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Should a contract trump the Constitution?

Founding Fathers wouldn't like today's arbitration agreements

MedMal Matters

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In a recent decision, Judge Chris Altenbernd, a Florida appellate judge, felt compelled to write a concurring opinion to state something every American is supposed to learn in middle school: "On July 4, 1776, in deciding to declare independence from a king who was regarded as a despot, Thomas Jefferson and John Adams provided a list of grievances that justified the revolutionary decision. One of those grievances stated: 'For depriving us in many cases, of the benefits of Trial by Jury.'

"After a long and painful war for independence, we placed the Seventh Amendment into our federal constitution to assure that in suits at common law with a value exceeding $20, 'the right of trial by jury shall be preserved.' " *Santiago v. Marisa Baker.*

Altenbernd wrote those words as he apparently held his nose and concurred with a decision that upheld an arbitration agreement between a patient and a medical-practice case.

Corporations have increasingly taken their battle against the civil justice system underground by forcing consumers to give up their right to trial by jury in order to purchase a product or service. When we buy a phone or download a song, we have probably unwittingly waived our right to use the civil justice system to hold the seller accountable.

What consumer has actually read every word — or any word — of the terms and conditions that flash on the screen before buying something online or registering on a website? It's composed of eight pages of impenetrable language in a font measured in micrometers. And buried within that font is a mandatory, pre-dispute arbitration agreement.

In a series of opinions, the U.S. Supreme Court has ruled that the Federal Arbitration Act (FAA) pre-empts state laws prohibiting mandatory arbitration agreements. As a result, the courts have enforced arbitration agreement after arbitration agreement, no matter how drastic or unfair and corporations have become increasingly emboldened.

The *New York Times* reported recently that General Mills had added language to its website to alert customers that by using its website to request a coupon or even by "liking" something on its Facebook page, they are agreeing to resolve any disputes using "informal negotiation via e-mail" or arbitration. After being contacted by a reporter, the *Times* reported, the company added language that suggested that simply buying a General Mills product would bind a consumer to those terms. After a public outcry, General Mills reverted back to its previous policy.

What's wrong with that? According to corporate America, arbitration is cheaper, quicker and more efficient than a lawsuit, so everyone wins. Not quite.

Many pre-dispute arbitration agreements replace a jury of one's peers with a single arbitrator that works for a company chosen by the defendant corporation and is arguably beholden to that corporation for future business. Non-party discovery is nonexistent, and the injured party has to share the fees of the arbitrator — all while paying taxes to support the court system to which he or she has no access, including the appellate courts, because no appeal is allowed.

In Illinois, the Nursing Home Care Act (NHCA) and the Health Care Arbitration Act either prevent or limit the ability of health-care providers to enforce pre-dispute arbitration agreements. The Illinois Supreme Court, however, bound by U.S. Supreme Court precedent, has held that the FAA pre-empts the anti-waiver provision in the NHCA. Only common-law contract defenses applicable to all contracts escape pre-emption. See, *Carter v. Odin*, 2012 IL 113204 (2012). Fortunately for us, Illinois law that defines different causes of action provides a significant check on the scope of arbitration agreements in the health-care setting.

In the same decision that found nursing home arbitration agreements generally enforceable, the Illinois Supreme Court held that the agreement before it was not enforceable against beneficiaries under the Wrongful Death Act. The agreement had been signed by the later-appointed special administrator of the estate, but only as "representative" of the decedent. The court held that the special administrator and other next of kin were not parties to the agreement and thus could not be bound by it in their wrongful-death action.

In *Curto v. Illini Manors Inc.*, 405 Ill. App. 3d 888 (3d Dist. 2010), the Illinois Appellate Court held that a wife's signature on an arbitration agreement as a "representative" does not, by itself, establish that the wife had actual authority to bind the husband. As there was no other evidence of actual authority, the court held that the arbitration agreement was not enforceable in either the Wrongful Death Act or the Survival Act claim.

As Altenbernd stated in his concurrence, normally, a person can waive a constitutional right only by a knowing and intelligent decision.

But somehow in deference to the supposed economic efficiency of arbitration, our society seems to be more and more willing to allow the use of form contracts, not subject to negotiation, that force patients, the elderly, the marginally literate and ordinary consumers of everyday products to waive their constitutional right to trial by jury — in order to receive basic goods and services.

By interpreting the FAA to pre-empt federal and state guarantees of the right to jury trial, the Supreme Court has elevated contract law over constitutional law. As Altenbernd aptly put it, "I fear that I have disappointed Thomas Jefferson and John Adams." ■

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