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Paul Bland

National Arbitration Forum's Wall of Secrecy Begins to Crumble

While very few of them actually know it, courts would say that tens if not hundreds of millions of Americans have "agreed" that if they ever have a dispute against various powerful corporations, that their dispute will be decided by an organization named The National Arbitration Forum (or "NAF"). Who is the NAF? What is its background? Is it really a neutral organization, or is it likely to favor one side or the other in disputes?

Let me put my own "biases" on the table at the outset. Based upon extensive investigation and interviews with literally hundreds of people, my law firm, Trial Lawyers for Public Justice, has argued vociferously in several different court cases around the nation that the NAF is not a truly neutral organization. Instead, we have argued, NAF has conducted itself in ways that suggest that it in disputes between consumers and large corporations (and particularly banks and other lenders), that the NAF as an institution is pre-disposed to favor the corporations and lenders.

A great deal of background about this organization is set forth in a legal brief that we filed in a case in North Carolina called McQuillan v. Check N Go. A copy of this brief is posted on the website of my law firm, www.tlpj.org, along with hundreds of pages of evidence, that anyone can download for free. You can find affidavits from consumers who swear that they had terrible experiences with the NAF, an expert affidavit from a law professor who studied the way NAF conducted arbitrations in a certain category of non-consumer cases and concluded that NAF has a systematic tendency to favor the more powerful party in those disputes, a series of advertisements and solicitations that NAF has used to try to get banks and other large corporations to write it into their standard form agreements where the NAF has made statements that we argue show a pre-disposition to favor the corporations, and other similar evidence. I should make clear that the trial court in the McQuillan case did not agree with our challenge to the NAF as biased, holding in essence that a consumer can't challenge an arbitration company as biased in advance, but must instead wait until after the arbitration is complete to raise that question, and also holding that some of our evidence was hearsay and not admissible. That ruling is on appeal, and our brief in the appeal is also available on TLPJ's website.

It has been very difficult to gather much information about the NAF, though. It is a closely held corporation that vigorously resists answering

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questions about itself in court. In a series of cases where individuals have sought to challenge the NAF's status as a neutral (consumers and employees in these cases have had mixed results, winning some challenges and losing others), NAF has refused to respond to subpoenas and has gone to court seeking court orders quashing the consumers' discovery requests. In a number of cases where consumers have been able to get past these obfuscations, courts (mostly state courts in Minnesota, where the NAF is based, and where a consumer must generally go to fight for information about the secretive organization) have only allowed the consumers to learn key facts under stringent gag orders that make it impossible for other persons to find out what those consumers had learned.

There is something ironic about the fact that NAF seeks to replace the court system and the jury system, while being so secretive. Think about how open our court system generally is – trials are open to the general public, most courts write out opinions setting out the reasons for their decisions in important cases, and those opinions are publicly available in published volumes or can be searched through various data bases. By contrast, the NAF has sought to make itself as much of a "black box" as possible.

Until this month! Two major cracks have appeared in the wall of NAF secrecy, that offer disturbing insights into the way that this organization operates. The first comes in the form of an article entitled "Arbitration and the Godless Bloodsuckers" written by Richard Neely, a former justice of the West Virginia Supreme Court in the September/October issue of "The West Virginia Lawyer." After retiring from the bench, Justice Neely was approached by the NAF to serve as one of their independent-contractor arbitrators, and he agreed to do so. His experience turned out to be very different from what he expected, though. He concludes that "banks have converted apparently neutral arbitration forums into collection agencies to exact the last drop of blood from desperate debtors." Among other things, he tells that NAF "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!" He also reports that when he did not award a bank the full amount of attorneys' fees it asked for, that he found himself barred from handling anymore cases involving that bank. He explains that banks, as "professional litigants," can make use their superior knowledge to help make sure that their cases are heard by NAF arbitrators who will rule on them.

The second crack in the wall comes in a deposition of Harvard Law Professor Elizabeth Bartholet, taken on September 26, 2006, by a lawyer challenging the NAF as being biased in a consumer case against Gateway Computers. Professor Bartholet had also served as an independent contractor arbitrator for the NAF, until she resigned. Her February 8l, 2005 resignation letter expressed her concern that NAF's system is biased in favor of lenders and against individuals. NAF fought

hard to block Professor Bartholet from testifying in the Gateway case, but after a lot of back and forth, a court basically ruled that she would be permitted to testify so long as she did not give the names of particular parties whose cases she had handled as an arbitrator. Her deposition describes how she was also blackballed by a credit card company after she ruled against it in a single arbitration. At the time that the credit card company decided to block her from hearing any more cases involving itself, she was scheduled to hear a number of other consumer cases. NAF sent out letters to the consumers falsely stating that she would no longer be the arbitrator in their cases, because she supposedly had a scheduling conflict. The professor did not have a scheduling conflict, however, but the NAF sent out this explanation rather than the true one that she had been blackballed by a lender who didn't like how she had ruled in a past case. Professor Bartholet has testified eloquently about how NAF operates a systematically unfair system that is biased against credit card companies.

Consumers or consumer advocates who would like to see these documents should contact me at pbland@tlpj.org.

Much about the way that the NAF operates, and how it makes key decisions, and how it makes its money, remains unknown. Nonetheless, there are now some new cracks in the wall of secrecy it has erected around itself, and what we can see through those cracks is not at all pretty. The NAF bills itself as offering a (a) private (b) neutral (c) justice (d) system, but from here, it looks like it only meets the promises of (a) and (d).

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