

# ARBITRATION AND THE GODLESS BLOODSUCKERS

by Richard Neely, Esq.

Once I received a gift of instructional tapes on how to be a second mortgage broker. There I learned that in the mortgage business, penalty fees are a major profit center: Because people don't want lose their homes, they will pay a \$50 late fee. The tapes told me to *encourage* people to be late. Indeed, late fee income frequently rivaled interest income!

The lesson from mortgage lending was that more organizations than we would like to imagine are in business to exact small sums from desperately poor people. How else to explain the "over the limit" penalty on your credit card? If you pay your bill, going over the limit would appear an unmixed blessing to the bank. But since the bank has you by the little round ones, why not squeeze? Indeed, quasi-monopoly businesses like banks vindicate Jesus' pronouncement: "For unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken away even that which he hath." 24 *Matthew 29*

All of which brings me to the subject of consumer contractsB particularly credit card contractsB and arbitration. A few years ago I answered a request from the National Arbitration Forum to join their panel of arbitrators. I thought I was invited because I was a former state supreme court judge. Stupid me! I was just another piece of raw meat. I received no invitations to arbitrate significant cases, but about a year after I signed up, I was sent two credit card company claims against consumers to be handled for a flat fee of \$150 each. So I thought, what the hell: Let's see how this works.

Thus I learned how Godless bloodsucking banks have converted apparently

neutral arbitration forums into collection agencies to exact the last drop of blood from desperate debtors. Here's how it works: All bank credit card contracts (and most other consumer contracts like your wireless telephone contract) have arbitration clauses that make arbitration the exclusive remedy for either side in any dispute.

In a credit card claim the consumer won't spend money to fight the case because she owes the money. So it turns out that credit card arbitrations are done entirely on the written record, without oral presentation and without an appear-

ance by the consumer. The consumer, of course, is entirely naive. Thus the consumer gets paperwork in the mail and, being overwhelmed already by debt-related calls, simply ignores it. Default follows, at which point all the paperwork is sent to the arbitrator. The arbitrator then enters judgment for the credit card company and collects his \$150. The credit card company enforces the award in court and sells the debtor's house.

But that is not the outrage: The outrage is that the bank doesn't just ask the arbitrator for the debt plus legal interest. Rather, the bank asks for substantial costs related to the arbitration *itself*, and those costs are significantly higher than court filing fees. In essence, because all of the work of collection is really done by the arbitration organization (in my case the National Arbitration Forum) what the fees amount to is the consumer paying the credit card company's legal fees! In one case that I handled, the fees alone amounted to \$450. Furthermore, the arbitration company sends the arbitrator a judgment form already filled out so that all the arbitrator need do is check the appropriate box and sign his or her name. It looks like a collection agency to me!

In my case I did not award the bank the litigation-related fees. Those fees are tantamount to an award of attorneys' fees and such fee shifting in a contract of adhesion is "unconscionable!" I never got another case! And that is entirely understandable because banks are *professional* litigants. When a mega-bank gets a list of possible arbitrators, it knows that old Richard here ain't much for giving the single mom that extra \$450 screwing. So... the bank knows to strike Richard as unacceptable.

The single mom, on the other hand, is entirely innocent. Michael Ludig or

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Nino Scalia would be acceptable arbitrators to her – after all, they look great on paper! So there it is: In arbitration the professional litigants have an enormous advantage not only because they write the contract designed to stick it to the consumer, but also because they know the arbitrators who will enforce any and all illegal and/or unconscionable provisions in their contracts.

And I'm not exaggerating: Big companies of every stripe put illegal and unconscionable clauses in their contracts all the time. For example, when St. Paul Insurance Company sold malpractice insurance in West Virginia, St. Paul's policy contained an arbitration clause – something that is *expressly* prohibited by a written Insurance Commissioner regulation. But without an expensive and experienced lawyer, the average doctor wouldn't know that.

In a real court the judge is familiar with the law that applies to consumer contracts. On motions for default judgment, then, the judge will protect the consumer. But real judges aren't paid by the case or dependent on one group of professional litigants for their spending money. From what I see, in consumer arbitration cases there exists the same problem that caused our Supreme Court to destroy the old Justice of the Peace system. In the old J.P. system, the J.P.s depended for their income upon favorable verdicts for plaintiffs. See, *Schrewsbury v. Poteet*, 157 W. Va. 450 (1974).

And now let's look at operations like the National Arbitration Forum that organize these so-called "neutral" arbitrations. How many arbitrations do you think are initiated by consumers? That's right, hardly a one! So, upon whom do the arbitration companies depend for their revenue? That's also right, the miserable, Godless bloodsucking banks and other professional litigants. Whom, then, are all the procedures designed to accommodate? Right again: the professional bloodsuckers who have set the system up to screw the consumer.

So what do we do about this? Well... actually some thought has been given in a number of places to making arbitration

look more like a court and less like a whore house. For example, in response to the need for an international arbitration system, *The Code of Ethics for Arbitrators in Commercial Disputes* (usually referred to as the AAA/ABA Code of Ethics) was substantially revised effective March 1, 2004 to make the *Code of Ethics* virtually identical to the *Code of Judicial Conduct*.<sup>2</sup>

Canon II of the *Code of Ethics* expressly provides that an arbitrator must disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality. Obviously, if I'm a retired lawyer turning out four \$150 credit card arbitrations a week for a small group of banks, that's a fact that should be disclosed to consumers! Also, our own *Code of Judicial Conduct* is sufficiently broad to encompass arbitrators,<sup>3</sup> and the fact that the arbitrators' own *Code of Ethics* now parallels our *Judicial Code of Conduct* makes that proposition virtually unarguable. So... when you are defending a consumer who is the victim of a collection agency *qua* arbitrator, ask the court to strike the arbitration because of failure of full disclosure by the arbitrator. That will put the fox among the chickens!

Notwithstanding the Federal Arbitration Act,<sup>4</sup> lots of reform can be accomplished by our Supreme Court. For example, the Court can require *as a condition precedent to arbitration* a full disclosure of all possible conflicts. Also, our Court can make arbitration clauses void in any consumer contract with an illegal or unconscionable provision. Ours, after all, is the Court that decided unanimously *State ex rel. Dunlap v. Berger*, 211 W. Va. 549 (2002).<sup>5</sup>

Banks and other bloodsuckers make campaign contributions and single moms don't. That accounts for the current federal system, but we can fight back in the state courts. We need to nibble away at arbitration the same way that monopoly business nibbled away at judicial protections.<sup>6</sup> Although we can't take on the Federal Arbitration Act<sup>7</sup> directly, what we *can* do is make the State-mandated procedural rules in arbitration consumer-friendly and put a big brake on illegal, fee-exacting contract clauses by voiding

the arbitration provisions whenever illegal clauses appear in a contract.

### About the Author

Richard Neely is a retired chief justice of the West Virginia Supreme Court of Appeals and practices law in Charleston.

<sup>1</sup>Of course it's always a judgment call whether a contractual provision allowing for the shifting of attorneys' fees is binding; in general, provisions in genuinely negotiated contracts are enforced while such provisions in contracts of adhesion are not.

<sup>2</sup>Code of Ethics for Arbitrators in Commercial Disputes (American Arbitration Association 1977); See also, American Arbitration Association, Side by Side Comparison of 1977 and 2004 Versions of the Code of Ethics for Arbitrators in Commercial Disputes Canon VII (2004), available at:

<http://www.adr.org/upload/LIVESITE/RulesProcedures/EthicsStandards/code%20for%20arbitrators%20comparison.pdf>.

<sup>3</sup>Canon 6A of the Code of Judicial Conduct provides:

Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Law Masters, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners and Special Masters, is a judge within the meaning of the Code. [emphasis added.]

<sup>4</sup>9 U.S.C. 1 et seq.

<sup>5</sup>The big holding in *Berger* was contained in Syl. Pt. 4, which says in relevant part:

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable...

<sup>6</sup>For example, arbitration has been an imaginative way for monopoly business to circumvent many statutory and common law protections. Relying on the Federal Arbitration Act, courts have, for example, allowed consumer arbitration clauses to undermine the deterrent effect of class action remedies.