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SPIRIT OF THE LAW: Can The Constitution Save Workers From Forced Arbitration?

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By Alexander Schmidt

The answer to the above headline is “Maybe.” The Constitution grants every American a right to

sue in court. The Supreme Court

long ago held, in fact, that the right to sue in court is one of our most important rights, calling it "the right conservative of all other rights" and essential to "orderly government" in a democracy. Given this, the Constitution should prevent corporations, one would think, from using forced arbitration clauses to deny workers and consumers their day in court.

Vital worker rights are hanging in the balance.

But to date, all efforts to enforce the fundamental right to sue in court in the face of arbitration clauses have failed. Courts have not ruled that "arbitration clauses trump the Constitution." They could never say that because the Constitution is the supreme law of the land. Instead, courts have accepted corporations' arguments that the Constitution simply does not apply to arbitration.

The right to sue in court arises from three separate constitutional provisions. First is the Seventh Amendment right to a jury trial. Forced arbitration clauses very obviously deprive Americans of their jury trial rights. But corporations have argued that the jury trial right doesn't come into play until someone is validly in court, and people who have "agreed" to arbitration (even if forced to agree by their employer under threat of losing their job) are not validly in court. This argument has prevailed in every case where a citizen tried to enforce the Seventh Amendment.

The second source of the right to sue in court is Article III of the Constitution, which gives only courts the power to hear civil lawsuits. The other two branches of government, Congress and the President, have no power to hear civil suits. While some federal agencies also have "judges" (called "Article I" judges) that hear highly specialized types of cases, courts have jealously guarded their power over civil lawsuits, routinely ruling that letting Article I judges hear civil suits would undermine the Constitution's "separation of powers" structure, which requires preventing the three co-equal branches of government from intruding on each other's domains. Courts, however, have accepted corporations' arguments that since private arbitrators are not part of the government, there is no separation of powers problem with forcing citizens to arbitrate instead of suing in court. As a result, all efforts to enforce the right to sue under Article III have failed.

The last source of the right to sue in court is the Petition Clause of the First Amendment. Like the freedom of speech, the right to "petition for a redress of grievances" is one of the ways the First

Amendment enables citizens to speak truth to power. While unions and other groups frequently "petition" Congress or Executive branch agencies, filing a lawsuit is also a "petition," made to a court. The Petition Clause gives every citizen the right to sue in court.

Forced arbitration agreements plainly violate Americans' right to petition courts. But corporations have argued that the Petition Clause doesn't apply to arbitration because the Constitution only prevents "the government" from violating the First Amendment, it does not prevent private corporations from doing so. Just as private companies can limit employees' freedom of speech (as many have learned from the NFL's kneeling-during-the-anthem controversy), private companies can prevent their employees from suing them in court, they say.

Only one court has addressed this argument, and it agreed with the corporation. That ruling is currently on appeal to the Ninth Circuit Court of Appeals in San Francisco. (Full disclosure, I am one of the plaintiffs' lawyers in that case.)

The plaintiffs argue that even though their forced arbitration agreement was written by a private company, "the government" is still responsible for violating their Petition Clause rights because it was the government that empowered that company to write the forced arbitration agreement in the first place. Forced arbitration against employees and consumers was not typically permitted under the law at all until recently. It is permitted today only because the Supreme Court re-interpreted a 1925 statute called the Federal Arbitration Act (FAA) in a new way that allowed corporations for the first time to violate citizens' rights to sue in court. The Supreme Court is, by definition, "the government," and its changing of the law to permit forced arbitration was an unconstitutional act.

The plaintiffs are not challenging a purely private violation of their First Amendment right to sue in court, they are challenging the Supreme Court's violation of that right. If the Ninth Circuit agrees that their case is really about "government action" rather than private corporate behavior, it could be the beginning of the end of forced arbitration in this country.

Justice thus far has not prevailed in the realm of forced arbitration. Let's pray that the Ninth Circuit rules in favor of workers and consumers so that the blight of forced arbitration can be vanquished from the land.

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