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MEMORANDUM OF SUPPORT

A. 6889 (Lavine) / S. 8201 (Hoylman-Sigal) – Addressing the Loophole in Forced Arbitration Fees

Bill Number: A6889/S2801

Sponsors: Assemblymember Lavine and Senator Hoylman-Sigal

Public Justice supports A6889/S8201, which provides vital protections for millions of consumers subjected to arbitration

Public Justice is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct and preserving the civil justice system as an effective tool for holding the powerful accountable.

Public Justice supports A6889/S8201, which eliminates unnecessary roadblocks to efficient arbitration and penalizes drafters that do not honor the terms of their contracts. This bill will:

- Eliminate so-called mandatory mediation, which are increasingly popular and onerous processes claimants must exhaust before they may even file a claim.
- Create penalties for drafters who refuse to engage in the arbitration procedures they wrote.
- Ensure consumers who obtain legal representation in an arbitration proceeding are not subjected to discriminatory treatment.
- Introduce a provision for jurisdiction, so claimants can file related claims within their locality, reducing logistical and financial burdens on them.

Without the commonsense solutions offered by this bill, consumers who attempt to resolve their disputes in arbitration will continue to face needless delays and obstructions, created by the companies who imposed the arbitration in the first place.

Mandatory "pre-dispute" procedures

Nearly 80% of arbitration clauses now contain terms requiring consumers to complete a series of so-called "pre-dispute" actions, before they can even file a claim.[1] These procedures typically require sending the company (often via postal mail) a detailed notice of the dispute, including claimants' personal information, damages alleged, evidence such as screen shots, and relief sought. To contrast, a party initiating a lawsuit in civil court need only include a "short and plain statement" of their claim.

Inserting pre-dispute mediation into business-to-consumer contracts is a relatively new practice that has grown substantially since the rise of mass arbitration. Defense firms openly advise their corporate

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4705062

clients to incorporate it as a countermeasure against mass arbitration, assuring them that it can "thwart, or at least deter"[2] and "discourage or limit"[3] too many consumers from filing claims at once.

But pre-dispute schemes do not usually distinguish between claimants with one-off disputes or those who have suffered a mass harm, so they delay *all* claims. Mandatory mediation also creates an extra "gotcha" loophole which exclusively benefits the drafter: if it can be determined that a claimant did not follow the pre-dispute rigamarole to the letter, their claim can be immediately dismissed, *regardless of merit*.

Even if a company's motivation for mandatory mediation is the sincere desire to serve its customers and employees, the end result is the same: delayed or denied access to arbitration. In this way, **mandatory mediation is actually *hostile* to arbitration**. By doing away with complicated and burdensome pre-dispute requirements, A6889/S8201 ensures arbitration retains two of its apparent benefits: speed and efficiency.

Refusing to honor their own arbitration agreements

The corporate legal maneuvering in response to groups of consumers attempting to arbitrate their individual claims is instructive. In a recent hearing on forced arbitration held by the Senate Judiciary Committee, Cardozo Law Professor Myriam Gilles testified, "The resistance these companies have to individually arbitrating these cases after unilaterally forcing these provisions on their workers and consumers makes clear that forced arbitration was never about fairness or efficiency, but about suppressing worker and consumer cases."[4]

For example, in 2022 Samsung customers retained counsel to file 50,000 individual claims for arbitration with the AAA, in accordance with the terms of Samsung's arbitration agreement. When faced with the expense of AAA filing fees that had no doubt seemed very hypothetical when it offered in writing to pay them, Samsung refused to participate in arbitration.[5]

But behind every instance of a powerful corporate entity telling on itself by trying to get out of its own contract, there is the very real problem of human beings who are left without options. In our own amicus brief for *Wallrich v. Samsung*, Public Justice wrote,

> *"[B]ecause corporations have largely managed to push other collective-action vehicles out of the picture, large-scale individual arbitrations are one of the few avenues left for workers and consumers to vindicate their rights and deter corporate wrongdoing. With other paths to recovery effectively blocked off, arbitration's continued viability for large swaths of low-*

[2] https://www.jdsupra.com/legalnews/staying-on-the-front-foot-in-the-face-4097064/
[3] https://www.jdsupra.com/legalnews/potential-pitfalls-of-the-arbitration-3665011/
[4] https://www.judiciary.senate.gov/committee-activity/hearings/small-print-big-impact-examining-the-effects-of-forced-arbitration
[5] https://www.reuters.com/legal/transactional/column-facing-arbitration-onslaught-samsung-changes-rules-consumer-claims-2023-04-11/

resource workers and consumers might make the difference between corporate impunity and civil justice."[6]

A6889/S8201 reduces this burden by making it clear that a drafting party who refuses to pay the fees and costs to proceed in arbitration will be in material breach of the arbitration agreement, and they waive their right to compel arbitration. Claimants will then have the right to choose between advancing their claims in court or remaining in arbitration, with defined processes for recovering the costs and fees associated with each—including penalties for breaching the agreement.

California passed similar legislation in 2019. With California's revised arbitration code, companies are penalized for not paying arbitration fees within a set timeframe. The result has been a significant decline in the abusive practice of non-payment. **New York can replicate California's success.**

Public Justice urges your support for A6889/S8201. This bill will rectify the ongoing manipulation of arbitration clauses by corporations to the detriment of New York's workers and consumers. It's a corrective measure that provides fairness for the many New Yorkers who are forced into the private arbitration system. **Your backing will close the loopholes and level the playing field.**

[6] https://www.publicjustice.net/wp-content/uploads/2024/05/wallrich-v-samsung_pj-amicus.pdf