Arbitration can be a faster, less costly and fairer way to resolve legal disputes

- *Arbitration of consumer disputes is simply the answer to decades of abusive and expensive lawsuits that cost consumers, businesses and taxpayers.*

- *HB1261 and HB1262 appear designed to undermine the efficiency of arbitration by making it as long and costly as court trials.*

Arbitration is an *alternative* dispute resolution mechanism to court-based proceedings. Court proceedings can be costly, long and complex, and often end with the aggrieved party never achieving his or her day in court. Arbitration, on the other hand, can be cheaper and faster for both parties, saving on the largest driver of litigation costs—attorneys' fees. Arbitration can also be more flexible, less procedurally complex, private and with less hostility than drawn-out court cases.

Consumer class actions are a prime example: they are procedurally complex and it can be years before consumers actually recover anything on their claims—assuming they recover anything at all. Many consumer class actions result in nothing more than "coupon" payments for the class members, with big paydays for plaintiffs' attorneys. Further, most consumers never receive their "day in court," as most class actions end in settlement.

Businesses pass on to their customers the costs of defending legitimate and illegitimate lawsuits. It is not hard to understand why arbitration has become one answer to abusive class litigation practices.

- Arbitration provides consumer with a quick and efficient forum to voice their complaints. (See box.)

- Less than 1% of all civil cases filed in Colorado get to trial. AAA estimates 50% of consumer claims in arbitrations make it to a hearing before a neutral arbiter.

- In many cases, contracts limit the out-of-pocket expenses incurred by consumers. For instance, by rule, the arbitral institution JAMS caps the amount a consumer has to pay to pursue a claim to $250.

- Lastly, the Federal Arbitration Act broadly preempts states' abilities to limit arbitration. The US Supreme Court has repeatedly upheld the relatively unfettered rights of parties to engage in arbitration under Federal law.

> "Based on our analyses, we found that on average, U.S. district court cases took more than 12 months longer to get to trial than cases adjudicated by arbitration (24.2 months v. 11.6 months); when the comparison involved time through appeal, U.S. district and circuit court cases required at least 21 months longer than arbitration to resolve (33.6 months v. 11.6 months)."
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> *American Arbitration Association, 2017*

HB1261 & HB1262

Both HB1261 and HB1262 will:

- Make arbitration more difficult and expensive by encouraging repeated court challenges to arbitrators or arbitral institutions.
- Impact far more than just consumer and employment contracts, including arbitration even between sophisticated businesses.
- Limit the impact of the Colorado Supreme Court's important *Vallagio* decision that will likely cut down on construction litigation and result in more affordable housing choices.

HB 1262, "The Arbitration Services Provider Transparency Act," would require private, non-governmental arbitral institutions to disclose a range of data about the arbitration proceedings they administer, the parties and the outcomes.

- Certain disclosure requirements will likely violate confidentiality provisions agreed to by the contracting parties.
- Only four other states have passed such legislation, and none as extensive as HB 1262.
- A party seeking to thwart arbitration will be able challenge the *institution*'s noncompliance with pages of lengthy, detailed and onerous disclosure requirements imposed on institutions.
- The bill will create uncertainty in Colorado's law for years, as the Federal Arbitration Act quite possibly preempts portions of the reporting requirements.

HB 1261, "The Colorado Arbitration Fairness Act," seeks to limit consumer and employment arbitrations by imposing on arbitral institutions and arbitrators heightened impartiality standards and disclosure requirements.

- The bill is unnecessary. Colorado's Uniform Arbitration Act, Colorado case law, Colorado's Rules of Professional Conduct, and private rules and standards imposed by arbitral institutions already apply when determining whether an attorney can serve as an arbiter. Likewise, the Federal Arbitration Act and Federal case law impose impartiality and ethical requirements on arbitrators.
- Page after page of new, vague and malleable "partiality" and "conflict" standards will prompt unwarranted challenges to arbitral institutions and arbitrators and will result in delay and added litigation costs. These standards would make institutional arbitration nearly impossible.
- Currently, challenges to arbitrators come after an arbitration award is issued. Under this bill, those challenges are up-front, with the potential—if not hope—of grinding the process of arbitration to a halt. In the least, it adds unneeded procedural complexity to a process intended to be streamlined and efficient.
- The bill is much broader than advertized. Instead of just covering consumer or employment contracts, it also limits business-to-business contracts as it applies to arbitration agreements in contracts with any "purchaser" and with independent contractors.

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