action bans in arbitration agreements. Unfortunately, later that year, the United States Senate, using the Congressional Review Act, struck down the "Arbitration Agreements Rule," giving it no "force or effect."[xxviii]

It appears that the only hope to fully restore the right to a jury trial in both individual and class cases is through the legislature and there has been some movement there.

On March 3, 2022, Congress enacted the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act," barring the enforcement of mandatory arbitration clauses for claims involving sexual misconduct. This Act allows an employee alleging sexual harassment or assault, either as an individual or a class member, to pursue their claims in court, regardless of any arbitration agreement.[xxix]

States have taken action to prohibit arbitration where preemption isn't an issue. For example, in Maryland it is illegal to place waiver of jury trial clause in a residential lease.[xxx] A California law prohibiting employers from requiring job applicants or employees to sign arbitration agreements recently went into effect after initially being put on hold by the 9th Circuit.[xxxi]

On March 17, 2022, the U.S. House of Representatives passed the sweeping Forced Arbitration Injustice Repeal Act of 2022,[xxxii] which prohibits mandatory arbitration agreements for employment, consumer, antitrust, or civil rights disputes. Unfortunately, the bill stalled in the Senate[xxxiii] and given the incoming congressional make-up it is unlikely that it will pass any time soon.

Conclusion

Although the current status of the 7th Amendment right to a jury trial is disheartening, efforts to restore this right are ongoing, as they should be. Like the prolonged battles to end slavery, grant civil rights, and provide marriage equity, this battle is for a just cause. It will continue until it is won.

Biography

Jane Santoni has been practicing law since 1986, specializing in consumer protection since 2002. For fifteen years her practice primarily consisted of car fraud until arbitration clauses made it nearly impossible to obtain justice for her clients. She now specializes in tenants' rights, debt collection, and credit reporting. She litigates for consumers in state, federal and appellate courts and has testified before state and federal legislatures. She is on the Board of Civil Justice, Inc. and MAJ's Board of Governors. She was named "Consumer Advocate of the Year" by the National Association of Consumer Advocates in 2015 and a "Leader in the Law" by the Daily Record in 2013.

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[i] Declaration of Independence
[ii] Id. (emphasis added).
[iii] United States Constitution, Bill of Rights.
[iv] Md. Const. Decl. Of Rights, Art. 5 (Amended 2022).
[v] Black's Law Dictionary 119 (9th ed.).
[vi] 9 U.S.C.A §§ 1-4.
[vii] Myriam Gilles, The Demise of Deterrence: Mandatory Arbitration and the 'Litigation Reform' Movement (presented at symposium by , THE POUND CIVIL JUSTICE INSTITUTE: Forced Arbitration and the Fate of the 7th Amendment: The Core of America's Legal System at Stake?) (July 26, 2014) available at https://www.poundinstitute.org/wp-content/uploads/2019/04/2014PoundReport.pdf.
[viii] Id. at p. 13 (citations omitted). For seminal cases from that time, see Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967) (Black, J., dissenting) and Wilko v. Swann, 346 U.S. 427, 435 (1953).
[ix] See, id. at 13.
[x] Id. at 10.
[xi] Id. (citations omitted).
[xii] Id. at 10-13.
[xiii] F. Paul Bland, Myriam Gilles & Tanuja Gupta, From the Frontlines of the Modern Movement to End Forced Arbitration and Restore Jury Rights, 95 CHI.-KENT L. REV. 585, 589-590 (2021). (footnotes omitted).
[xiv] Id. at 588 (footnotes renumbered).
[xv] Adkins v. Labor Ready, Inc. 303 F.3d 496, 498 (2002).
[xvi] See CONSUMER FIN. PROT. BUREAU, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act 1028(A) at § 2.3 (2015) available at http://files.consumerfinance.gov/f/201503cfpbarbitration-study-report-to-congress-2015.pdf [https://perma.cc/2XBD-G9V7] (reporting that 99.9% of cell phone subscribers, 90% of credit card contracts, 98.5% of storefront payday loans, 86% of private student loans, and 84% of prepaid cards are

all subject to forced arbitration). See also Alexander Colvin, The Growing Use of Mandatory Arbitration, ECON.POL'Y INST. (2018) available at epi.org/files/pdf/144131.pdf [https://perma.cc/P9L2-ZY3N] (estimating that over half the country's nonunionized workforce is now subject to these provisions – over 80 million workers).

[xvii] COMAR 11.12.01.15(A).

[xviii] Md. Ann. Code Transportation § 15-311.

[xix] Rota-McLarty v. Santander Consumer USA, 700 F.3d 690 (4th Cir. 2012).

[xx] The presumed application of the FAA in most consumer contracts is why states are largely unsuccessful in banning arbitration. Preemption applies. See, e.g. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688–89 (1996) (finding that the FAA preempted a state law requirement that a contract containing an arbitration clause include a notification on the first page of the contract). This pre-emption was made even stronger by the Supreme Court decision in AT&T Mobility v. Concepcion 131 S.Ct. 1740 (2011), where the Court struck down under the Supremacy Clause a California common law contracts doctrine under which arbitration clauses in consumer agreements were generally regarded as unconscionable and unenforceable unless they allowed for class proceedings inside the arbitral forum.

[xxi] Id. at 697.

[xxii] Id.

[xxiii] The Truth About Forced Arbitration, AMERICAN ASSOCIATION FOR JUSTICE, September 2019, available at https://www.justice.org/resources/research/the-truth-about-forced-arbitration (citations omitted).

[xxiv] Forced Arbitration in a Pandemic, AMERICAN ASSOCIATION FOR JUSTICE, October 2021, available at https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic (citations omitted).

[xxv] Available at https://www.nytimes.com/video/business/dealbook/100000004010759/beware-the-fine-print.html.

[xxvi] In that case the arbitrator found that the clients were treated "unfairly" but cited the law as being "buyer beware". He was wrong. Maryland's Consumer Protection Act, Md. Code Ann. 13-301 et seq, is titled "Unfair and Deceptive Trade Practices Act" and pursuant to it, the clients had recourse for being treated "unfairly". Unfortunately, it is almost impossible to appeal an arbitration decision.

[xxvii] In the past decade, the Supreme Court has decided over a dozen cases upholding forced arbitration clauses. See, e.g., Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); BG Grp. PLC v. Republic of Argentina, 572 U.S. 25 (2014); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013); Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17 (2012); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); KPMG LLP v. Cocchi, 565 U.S. 18 (2011); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

[xxviii] Available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/

[xxix] 9 U.S.C.A. §402.

[xxx] Md. Ann. Code Real Property § 8-208(d)(4).

[xxxi] See CA LABOR 432.6.

[xxxii] H.R. 963

[xxxiii] S. 505