Forced Arbitration: the Bad, the Bad, and the Ugly

By Ben Lebsack

Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion.
~ Samuel Gompers

Forced arbitration is a perversion of the American Justice system. Arbitration is supposed to be cheaper and faster than litigation. That has not been my experience. I have not found arbitration to be cheaper or faster when representing employees against their employers. And forced arbitration is unfair. Employees and consumers have no bargaining power in accepting an arbitration provision. If you open the plastic bag holding the remote for a new TV, you agree to arbitration. The deck is stacked against the claimant, not because the arbitrator is necessarily biased against my client, but because the forced arbitration process is an inherently unfair system.

There are some useful purposes for arbitration, including the labor context and when parties agree to it after the dispute arises. But forced arbitration is different. As the Institute for Workers Rights explains:

> Forced arbitration is different from voluntary arbitration because it is not the result of free and equal bargaining between workers and their employers. It is a process that benefits employers by taking away the rights of workers.
>
> Forced arbitration requires workers to resolve disputes in private rather than in a public court. It shields employers from public accountability for their wrongdoing, preventing employees and the broader public from learning about unlawful employer activity. Unlike a court of law, private arbitration occurs in the absence of legal safeguards and other guarantees that ensure a fair process.[1]

Forced arbitration is anti-American. Millions of consumers and employees are forced into arbitration agreements with corporations. When they are sexually harassed, they cannot sue in court. When they are maimed by exploding batteries, they cannot sue in court.

Employees in arbitration win about a fifth of the time compared to over one-third of the time in federal court.[2] And awards in employment arbitrations average $36,500, much less than the $176,426 average verdict in a federal employment trial.[3] The American Association for Justice recently published a study showing that there were 19% more closed arbitration cases in 2020 than 2019 and that consumers prevailed at hearing in 4.1% of cases and employees prevailed at hearing in 1.9% of cases.[4] Of course, most of the rest of those cases settled, but given the statistics about arbitration awards, it is reasonable to assume settlements in arbitration matters are lower than settlements in litigation.

The easiest way to avoid arbitration is not to take a case with an arbitration agreement. But as more and more corporations use arbitration agreements, you limit your client base and put those consumers and employees in a worse position by not taking their cases. And sometimes, you do not know about the arbitration agreement until it shows up in initial disclosures with an email conferring about a motion to compel arbitration.

Regardless of whether you know about the arbitration agreement, file the case in court. Filing an arbitration demand does not toll statutes of limitations. A bad defendant can avoid paying arbitration fees, which results in AAA dismissing the arbitration and prohibiting the company from using AAA in the future, but also results in a 6-month delay while AAA tries to collect the fees. In that situation, you would likely rather pursue the claims in court than pursue a possible default through AAA and worry about what the arbitrator awards and whether the defendant contests a judgment on some due process grounds. Pursuing default through AAA requires the employee or consumer to pay the entire cost of arbitration, which may never be collected.

While you have to comply with statutes of limitations outside of the arbitration process, you can also use arbitration to your advantage and may be able to bring otherwise untimely claims. Many courts have held that statutes of limitations do not apply to arbitration unless explicitly incorporated into the agreement.[5] The Second Circuit recently expressed doubt that administrative exhaustion requirements for employment claims apply to claims brought in arbitration.[6]

Avoiding Arbitration

When an opposing party raises an arbitration agreement that you want to contest, consider who is seeking to enforce the agreement and as to why claims.

Generally, only parties to an arbitration agreement can enforce it.[7] If you sue a company, that company usually cannot rely on your client's arbitration agreement with a different company to get the case out of court.

But there are exceptions, circumstances when a defendant can rely on a third-party's arbitration agreement to compel your client to arbitration. Those exceptions include "(1) incorporation of an arbitration provision by reference in another agreement; (2) assumption of the arbitration obligation by the nonsignatory; (3) agency; (4) veil-piercing/alter ego; (5) estoppel; (6) successor-in-interest; and (7) third-party beneficiary."[8]

Some of these exceptions are unlikely to come up for plaintiff's lawyers. It is unlikely your client assumed an arbitration obligation or is the agent or alter ego to a company that has an arbitration agreement with the defendant. A defendant is more likely to argue that it is a third-party beneficiary or successor-in-interest to an arbitration provision or that your client is an agent of the party who signed the agreement or is estopped from denying applicability of the agreement.

If the defendant asserts any incorporation, assumption, or successor-in-interest basis to enforce the agreement, demand to see the other agreements involved, like an assignment or asset purchase agreement.

The Colorado Supreme Court in *Allen v. Pacheco* held that an arbitration agreement between Kaiser and one of its members binding "a Member, or by a Member's heir or personal representative, or by a person claiming that a duty to him or her arises from a Member's relationship with Health Plan, Hospitals or Medical Group incident to this Agreement" was enforceable against a spouse in a wrongful death action because a spouse is an heir.[9]

But the Court clarified that third-party beneficiary concepts do

> not create a novel (and seemingly unlimited) principle that a nonsignatory to a contract can be bound to an arbitration clause whenever the signatories to the contract so intend. That broad a principle would lead to absurd results (e.g., applied literally, such a principle would allow a signatory to argue successfully that a complete stranger to the agreement and to the parties thereto was bound because the parties to the agreement intended to bind the stranger). Rather, our statements in Allen must be read in context. When thus construed, they are fully consistent with the settled contractual and equitable principles set forth above because the plaintiff in *Allen* (1) was asserting rights under her late husband's agreement with the HMO and therefore was equitably estopped from disclaiming her obligations under that same agreement; (2) was in privity with her late husband; and (3) was an heir and thus a successor-in-interest and third-party beneficiary under the agreement.[10]

Equitable estoppel exists "where one party induces another to detrimentally change position in reasonable reliance on that party's actions through words, conduct, or silence."[11] Colorado law disfavors the doctrine of estoppel, so a defendant seeking to compel a plaintiff to arbitration based on estoppel must show that the "party against whom the estoppel is asserted must know the relevant facts; that party must also intend that its conduct be acted upon or must lead the other party to believe that its conduct is so intended; the party claiming estoppel must be ignorant of the true facts; and the party asserting the estoppel must detrimentally rely on the other party's conduct."[12] And generally, equitable "estoppel is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration."[13]

Uber uses arbitration agreements. If you have used Uber, you have an arbitration agreement with Uber. In *Lee v. Uber Tech Inc.*,[14] Uber tried to compel arbitration against a woman who brought a wrongful death action against Uber because its driver negligently killed her husband by accidentally shooting him during a trip. Uber relied on the arbitration agreement with her husband as she had not used Uber herself. The Court did not compel arbitration. Notably, this arbitration agreement was solely between "you" and Uber.

Avoid Claims Falling Under the Agreement

In *Lee v. Uber Tech Inc.*, the plaintiff smartly brought a wrongful death claim, not an estate or survival claim. Because a survival claim is meant to compensate for the harms suffered by the deceased, Uber could invoke the agreement with the deceased to arbitrate the claim.[15]

That is a rare situation. Usually, you are representing the client who signed the arbitration agreement. In that more common situation, read the arbitration provision closely. As an arbitration agreement is just that, an agreement, so courts examine whether a claim falls within the scope of the provision rather than assuming that all claims between a party who have any arbitration agreement between them are subject to arbitration.

Unfortunately in this regard, "Colorado has followed federal precedent to determine the scope of an arbitration clause under the UAA by requiring the district court to apply the presumption favoring arbitrability and to prohibit litigation "unless the court can say with 'positive assurance' that the arbitration provision is not susceptible of any interpretation that encompasses the subject matter of the dispute."[16] But courts have found, for instance, that a claim about insurance coverage was not within the scope of an explicit arbitration provision about the amount of damages related to a claim.[17]

Fight Forced Arbitration Legislatively

Usually, arbitration agreements are written well and broadly cover any claims your client has. The best efforts at opposing forced arbitration are at the legislative level.

Legislators introduced the Forced Arbitration Injustice Repeal Act, the FAIR Act, in 2019. It passed the House of Representatives in 2019, but not the Senate. This is the best chance at forced arbitration reform because federal law enforcing arbitration agreements preempts any major reform at the state level. FAIR would "1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and (2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute."[18] AAJ has an email you can send from their website to legislators about FAIR.[19]

CTLA has been an active member of a coalition aimed at reforming arbitration in Colorado. While that effort slowed over the last two years with the hopes of FAIR passing at the federal level, CTLA is always fighting for consumers and employees at the capital, so consider donating to EAGLE today. ▲▲▲

Ben Lebsack represents employees who have been sexually harassed, assaulted, discriminated against, or not paid by their employers. He serves on the boards of the Colorado Plaintiff Employment Lawyers Association (chair), National Employment Lawyers Association, and Colorado Trial Lawyers Association. He recently watched Space Jam: A New Legacy.

Endnotes:

[1] Taking "Forced" Out of Arbitration: How forced arbitration harms America's workers, The Employee Rights Advocacy Institute for Law & Policy (2016).

[2] *Id*. (citing Katherine V. W. Stone and Alexander J. S. Colvin, The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights, Economic Policy Institute (Dec. 7, 2015), available at https://www.epi.org/publication/the-arbitration-epidemic/.)

[3] *Id.*

[4] Forced Arbitration During a Pandemic: Corporations Double Down, Am. Ass'n for Justice (Oct. 2021), available at https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.

[5] *NCR Corp. v. CBS Liquor Control, Inc*., 874 F. Supp. 168, 172 (S.D. Ohio 1993) ("[T]he effect of a statute of limitations is to bar an action at law, not arbitration."); *Har-Mar, Inc. v. Thorsen & Thorshov, Inc*., 218 N.W.2d 751, 754 (Minn. 1974) ("Based upon the special nature of arbitration proceedings and both the statu-

tory and common-law meaning of the term 'action,' we feel compelled to hold § 541.05(1) was not intended to bar arbitration of [the] fee dispute solely because such claim would be barred if asserted in an action in court.").

[6] *Virk v. Maple-Gate Anesthesiologists, P.C.*, 657 F. App'x 19, 23 (2d Cir. 2016).

[7] *N.A. Rugby Union LLC v. U.S. Rugby Football Union*, 442 P.3d 859 (Colo. 2019).

[8] *Id.*

[9] *Allen v. Pacheco*, 71 P.3d 375, 377 (Colo. 2003).

[10] *N.A. Rugby Union LLC*, 442 P.3d at 865.

[11] *V Bar Ranch LLC v. Cotten*, 233 P.3d 1200, 1210 (Colo. 2010) (citing *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 75 (Colo. 1996)).

[12] *Santich v. VCG Holding Corp.*, 443 P.3d 62, 65 (Colo. 2019) (citing *Jefferson Cty. Sch. Dist. No. R-1 v. Shorey*, 826 P.2d 830, 841 (Colo. 1992); *Dove v. Delgado*, 808 P.2d 1270, 1275 (Colo. 1991); *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)).

[13] *Hirsch v. Amper Fin. Servs.*, 215 N.J. 174, 71 A.3d 849, 852 (2013).

[14] *Lee v. Uber Tech Inc., No. 2020CV31858 (Denver Dist. Ct. Nov. 4, 2020).*

[15] *Id.*

[16] *City & Cty. of Denver v. Dist. Ct.*, 939 P.2d 1353, 1363–64 (Colo. 1997) (quoting *Jefferson County Sch. Dist. v. Shorey*, 826 P.2d 830, 840 (Colo.1992); *AT & T Techs. v. Commc'ns Workers*, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L. Ed.2d 648 (1986)).

[17] *State Farm Mut. Auto. Ins. Co. v. Stein*, 886 P.2d 326 (Colo. App.1994) (disputes over anti-stacking provisions of insurance policy were not encompassed by narrow, unambiguous arbitration clause), appeal on other grounds after remand, 924 P.2d 1154 (Colo.App.1996), aff'd, No. 96SC283, 940 P.2d 384 (Colo. June 30, 1997).

[18] H.R.963 - FAIR Act, 117th Congress (2021-2022)

[17] https://www.justice.org/advocacy/our-issues/fair-act-landing.