The Federal Arbitration Act, Preemption, and the Privatization of Law

prepared for

National Association of Attorneys General
2016 Southern Region Meeting

Emory University School of Law
Atlanta, Georgia

Judith Resnik
Yale Law School
April 19, 2016
“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”

Constitution of Conn., art. I, § 12 (1818)

Source: http://historicbuildingsct.com/?p=1574
“A court-house and jail shall be erected at the public expense in each county, where the present convention or the future legislature shall point out and direct.”

Constitution of Georgia, art. LV. (1777)

The Old Richmond County Courthouse, Augusta, Georgia, 1801.
Served as courthouse and seat of local government until 1821.
Source: http://www.nps.gov/nr/travel/Augusta/oldgovernment.html

“The state shall be divided into judicial circuits, each of which shall consist of not less than one county. Each county shall have at least one superior court, magistrate court, a probate court and, where needed, a state court and a juvenile court.”

Constitution of Georgia, art. VI (1983)
Comparing the Volume of Filings: State and Federal Courts, 2010

The Federal Arbitration Act, Preemption, & the Privatization of Law - NAAG - Apr 14, 2016 rev 5
State Trial Court Filings, 1976-2008

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Filings</th>
<th>Juvenile</th>
<th>Criminal</th>
<th>Civil (including Domestic Relations)</th>
<th>Traffic</th>
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</thead>
<tbody>
<tr>
<td>1976</td>
<td>48,088,437</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>1992</td>
<td>93,786,499</td>
<td></td>
<td>19,707,374</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>105,965,656</td>
<td></td>
<td>21,292,567</td>
<td></td>
<td>57,500,000</td>
</tr>
</tbody>
</table>

Figures are estimates, as not all states report data in all categories.

The Federal Arbitration Act of 1925

An arbitration provision “written . . . in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

9 U.S.C. § 2

“But nothing . . . contained [in the Federal Arbitration Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

9 U.S.C. § 1
Even if some buyers and sellers “deal[t] at arm’s length on equal terms,” the federal securities laws were “drafted with an eye to the disadvantages under which buyers labor.”

Arbitrators’ “award[s] may be made without explanation of their reasons and without a complete record of their proceedings,” and hence, one could not examine “arbitrators' conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact’ . . . .”

“... so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”

The Federal Arbitration Act, Preemption, & the Privatization of Law

NAME AND ADDRESS OF COMPANY OF BUSINESS
FROM TO DESCRIBE IN DETAIL THE WORK YOU DID STARTING HOURS RATE
NAME OF SUPERVISOR

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS
FROM TO DESCRIBE IN DETAIL THE WORK YOU DID STARTING HOURS RATE REASON FOR LEAVING
NAME OF SUPERVISOR

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS
FROM TO DESCRIBE IN DETAIL THE WORK YOU DID STARTING HOURS RATE REASON FOR LEAVING
NAME OF SUPERVISOR

NOTICE TO EMPLOYEES

Failure to be truthful on the application may affect the applicant's subsequent ability to receive workers' compensation benefits.

The facts set forth above in my application for employment are true and complete. I understand that if employed, false statements or omissions of facts called for on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal history and financial credit record through any investigative or credit agencies or bureaus of your choice. I further understand that I am an "Employee at Will" and that Waffle House, Inc. does not guarantee my employment for any specific period of time.

In making this application for employment I also understand that an investigative consumer report may be made whereby information is obtained through personal interviews with my neighbors, friends, or others with whom I am acquainted. This inquiry includes information as to my character, general reputation for moral character, and mode of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional, detailed information about the nature and scope of this investigative consumer report.

I FULLY UNDERSTAND THAT IF ASSIGNED TO ANY POSITION WHEREBY MONIES, EQUIPMENT, OR OTHER SUPPLIES OF WAFFLE HOUSE, INC. ARE ASSIGNED TO ME, I SHALL BE ACCOUNTABLE FOR THE AFORESAID ITEMS AND LIABLE FOR ANY SHORTAGES IN SAME. I AGREE THAT WAFFLE HOUSE, INC. MAY DEDUCT FROM ANY MONIES DUE ME, AN AMOUNT TO COVER ANY SHORTAGES WHICH MAY OCCUR AND WILL INDEMNIFY WAFE HOUSE, INC. AGAINST ANY LEGAL LIABILITY FOR WITHHOLDING SAID SHORTAGES FROM MONIES DUE ME AS A RESULT OF MY EMPLOYMENT WITH WAFFLE HOUSE. IF THERE ARE ANY SHORTAGES OR LOSSES IN MONEY, FOOD, OR EQUIPMENT WHICH IS ASSIGNED TO ME OR TO WHICH I HAVE ACCESS, I AGREE TO SUBMIT TO A POLYPH A OR OTHER SCIENTIFIC EVALUATION TEST CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW DURING ANY INVESTIGATION OF SUCH SHORTAGE OR LOSS, AS PART OF THIS APPLICATION PROCESS AND AS A CONDITION OF MY CONTINUED EMPLOYMENT, AT THE REQUEST OF WAFFLE HOUSE, INC. I AGREE TO SUBMIT TO TESTING TO DETERMINE MY USE OF DRUGS OR ALCOHOL. I UNDERSTAND THAT REFUSING TO SUBMIT TO A TEST OR A POSITIVE RESULT IN ANY TEST INDICATING DRUG OR ALCOHOL USE MAY RESULT IN MY IMMEDIATE TERMINATION FROM EMPLOYMENT.

IF THE POSITION TO WHICH I AM ASSIGNED SHALL BE A POSITION WHERE I NORMALLY RECEIVE TIPS, I UNDERSTAND THAT IT IS MY OBLIGATION TO REPORT ALL TIPS TO THE INTERNAL REVENUE SERVICE FOR INCOME TAX PURPOSES. THIS MAY BE DONE EITHER BY REPORTING THEM ON THE PRELIST OR ON MY TAX RETURN AT THE END OF THE YEAR. DELIBERATELY NOT REPORTING ALL INCOME COULD RESULT IN SEVERE PENALTIES.

I UNDERSTAND AND ACKNOWLEDGE THAT WAFFLE HOUSE IS TAKING A CREDIT AGAINST MY WAGES FOR TIPS RECEIVED, IN THE EVENT I DO NOT RECEIVE TIPS EQUAL TO THAT CREDIT. I SHALL NOTIFY MY UNIT MANAGER SO THAT MY TIPS CAN BE COUNTED AND AUDITED TO ENSURE THAT THE TIPS RECEIVED ARE OR ARE NOT INCLUDED IN MY WAGES. I UNDERSTAND THAT WAFFLE HOUSE, INC. IS ALSO BOUND TO REPORT TO THE IRS THE AMOUNT OF TIPS RECEIVED.

MEAL POLICY: As a part of your compensation, Waffle House allows its employees to eat during their shift at a reduced rate. This includes a full meal if your workday is 4 hours or less and 2 full meals if your workday is over 4 hours. In addition, beverages and snacks are allowed during breaks. The only limitation is that dinner steaks, chicken and pork chops are not offered under this meal policy. Please try to eat the meal at some time during the shift. However, this should be during a slow time and must not interfere with customer service. To cover the cost of the meal, drinks, snacks and the time to eat these items, Waffle House will deduct from your paycheck an amount based on the number of hours worked that day. Please see your Unit Manager for the schedule of meal charges.

I have read and understand the above notice and agree to comply with the provisions above. Signed this _______ day of __________, 19______

Signature of Applicant
“... I AGREE THAT WAFFLE HOUSE, INC. MAY DEDUCT FROM ANY MONIES DUE ME, AN AMOUNT TO COVER ANY SHORTAGES WHICH MAY OCCUR AND WILL INDEMNIFY WAFFLE HOUSE, INC. AGAINST ANY LEGAL LIABILITY FOR WITHHOLDING SAID SHORTAGES FROM MONIES DUE ME AS A RESULT OF MY EMPLOYMENT WITH WAFFLE HOUSE. IF THERE ARE ANY SHORTAGES OR LOSSES IN MONEY, FOOD, OR EQUIPMENT WHICH IS ASSIGNED TO ME OR TO WHICH I HAVE ACCESS, I AGREE TO SUBMIT TO A POLYGRAPH OR OTHER SCIENTIFIC EVALUATION TEST CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW ...”

“The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.”

“The Court holds today that the . . . EEOC . . . may obtain victim-specific remedies in court on behalf of an employee who had agreed to arbitrate discrimination claims against his employer. . . . I cannot agree that the EEOC may do on behalf of an employee that which an employee has agreed not to do for himself.”

INDEPENDENT ARBITRATION

INSTEAD OF SUING IN COURT, YOU’RE AGREETING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE’S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION (“AAA”) UNDER WIRELESS INDUSTRY ARBITRATION (“WIA”) RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU . . .

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

(4) IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON’T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;

(5) NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN’T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.
“[I]n a consumer contract of adhesion [when] . . . disputes . . . involve small amounts of damages . . . the waiver [of a class action] becomes in practice the exemption of the party ‘from responsibility for [its] own fraud . . .’.”

“States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons . . . .

Because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ . . . California's Discover Bank rule is preempted by the FAA.”

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).
“1.3 Can AT&T Change My Terms And Rates?

We may change any terms, conditions, rates, fees, expenses, or charges regarding your Services at any time . . . .”

effective as of January 20, 2015

https://m.att.com/shopmobile/legal/terms.wirelessCustomerAgreement.html
## Consumer Arbitrations Filed with the American Arbitration Association, 2009-2014

<table>
<thead>
<tr>
<th>Sources</th>
<th>Types</th>
<th>Average per Year</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA Data, <em>Provider Organization Report</em> June 2009 – July 2014</td>
<td>AAA-defined consumer claims</td>
<td>1,460</td>
<td>7,303</td>
</tr>
<tr>
<td></td>
<td>AAA claims involving AT&amp;T</td>
<td>27</td>
<td>134*</td>
</tr>
<tr>
<td>Consumer Financial Protection Bureau, 2015 <em>Arbitration Study</em> January 2010 – December 2012</td>
<td>AAA claims in credit card, prepaid card, checking account, payday, private student, and auto loan markets</td>
<td>616**</td>
<td>1,847</td>
</tr>
</tbody>
</table>

* All 134 of the consumer claims involving AT&T were filed by consumers.
** Of the 616 consumer arbitrations a year, approximately two-thirds were filed by consumers.

“Mobile cramming”: Billing consumers for unauthorized monthly subscriptions for text messages

Typically $9.99 per month
Charges not clearly identified on bills
Complaints: no or limited refunds (1-2 months)

FTC Complaint: AT&T typically kept 35% of charges, sometimes up to 40%
AT&T earned $161 million in 2013 from third-party subscription charges

2014 SETTLEMENT
AT&T WITH FCC, FTC, AND PARTICIPATING STATES

Total settlement: $105,000,000
$80,000,000 to consumer refunds (redress program)
$20,000,000 to states
$5,000,000 to U.S. Treasury


“AT&T Mobility shall, for at least six (6) years from April 1, 2015, provide a report to the [Enforcement Bureau of the FCC] . . . documenting its compliance . . . .

The Bureau shall treat all reports received . . . as confidential under 47 C.F.R. § 0.457.”

(adopted October 8, 2014)
The Interaction of Public and Private Enforcement

Filings, 20 states: 2008-2012
740 state and municipal enforcement actions
410 federal enforcement actions
88% no overlapping class action identified

114 private class actions: 2008-2012

34%: overlapping public enforcement proceedings

When overlap, class action lawyers “filed before the government” about two-thirds of the time

ARBITRATION STUDY, CFPB (March 2015),
“Arbitration. All disputes or claims between the parties related to this Agreement shall be submitted to binding arbitration in accordance with the rules of [the] American Arbitration Association within 30 days from the dispute date or claim. Any arbitration proceedings brought by Client shall take place in Orange County, California. Judgment upon the decision of the arbitrator may be entered into any court having jurisdiction thereof. The prevailing party in any action or proceeding related to this Agreement shall be entitled to recover reasonable legal fees and costs, including attorney's fees which may be incurred.”

Provision Provided to Patty Gandee by LDL Freedom Enterprises, Inc.

“Gandee estimated her underlying claim to involve roughly $3,500 in actual damages. . . . Because Gandee struggles financially (as presumably do all Freedom’s customers) and the costs of arbitrating in California would exceed her claim, sufficient evidence was presented to make a prima facie case for a prohibitive-cost defense. . . .

Because the ‘loser pays’ provision serves to benefit only LDL Freedom Enterprises, Inc. and, contrary to the legislature’s intent, effectively chills Gandee’s ability to bring suit under the Consumer Protection Act, it is one-sided and overly harsh.

[T]he provision shortens the statute of limitations from the four years provided by the CPA to 30 days. . . . [That is] substantively unconscionable. . . .

[This] short, four-sentence arbitration clause containing three unconscionable provisions. . . . is so permeated with unconscionable provisions as to make severance impossible.”

Regulating Consumer Arbitration
Data Disclosure

“[A] private arbitration company that administers or is otherwise involved in a consumer arbitration, **shall collect, publish at least quarterly, and make available to the public** on the Internet Web site of the private arbitration company, if any, and on paper upon request . . . :

1) Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.

2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

3) The nature of the dispute . . .

4) Whether the consumer or nonconsumer party was the prevailing party . . .

7) Whether the consumer party was represented by an attorney and, if so, the name of the attorney and . . . the law firm . . .

8) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

9) The type of disposition . . .

10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney’s fees awarded, and any other relief granted, if any.

11) The name of the arbitrator, his or her total fee for the case, the percentage of the arbitrator’s fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver.”

California Code of Civil Procedure § 1281.96(a)
effective 2003, amended 2014
Regulating Consumer Arbitration
Fee Waivers

“(a) No neutral arbitrator or private arbitration company shall administer a consumer arbitration under any agreement or rule requiring that a consumer . . . pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration . . . .

(b) 1) All fees and costs charged to or assessed upon a consumer party by a private arbitration company in a consumer arbitration, exclusive of arbitrator fees, shall be waived for an indigent consumer. . . . “[I]ndigent consumer” means a person having a gross monthly income that is less than 300 percent of the federal poverty guidelines . . . .

2) Prior to requesting or obtaining any fee, a private arbitration company shall provide written notice of the right to obtain a waiver . . . in a manner calculated to bring the matter to the attention of a reasonable consumer . . . .

3) Any consumer requesting a waiver of fees or costs may establish his or her eligibility by making a declaration under oath on a form provided . . . by the private arbitration company for signature stating his or her monthly income and the number of persons living in his or her household. No private arbitration company may require a consumer to provide any further statement or evidence of indigence . . . .”

California Code of Civil Procedure § 1284.3
Effective 2003
District of Columbia Code Data Disclosure and Fee Waivers

“(a) Any arbitration organization that administers or otherwise is involved in 50 or more consumer arbitrations a year shall collect, publish at least quarterly, and make available to the public in a computer-searchable database that permits searching with multiple search terms . . . , and is accessible at the Internet website of the arbitration organization, . . . all of the following information regarding each consumer arbitration it has administered or otherwise been involved in within the preceding 5 years:

(d) (1) All fees and costs charged to or assessed in the District of Columbia . . . shall be waived for any person having a gross monthly income that is less than 300% of the federal poverty guidelines issued annually by the United States Department of Health and Human Services.

(2) Any consumer requesting a waiver of fees or costs may establish eligibility by making a declaration under oath on a form provided by the arbitration organization indicating the consumer’s monthly income and the number of persons living in the household. No arbitration organization may require a consumer to provide any further statement or evidence of indigence. The form, and the information contained therein, shall be confidential and shall not be disclosed to any adverse party or any nonparty to the arbitration.

(3) An arbitration organization shall not keep confidential the number of waiver requests received or granted, or the total amount of fees waived . . . .

(e) Nothing in the section shall affect the ability of an arbitration organization to shift fees that would otherwise be charged or assessed upon a consumer party to another party.”

§ 16-4430. Regulation of arbitration organizations. Effective: February 27, 2008
American Arbitration Association Affidavit For Waiver of Fees Notice
For Use By California Consumers Only

Pursuant to section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines, are entitled to a waiver of all fees and costs, exclusive of arbitrator fees. This law applies to all consumer arbitration agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, please complete this form and submit it with your demand for arbitration to the AAA’s Western Case Management Center.

If (1) you are not a California consumer; or (2) your gross monthly income is more than 300% of the federal poverty guidelines, you may still apply for a reduction or deferral of AAA administrative fees by contacting the nearest AAA Case Management Center and requesting a hardship application form.

Name: __________________________________________________________
Address: _________________________________________________________
Number of Persons in Household ______________________________________
Gross Monthly Income _____________________________________________

I hereby swear that the foregoing is a true and correct statement.

____________________________________
Signature

See American Arbitration Association Affidavit for Waiver of Fees Notice for Use by California Consumers Only,
https://www adr org/aaa/ShowPDF;jsessionid=kbxPbvFTQmmP8cycYdvLtfxmgYV4dLDBNsfx1gH347bx1GqLL!1786312740?doc=ADRTG_004304 [http://perma.cc/63NM-A4E3].

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# American Arbitration Association Affidavit in Support of Reduction or Deferral of Filing and Administrative Fees

<table>
<thead>
<tr>
<th>Name:</th>
<th></th>
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<tbody>
<tr>
<td>Age:</td>
<td></td>
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<tr>
<td>Address:</td>
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<tr>
<td>Spouse:</td>
<td></td>
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<tr>
<td>Dependents:</td>
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<tr>
<td>Employer:</td>
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<tr>
<td>Salary:</td>
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<tr>
<td>Other Sources &amp; Amounts of Income:</td>
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</tr>
<tr>
<td>Assets:</td>
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<td>Bank:</td>
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<td>Bank:</td>
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<td>Home:</td>
<td>Value:</td>
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<tr>
<td>Other:</td>
<td>Value:</td>
</tr>
<tr>
<td>Automobile:</td>
<td>Make: Year</td>
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<tr>
<td>Value of Stocks:</td>
<td>Bonds: CD's</td>
</tr>
<tr>
<td>Retirement (IRA, 401k, etc.):</td>
<td>Other:</td>
</tr>
<tr>
<td>Liabilities:</td>
<td></td>
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<tr>
<td>Rent or Mortgage</td>
<td>$</td>
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<tr>
<td>Automobile</td>
<td>$</td>
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<tr>
<td>Medical</td>
<td>$</td>
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<tr>
<td>Other</td>
<td>$</td>
</tr>
<tr>
<td>Other</td>
<td>$</td>
</tr>
</tbody>
</table>

I have no other sources of income other than those indicated above, and I do not have assets sufficient to pay the American Arbitration Association’s filing and administrative fees. Any other facts or circumstances, which support my position that I am unable to pay such fees, are indicated on additional correspondence or papers which are attached and are incorporated into this affidavit.

I hereby swear that the foregoing is a true and correct statement of my financial condition and by ability to pay.

__________________________
Signature

Sworn to before me this ___ day of______, 2

__________________________
Notary Public

The AAA will not retain any copies or originals of documents or information submitted by a party in connection with their hardship request, except for information such as whether a hardship request was granted, and the amount of the waiver or deferral. Accordingly, please indicate below where the AAA should mail such materials:

Name:
Address:
City: State: Zip Code:

If no return address is filled in above, all documentation will be destroyed within 10 days of the AAA’s hardship determination.
CFPB Proposed Reforms
pending 2015

“. . . to require any arbitration agreement included in a contract for a consumer financial product or service offered by an entity subject to the proposals to provide explicitly that the arbitration agreement is inapplicable to cases filed in court on behalf of a class unless and until class certification is denied or the class claims are dismissed. . . . 

to require covered entities that use arbitration agreements in their contracts with consumers to submit initial claim filings and written awards in consumer finance arbitration proceedings to the Bureau . . . .

to publish the claims or awards to its website, making them available to the public.”
Centers for Medicare & Medicaid Services  
Proposed Rule  
Reform of Requirements for Long-Term Care Facilities

“[T]he nursing home must explain the [arbitration] agreement to the resident in a form and manner that he or she understands, . . . . [and] admission to the facility cannot be contingent upon the resident signing the agreement . . . .

[C]omprehensive requirements are needed so that residents understand the right they are waiving by signing an agreement for binding arbitration and that the arbitration will be conducted in a neutral and fair manner. . . .

[W]e are concerned that despite the protections we have proposed in this rule, some nursing home residents and potential residents may feel pressured to sign these agreements. . . . Thus, we have also requested comments on whether agreements for binding arbitration should be prohibited.”

Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168, 42242 (July 16, 2015)
Sec. 3(b).

“[Written obligations for ‘an individual or a small business concern’ to arbitrate] shall not be enforceable if the cases] aris[e] from the alleged violation of a Federal or State statute, the Constitution of the United States, or a constitution of a State, unless the written agreement to arbitrate is entered into by both parties after the claim has arisen and pertains solely to an existing claim . . . .

Sec. 3(c).

INTERACTION WITH STATE LAW.—For purposes of subsection (a), the phrase ‘grounds as exist at law or in equity for the revocation of a contract’ shall include a Federal or State statute, or the finding of a Federal or State court, that prohibits the agreement to arbitrate on grounds that the agreement is unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of contract law of public policy.” . . .
European Regulation of
Online Dispute Resolution (ODR)

“Whereas . . .

(1) Regulation (EU) No 524/2013 provides for the establishment of an online dispute resolution platform at Union level (ODR platform). . . . [ [in] the form of an interactive and multilingual website . . .

Article 6
Constitution of certain disputes and deletion of personal data

1. A dispute submitted through the ODR platform shall not be processed further in particular where:

   (a) the respondent party states that it is not willing to use an ADR entity;

   (b) the parties fail to agree on an ADR entity to deal with their dispute within 30 calendar days after submission of the electronic complaint form;

   (c) the ADR entity agreed upon by the parties refuses to deal with the dispute, . . .”

Regulation 2015/1051, of the European Commission,
2015 O.J. (L 171/1) (implementing regulation No 524/2013)
Whereas . . .

(26) The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter of Fundamental Rights of the European Union. ODR is not intended to and cannot be designed to replace court procedures, nor should it deprive consumers or traders of their rights to seek redress before the courts. This Regulation should not, therefore, prevent parties from exercising their right of access to the judicial system.

Regulation 524/2013, of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/1)
“Access to justice means that everyone – regardless of race, ethnicity or orientation, irrespective of wealth or poverty, whether we are mighty or weak – each and every one of us gets his or her day in court. Equal justice, that defining principle of our country, requires that every human being has access to the courts . . .”

Jonathan Lippman, Chief Judge, New York State

*The State of Judiciary 2015: Access to Justice: Making the Ideal a Reality*
The Landscape of Civil Litigation in State Courts 2015

925,000 civil cases (excluding domestic)

Dispositions 2012 - 2013 in 152 courts in 10 urban counties
5% of state civil caseloads nationally

At least one party was self-represented (usually the defendant) in more than 3/4 of the cases

“Most cases were disposed of through an administrative process.”

46% judgments, most likely default judgments.
1/3 dismissed, 10% recorded as settlements.

4%: adjudicated via bench or jury trial, summary judgment, or binding arbitration

DEKALB COUNTY
COLLECTION OF FINES AND COURT COSTS

All DeKalb County Recorder’s Court judges adjudicating misdemeanor probation revocation proceedings shall abide by the described procedures:

<table>
<thead>
<tr>
<th>RIGHT TO COUNSEL</th>
<th>ENFORCING FINES BY IMPOSING JAIL</th>
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<td>All probationers have a right to counsel (which may include a public defender or court-appointed attorney) in probation revocation proceedings.</td>
<td>A probationer charged with failure to pay may be jailed only if (s)he has willfully failed to pay or failed to make reasonable efforts to acquire the resources to pay, AND no adequate alternative to incarceration exists.</td>
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<td>The court MAY NOT accept a written or oral waiver of the right to counsel without FIRST informing the probationer of the dangers of proceeding without counsel and ensuring that any waiver of the right to counsel is knowing, intelligent, and voluntary.</td>
<td>Prior to revoking probation and committing a probationer to jail for nonpayment of fines, the court must conduct an economic ability-to-pay hearing.</td>
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<td>If a probationer seeks to waive his right to counsel, the court must conduct a colloquy on the record to inform the probationer:</td>
<td>To conduct such a hearing, the court shall</td>
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<tr>
<td>- That the probationer has a right to a court-appointed attorney or public defender at no cost, if he cannot afford to retain an attorney;</td>
<td>• Inquire and make a determination of a probationer’s ability to pay a fine, which shall address the probationer’s ability to pay and the income, assets, debts, and financial responsibilities presented by the probationer;</td>
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<tr>
<td>- That the $50 fee normally charged for representation by the DeKalb County Public Defender may be waived for those who cannot afford to pay;</td>
<td>• Inquire and make a determination of the reasonableness of a probationer’s efforts to acquire resources to pay a fine, which shall take into account efforts to secure employment and borrow money, as well as limitations to the probationer’s ability to secure employment and borrow money;</td>
</tr>
<tr>
<td>- Of the risks and dangers of proceeding without counsel, including the risk of incarceration and the maximum jail time that may be imposed if the probationer is determined to have violated probation; and</td>
<td>• Consider and make a determination of the adequacy of alternatives to incarceration, including a reduction or waiver of fines and fees, an extension of time to pay, and community service, in the event that a probationer is determined to lack ability to pay despite having made reasonable efforts to acquire resources.</td>
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<td>- Of the benefits of representation by counsel, including assistance with asserting constitutional rights,</td>
<td></td>
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U.S. Department of Justice Civil Rights Division  
Office for Access to Justice  
Letter on “Basic Constitutional Principles Relevant to the Enforcement of Fines and Fees”

“(1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;

(2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;

(3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;

(4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;

(5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;

(6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and

(7) Courts must safeguard against unconstitutional practices by court staff and private contractors.”

Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, and Lisa Foster, Director, Office for Access to Justice (March 14, 2016)
William Clift, *Reflection, Old St. Louis County Courthouse*, taken in 1976 in conjunction with the Seagram Court House Project.

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