BEWARE THE FINE PRINT

A three-part series by the New York Times examining how clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court.

The New York Times

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Consumer Attorneys of California is a professional organization of plaintiffs' attorneys representing consumers seeking accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

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The New York Times

BEWARE THE FINE PRINT | PART I

Arbitration Everywhere, Stacking the Deck of Justice

By JESSICA SILVER-GREENBERG and ROBERT GEBELOFF
OCT. 31, 2015

On Page 5 of a credit card contract used by American Express, beneath an explainer on interest rates and late fees, past the details about annual membership, is a clause that most customers probably miss. If cardholders have a problem with their account, American Express explains, the company "may elect to resolve any claim by individual arbitration."

Those nine words are at the center of a far reaching power play orchestrated by American corporations, an investigation by The New York Times has found.

By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.

Alan Carlson, a restaurant owner and chef, was involved in a 2003 class-action suit against American Express. A decade later, a Supreme Court ruling enabled American Express to prevent merchants from bringing class actions.

Over the last few years, it has become increasingly difficult to apply for a credit card, use a cell phone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.

Among the class actions thrown out because of the clauses was one brought by Time Warner customers over charges they said mysteriously appeared on their bills and another against a travel booking website accused of conspiring to fix hotel prices. A top executive at Goldman Sachs who sued on behalf of bankers claiming sex discrimination was also blocked, as were African American employees at Taco Bell restaurants who said they were denied promotions, forced to work the worst shifts and subjected to degrading comments.

Some state judges have called the class action bans a “get out of jail free” card, because it is nearly impossible for one individual to take on a corporation with vast resources.

Patricia Rowe of Greenville, S.C., learned this firsthand when she initiated a class action against AT&T. Ms. Rowe, who was challenging a $600 fee for canceling her phone service, was among more than 900 AT&T customers in three states who complained about excessive charges, state records show. When the case was thrown out last year, she was forced to give up and pay the $600. Fighting AT&T on her own in arbitration, she said, would have cost far more.

By banning class actions, companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination, court records show.

“This is among the most profound shifts in our legal history,” William G. Young, a federal judge in Boston who was appointed by President Ronald Reagan, said in an interview.

“Ominously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach.”

More than a decade in the making, the move to block class actions was engineered by a Wall Street led coalition of credit card companies and retailers, according to interviews with coalition members and court records. Strategizing from law offices on Park Avenue and in Washington, members of the group came up with a plan to insulate themselves from the costly lawsuits. Their work culminated in two Supreme Court rulings, in 2011 and 2013, that enshrined the use of class action bans in contracts. The decisions drew little attention outside legal circles, even though they upended decades of jurisprudence put in place to protect consumers and employees.

One of the players behind the scenes, The Times found, was John G. Roberts Jr., who as a private lawyer representing Discover Bank unsuccessfully petitioned the Supreme Court to hear a case involving class action bans. By the time the Supreme Court handed down its favorable decisions, he was the chief justice.

Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely.

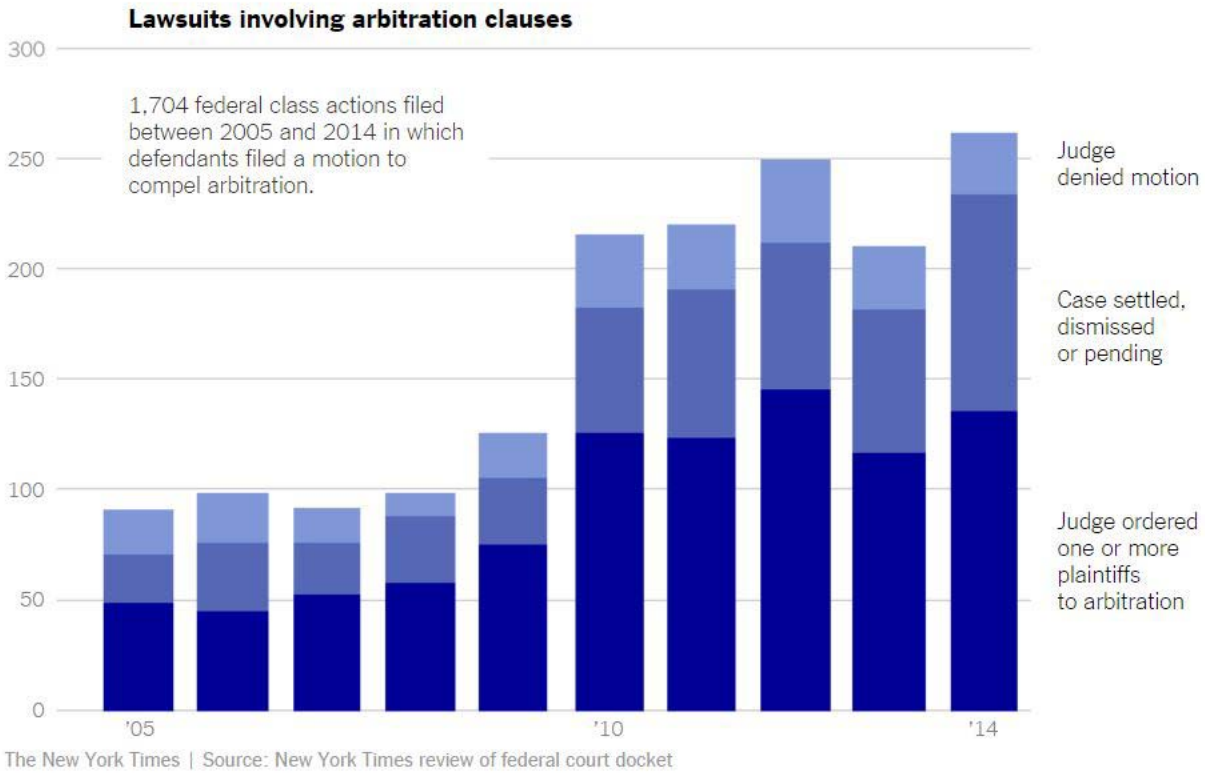
The Times investigation was based on thousands of court records and interviews with hundreds of lawyers, corporate executives, judges, arbitrators and plaintiffs in 35 states.

Since no government agency tracks class actions, The Times examined federal cases filed between 2010 and 2014. Of 1,179 class actions that companies sought to push into arbitration, judges ruled in their favor in four out of every five cases.

In 2014 alone, judges upheld class action bans in 134 out of 162 cases.

Some of the lawsuits involved small banking fees, including one brought by Citibank customers who said they were duped into buying insurance they were never eligible to use. Fees like this, multiplied over millions of customers, amount to billions of dollars in profits for companies.

The data provides only part of the picture, since it does not capture the people who were dissuaded from filing class actions.



A spokeswoman for American Express said that over the last few years, banking regulators have examined the company's business practices, largely obviating the need for class actions. The regulators "have required significant remediations and large fines to address issues they found, with very little loss in value to the consumer," said the spokeswoman, Marina H. Norville.

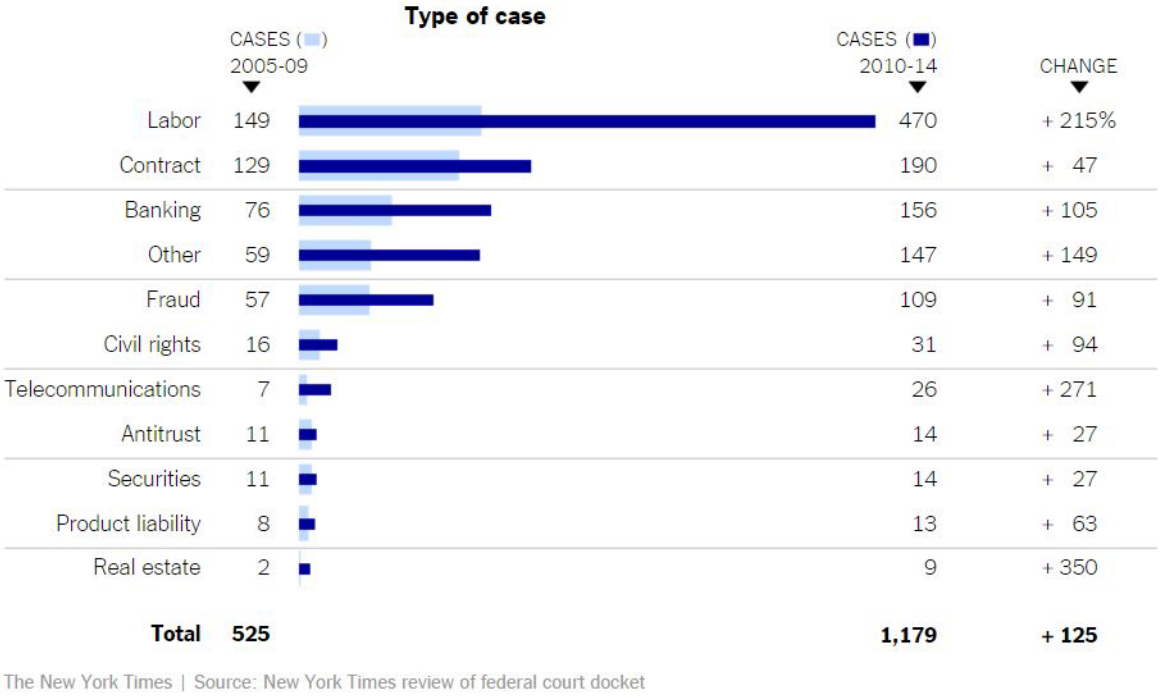
Law enforcement officials, though, say they have lost an essential tool for uncovering patterns of corporate abuse. In a letter last year to the Consumer Financial Protection Bureau, attorneys general in 16 states warned that "unlawful business practices" could flourish with the proliferation of class action bans.

In October, the bureau outlined rules to prevent financial firms from banning class actions. Almost immediately, the U.S. Chamber of Commerce galvanized forces to stop the move.

Andrew J. Pincus, a law partner at Mayer Brown in Washington who has represented companies that use arbitration, said class actions yielded little relief for plaintiffs. "Arbitration provides a way for people to hold companies accountable without spending a lot of money," Mr. Pincus said. "It's a system that can work."

Support for that assertion has been anecdotal, since there is no central database of arbitrations. But by assembling records from arbitration firms across the country, The Times found that between 2010 and 2014, only 505 consumers went to arbitration over a dispute of $2,500 or less.

Verizon, which has more than 125 million subscribers, faced 65 consumer arbitrations in those five years, the data shows. Time Warner Cable, which has 15 million customers, faced seven.



One federal judge remarked in an opinion that "only a lunatic or a fanatic sues for $30."

Daniel Dempsey of Tucson admits he might be both. He has spent three years and $35,000 fighting Citibank in arbitration over a $125 late fee on his credit card. Mr. Dempsey, who previously worked in Citi's investment bank, said the erroneous charge ruined his credit score, and he vowed to continue until he was awarded damages.

The odds are not in his favor. Roughly two thirds of consumers contesting credit card fraud, fees or costly loans received no monetary awards in arbitration, according to The Times's data.

The Supreme Court's rulings amounted to a legal coup for a group of corporate lawyers who figured out how to twin arbitration clauses with class action bans. The lawyers represented clients that had paid billions of dollars to resolve class actions over the years. The lawsuits, companies said, were driven by plaintiffs' lawyers who stood to make millions of dollars. They said they had no choice but to settle even those cases that were without merit.

"These lawsuits were not about protecting consumers but about plaintiffs' lawyers," said Duncan E. MacDonald, a former general counsel for Citibank who was part of the group. "These were nuclear weapons aimed at companies."

Consumer advocates disagreed. A class action, they argued, allowed people who lost small amounts of money to join together to seek relief. Others exposed wrongdoing, including a case against auto dealers who charged minority customers higher interest rates on car loans.

The consequences of arbitration clauses can be seen far beyond the financial sector. Even lawsuits that would not have been brought by a class have, according to the Times investigation. Taking Wall Street's lead, businesses — including obstetrics practices, private schools and funeral homes — have employed arbitration clauses to shield themselves from liability, interviews and arbitration and court records show.

Thousands of cases brought by single plaintiffs over fraud, wrongful death and rape are now being decided behind closed doors. And the rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators, interviews and records show.

The sharp shift away from the civil justice system has barely registered with Americans. F. Paul Bland Jr., the executive director of Public Justice, a national consumer advocacy group, attributed this to the tangle of bans placed inside clauses added to contracts that no one reads in the first place.

"Corporations are allowed to strip people of their constitutional right to go to court," Mr. Bland said. "Imagine the reaction if you took away people's Second Amendment right to own a gun."

Who Has Arbitration Clauses?

Many of the companies and brands you interact with have arbitration clauses built into their terms of service. Here are several:

A POWERFUL COALITION FORMS

At Italian Colors, a small restaurant tucked in an Oakland, Calif., strip mall, crayons and butcher paper adorn the tables, and a giant bottle of wine signed by the regulars sits in the entryway.

The laidback vibe matches that of the restaurant's owner and chef, Alan Carlson, who prides himself on running an establishment that not only serves great food — one crowd-pleaser is the spaghetti Bolognese — but also doesn't take itself too seriously.

"I've been a ski bum, a line cook at a Greek diner and owned restaurants, and it's all been about having fun," Mr. Carlson said.

Somewhat of a libertarian, Mr. Carlson said he used to associate big lawsuits with "ambulance chasers." But that was before he needed one.

In 2003, he sued American Express on behalf of small businesses over steep processing fees. The fees — 30 percent higher than Visa's or MasterCard's — were hurting profits, but the restaurants could not afford to turn away diners who used American Express corporate cards.

It was a classic antitrust case: A big company was accused of using its monopoly power to charge unfair prices. But as Italian Colors v. American Express wended its way through the courts over the next 10 years, it became something far more momentous.

When the case was filed, the alliance of corporate interests, including credit card companies, national retailers and carmakers, had already been strategizing on how to eliminate class actions.

The effort was led by a lawyer at Ballard Spahr, a Philadelphia firm that represented big banks. The only thing the lawyer, Alan S. Kaplinsky, had in common with Mr. Carlson was a first name. Laser focused and admirably relentless, Mr. Kaplinsky preferred his polo shirts buttoned up and tucked in.

Among his clients were Alabama money lenders accused of duping customers into taking out credit cards. Settlements were costly; trying the cases in front of sympathetic juries was worse.

Mr. Kaplinsky was searching for solutions when he remembered helping, as a young lawyer, a mutual savings and loan association draft an arbitration clause, he said in an interview. Banks could take it a step further, he thought, by writing class action bans into the clauses.

Alan Kaplinsky, a corporate lawyer, first brought companies and lawyers together in 1999 to strategize on how to promote the use of individual arbitration clauses in contracts.

"Clients were telling me they were getting killed by frivolous lawsuits and asking me what on earth could be done about it," Mr. Kaplinsky said.

He soon joined forces with lawyers at Wilmer Hale, a firm that had represented big banks. The group invited corporate legal teams in July 1999 to the law firm's New York offices to strategize about arbitration.

Attendees included representatives from Bank of America, Chase, Citigroup, Discover, Sears, Toyota and General Electric. At a subsequent teleconference, participants dialed in remotely using an easy to remember code: arbitration.

Details of the meetings, and of more than a dozen others over the next three years, were culled from court records filed in a federal lawsuit in Manhattan and corroborated in interviews with lawyers who attended.

The records and interviews show that lawyers for the companies talked about arbitration clauses as a means to an end. The goal was to kill class actions and send plaintiffs' lawyers to the "employment lines."

Of the companies participating, only American Express and First USA had adopted an arbitration clause banning class actions; months later, Discover Bank added its own. By the time the meetings concluded, many of the companies had followed suit.

To keep track of whether judges upheld or rejected the class action bans, Mr. Kaplinsky set up a scorecard. In the positive column were courts in Pennsylvania and Georgia, which upheld a clause used by some companies that gave consumers a small window to opt out of arbitration.

On the negative side were courts in California and one in Massachusetts, which struck down a class action waiver in a Comcast cable contract. The judge found that the ban would shield the company "even in cases where it has violated the law."

Many judges across the country did not object to companies' requiring consumers to use arbitration. But they bridled at preventing those consumers from banding together to bring a case.

State law guaranteed citizens a means to defend their rights, and contracts that tried to take that away were "unconscionable," many judges said. In other words, class action bans were unfair.

PETITIONING THE HIGHEST COURT

The push by Mr. Kaplinsky's group coincided with the Chamber of Commerce's own campaign against class actions, which they called a scourge on companies.

In particular, the chamber pointed to an Illinois judge who had ordered Philip Morris to pay more than $10 billion for playing down risks associated with light cigarettes.

At the other end of the spectrum, the chamber also criticized so-called coupon lawsuits that generated big paydays for lawyers and little money for consumers. In one, against a television manufacturer accused of selling sets with fuzzy pictures, plaintiffs each received $25 or $50 coupons while their lawyers collected $22 million.

"It's not like the class action system is a land of milk and honey," said Matthew Webb, a senior vice president at the Institute for Legal Reform, a chamber affiliate.

Once a state or federal judge certifies plaintiffs as a class, the suits are often unstoppable, the chamber has said — even if no one has been harmed. It has also said that plaintiffs' lawyers have brought cases in jurisdictions that were known to be friendly to class actions.

The chamber scored a victory when Congress passed the Class Action Fairness Act in 2005, which allowed companies to move cases into federal court and out of state courts considered hostile to corporate defendants.

Brian T. Fitzpatrick, a former clerk to Justice Antonin Scalia who teaches law at Vanderbilt University, said criticizing class actions for small awards was misleading. By their very nature, the lawsuits are intended to help large groups of people get back small individual amounts, Mr. Fitzpatrick said.

"Without a class action, if someone loses $500, they will not be able to do anything about it," he said.

Walter Hackett, who worked as a banker until 2007, said the real threat was cases that force companies to abandon lucrative billing practices.

"When banks make mistakes or do bad things, they tend to do them many times and to many people," said Mr. Hackett, who switched sides and became a consumer lawyer.

As a private lawyer, John G. Roberts Jr. unsuccessfully petitioned the Supreme Court to hear a case involving class-action bans. During his tenure as chief justice, the Supreme Court has ruled in favor of the bans.

With state courts still blocking their efforts, Mr. Kaplinsky's group focused on getting a case to the Supreme Court.

Success hinged on the justices' applying the Federal Arbitration Act, a dusty 1925 law that formalized the use of arbitration for disagreements between businesses. Since the mid1980s, the court had expanded the scope of the law to cover a range of disputes between companies and their employees and customers.

In fact, when Congress passed the act, lawmakers specifically emphasized that it was meant for businesses. Some raised concerns that companies would one day twist the law to impose arbitration on their workers, according to minutes from a congressional hearing.

The Supreme Court had never taken a case that centered on whether the Federal Arbitration Act allowed plaintiffs to form a class action.

A lawsuit in California's courts looked promising. The defendant, Discover Bank, was accused of charging unfair fees. A lower court upheld the bank's class action ban, but the state's Court of Appeals negated it, accusing Discover of trying to grant itself a "license to push the boundaries of good business practices to their furthest limits."

Discover, one of the companies involved with Mr. Kaplinsky's group, then petitioned the Supreme Court to intervene. Representing the company was John G. Roberts Jr., at the time a prominent corporate defense lawyer.

With much at stake, Mr. Kaplinsky said, he spoke with Mr. Roberts and offered input on the brief Mr. Roberts was drafting to the Supreme Court. "He was a really nice guy," Mr. Kaplinsky said.

In the subsequent petition, Mr. Roberts wrote that the California appeals court had overstepped its bounds in violation of the Federal Arbitration Act. Allowing consumers to bring a case as a class, he wrote, would violate the "core purpose of the Arbitration Act: to enforce arbitration agreements according to their terms."

In essence, companies were using the law to push disputes out of court, and then imposing conditions that made it impossible to pursue those disputes in arbitration.

The Supreme Court declined to take up the case.

A VICTORY FOR CORPORATIONS

Determined, businesses sweetened the terms of arbitration to try to tempt the Supreme Court to wade into the fray, according to interviews. A clause drafted for AT&T, for example, promised to award certain customers who prevailed in arbitration at least $7,500 and to pay them double their legal fees.

In 2010, the Supreme Court agreed to hear a case. In AT&T v. Concepcion, customers said the company had promised them a free phone if they signed up for service, and then charged them $30.22 anyway.

Once again, the ruling involved the California courts and their rejection of a class action ban as "unconscionable." By then, Mr. Roberts was chief justice.

Lawyers for both sides focused on the power of state courts.

Mr. Pincus, the Mayer Brown partner, represented AT&T and said that the Federal Arbitration Act superseded state law. In his main argument, Mr. Pincus accused state courts of making up special rules to discriminate against arbitration.

Deepak Gupta, who at age 34 was already known as a skilled appellate lawyer, worked for the plaintiffs. Mr. Gupta countered that the state courts should be free to enforce their own laws.

"We thought we had a fighting chance if we argued the case was about the importance of states' rights," Mr. Gupta said in an interview.

Sitting in the gallery during opening arguments, Mr. Kaplinsky had a different take on the Roberts court, which seemed to favor arbitration. "We were pretty sure we had his vote," Mr. Kaplinsky said.

When the court ruled 54 in favor of AT&T, it largely skipped over Mr. Pincus's central argument.

“Requiring the availability of classwide arbitration,” Justice Scalia wrote for the majority, “interferes with fundamental attributes of arbitration.” The main purpose of the Federal Arbitration Act, he wrote, “is to ensure the enforcement of arbitration agreements according to their terms.”

It was essentially the same argument Mr. Roberts had made as a lawyer in the Discover case.

With the Supreme Court marginalizing state law, the only option left for consumer advocates was to use a federal law to fight back.

Enter Mr. Carlson, the owner of Italian Colors, who was still fighting with American Express. After the company won the first round, Mr. Carlson’s lawyers appealed, saying the class action ban prevented merchants from exercising their federal rights to fight a monopoly.

“In a contest between just me — a restaurant in Oakland — and American Express, who do you think wins?” Mr. Carlson said.

Individually, none of the merchants could pay for a case that could cost more than $1 million in expert analysis alone.

The United States Court of Appeals for the Second Circuit, which included Sonia M. Sotomayor, ruled in the plaintiffs’ favor in 2009.

“In a contest between just me, a restaurant in Oakland, and American Express, who do you think wins?” Mr. Carlson said.

American Express appealed again, and the case ultimately went to the Supreme Court. By the time the court heard it, in 2013, Ms. Sotomayor was a justice and recused herself.

The case centered on the Sherman Act, a muscular antitrust law that empowered citizens to take on monopolistic entities. Conservatives and liberals on previous Supreme Courts had consistently found that Americans should be guaranteed a way to exercise that right.

On June 20, 2013, the justices abandoned the precedent and ruled in favor of American Express.

Arbitration clauses could outlaw class actions, the court said, even if a class action was the only realistic way to bring a case. “The antitrust laws do not guarantee an affordable procedural path to the vindication of every claim,” Justice Scalia wrote.

Within hours, critics from across the political spectrum registered their disbelief on legal blogs. “No one thinks they got it right,” Judge Young of Boston wrote later in a decision.

The most withering criticism came from Justice Elena Kagan, who wrote the dissenting opinion. “The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse,” she wrote. She went on to say that her colleagues in the majority were effectively telling those victims, “Too darn bad.”

Back in Oakland, Mr. Carlson got the news from his lawyer. The restaurateur said he had no choice but to continue accepting American Express. About a third of his customers use it, including many who run up bigger tabs because the cards are tied to expense accounts.

Mr. Carlson did make one change, though. He added a special bourbon cocktail to the menu. “I call it the Scalia,” he said. “It’s bitter and tough to swallow.”

A CLAUSE FOR ALL OCCASIONS

Signs posted in a theater in Los Angeles and a hamburger joint in East Texas informed guests that, simply by walking in, they had agreed to arbitration. Consumer contracts with Amazon, Netflix, Travelocity, eBay and DirecTV now contain arbitration clauses. Even Ashley Madison, the online site for adulterers, requires that clients agree to them.

It is virtually impossible to rent a car without signing an agreement like Budget's, which reads, "Arbitration, No Class Actions." The same goes for purchasing just about anything online, which makes adding the clauses even easier.

The "birth of a thousand clauses," as one corporate lawyer put it, has caught millions of Americans by surprise.

James Pendergast had no idea he had agreed to arbitration until a class action suit he filed on behalf of Sprint customers in Miami was thrown out of court. They had sued the company after noticing that their monthly bills contained roaming charges incurred in their homes.

The cost of arbitration was far more than the $20 charges Mr. Pendergast was contesting. And his lawyer, Douglas F. Eaton, advised him that winning would require high-tech experts at a six figure bill.

If he lost, Mr. Pendergast might even have to pay for Sprint's lawyers. "Why would anyone risk that?" Mr. Eaton said.

The data on consumer arbitration obtained by The Times shows that Sprint, a company with more than 57 million subscribers, faced only six arbitrations between 2010 and 2014.

"Just imagine how many customers Sprint can take money from because of arbitration," Mr. Pendergast said.

Sprint declined to comment.

Few industries more keenly understood the potential of arbitration clauses than financial firms. A particularly bruising set of lawsuits starting in 2009 revealed an accounting device that more than a dozen banks employed on debit card transactions. Customers accused the banks of deducting big payments like monthly rent before taking out smaller charges like those for a pack of gum — even if the customer bought the gum first.

Changing the order of transactions, the lawsuits said, allowed the banks to increase the number of times they could charge overdraft fees, typically $35 a pop. Forced into court, the banks settled the cases for more than $1 billion.

At least seven of the banks in the overdraft cases have since added arbitration clauses, The Times found.

A lot is at stake. Since regulations prompted by the 2008 financial crisis crimped profits from trading and other risky activities, revenue from fees has become crucial to banks' profits.

Together, the three largest banks in the country — JPMorgan Chase, Bank of America and Wells Fargo — made more than $1 billion through overdraft fees in the first three months of 2015, according to the Federal Deposit Insurance Corporation.

In interviews, corporate executives and defense lawyers predicted that consumers would use arbitration once it became more familiar. They added that people could also get relief in small claims court, an option often not covered by arbitration clauses. But much like arbitration, few people go to small claims court, according to court data and interviews with judges.

While many companies also include an opt out provision on arbitration — typically between 30 and 45 days — few consumers take advantage of it because they do not realize they have signed a clause to begin with, or do not understand its consequences, according to interviews with lawyers and plaintiffs.

Companies noted in interviews that arbitration incentivized them to resolve many customer disputes informally.

Matthew Kilgore, of Rohnert Park, Calif., had no such luck.

A bread truck driver, Mr. Kilgore had dreamed of being a helicopter pilot ever since his father, who was in the Navy, took him to an air show when he was a child.

At 28, after his first daughter was born, he enrolled at Silver State Helicopters, a for-profit school in Oakland, taking out a $55,950 loan from Key Bank to pay for the program.

Less than halfway into training, Mr. Kilgore got a call from his flight instructor, who said Silver State was bankrupt. In disbelief, he drove to Oakland the next day to find the school's doors padlocked.

Matt Kilgore, pictured with his wife and daughters.

Key Bank and Student Loan Xpress, the school's preferred lenders, demanded that students pay back their loans for degrees they never received. About 2,700 students, including Mr. Kilgore, joined in class actions against the two lenders, accusing them of ignoring financial signs that the school was in trouble.

Student Loan Xpress, whose contracts did not have an arbitration clause, agreed to settle and forgave more than $100 million in student loans. Key Bank, whose contracts did, used the clause to get Mr. Kilgore's lawsuit dismissed in 2013.

Key Bank declined to comment on Mr. Kilgore's case, but said the bank had forgiven a portion of many students' loans.

Mr. Kilgore has not been able to pay back his loan, which with interest has swelled to $110,000. With his credit ruined, he and his wife cannot buy a house and he has abandoned his dream of becoming a pilot.

"It's the worst decision I ever made," he said.

BARGAINING POWER FADES

A hunter whose trophies are mounted on the walls of his chambers in Philadelphia's federal courthouse, Judge Berle M. Schiller prefers to use a bow to catch his prey. He has stalked deer through the Pennsylvania woods, tracked caribou in Quebec and pursued fleet footed impala through South Africa.

Hunting with a rifle is “not a fair fight,” said Judge Schiller, 71, who applies the same philosophy to his courtroom. Or at least he did until December 2013, when he had to rule on a lawsuit against the owner of 39 Applebee’s restaurants in Pennsylvania.

The class action was brought by a former waiter on behalf of other low wage employees. The waiter, Charles Walton, said Applebee’s made workers sweep floors, stock silverware, scrub booths and empty trash cans, but did not pay them a fair wage for the extra tasks. The Applebee’s employees, who relied on tips, often ended up making less than minimum wage. Employment lawyers said these practices were widespread in the restaurant industry.

The Rose Group, which owned the restaurants, defended its practices and urged Judge Schiller to dismiss the lawsuit since Mr. Walton signed an employee contract that included “a mutual promise to resolve claims by binding arbitration.”

The request troubled Judge Schiller. “It is just these kinds of cases where it’s important to have a jury,” he said.

Applebee’s franchises, run by different owners, have faced similar class actions in Alabama, Florida, Illinois, Kentucky, Missouri, New York, South Carolina and Rhode Island.

Judge Berle Schiller reluctantly enforced a class-action ban in Applebee's employment contracts in 2013, noting the "lamentable" state of legal affairs.

In 2014, Ronnie Del Toro brought a case while working as a waiter in the Bronx. Once again, Applebee’s sought to have it thrown out.

Ronnie Del Toro brought a case against Applebee’s while working as a waiter for the company in the Bronx. Applebee’s sought to have it thrown out.

In the meantime, Mr. Del Toro said the restaurant’s owner and two hulking men, including one who went by “Big Drew,” confronted him on the job. They warned him to “stop being a little bitch” and withdraw his lawsuit, according to an application for a restraining order that Mr. Del Toro filed in a Bronx court.

“I didn’t wait to hear anymore,” said Mr. Del Toro, who moved to Brooklyn and got the restraining order.

Apple Metro Inc., which owns the Bronx Applebee’s, did not return requests for comment.

Mr. Del Toro now works at P.F. Chang's, another restaurant chain. He had to sign an employment contract with an arbitration clause to get the job.

Class action bans are also widely included in the employment policies of retailers, including Macy's, Kmart and Sears.

Even some N.F.L. cheerleaders have had to agree to them. When a group of cheerleaders sued the Oakland Raiders over working conditions, they discovered that Roger Goodell, the N.F.L. commissioner, would preside over the arbitration. The Raiders later agreed to use someone else.

The use of class action bans is spreading far beyond low wage industries to Silicon Valley and Wall Street, where banks like Goldman Sachs require some executives to sign contracts containing the clauses.

Civil rights experts worry that discriminatory labor practices will go unchecked as class actions disappear.

Cases brought by African American employees against Nike in 2003 and Walgreens in 2005, for example, led the companies to change their policies. The drug company Novartis paid $175 million to settle a class action brought by female employees over promotions and pay.

Jenny Yang, chairwoman of the Equal Employment Opportunity Commission, said arbitration allowed "root causes" to persist. Part of the problem, Ms. Yang said, is that arbitration keeps any discussion of discriminatory practices hidden from other workers "who might be experiencing the same thing."

The point was not lost on Judge Schiller in Philadelphia, who has handled many employment cases in his 15 years on the bench. Once an arbitrator himself for disputes between companies, the judge said he had nothing against the forum, as long as both sides wanted to go.

Among thousands of employees at Applebee's franchises, only four took the company to arbitration between 2010 and 2014, according to The Times's review of arbitration data.

When lawyers for Applebee's argued before Judge Schiller to have the lawsuit thrown out, they assured him that Mr. Walton, who brought the suit, could have turned down the job and not agreed to the arbitration clause.

Judge Schiller was not persuaded. "To suggest that he had bargaining power because he could wait tables elsewhere ignores reality," the judge wrote in court papers. The Applebee's workers, the judge wrote, must "chew on a distasteful dilemma" of whether to "give up certain rights or give up the job."

Despite his own objections, Judge Schiller said he was bound by the Supreme Court decisions. In his ruling, he noted the "lamentable" state of legal affairs and dismissed the case.

With no other option, Mr. Walton took his case to arbitration. In April, he lost.

Michael Corkery contributed reporting.

The New York Times

BEWARE THE FINE PRINT | PART II

In Arbitration, a 'Privatization of the Justice System'

JESSICA SILVER-GREENBERG and MICHAEL CORKERY
NOV. 1, 2015

Deborah L. Pierce, an emergency room doctor in Philadelphia, was optimistic when she brought a sex discrimination claim against the medical group that had dismissed her. Respected by colleagues, she said she had a stack of glowing evaluations and evidence that the practice had a pattern of denying women partnerships.

She began to worry, though, once she was blocked from court and forced into private arbitration.

Presiding over the case was not a judge but a corporate lawyer, Vasilios J. Kalogredis, who also handled arbitrations. When Dr. Pierce showed up one day for a hearing, she said she noticed Mr. Kalogredis having a friendly coffee with the head of the medical group she was suing.

During the proceedings, the practice withheld crucial evidence, including audiotapes it destroyed, according to interviews and documents. Dr. Pierce thought things could not get any worse until a doctor reversed testimony she had given in Dr. Pierce's favor. The reason: Male colleagues had "clarified" her memory.

When Mr. Kalogredis ultimately ruled against Dr. Pierce, his decision contained passages pulled, verbatim, from legal briefs prepared by lawyers for the medical practice, according to documents.

"It took away my faith in a fair and honorable legal system," said Dr. Pierce, who is still paying off $200,000 in legal costs seven years later.

If the case had been heard in civil court, Dr. Pierce would have been able to appeal, raising questions about testimony, destruction of evidence and potential conflicts of interest.

But arbitration, an investigation by The New York Times has found, often bears little resemblance to court.

Over the last 10 years, thousands of businesses across the country — from big corporations to storefront shops — have justice and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found.

The change has been swift and virtually unnoticed, even though it has meant that tens of millions of Americans have lost a fundamental right: their day in court.

“This amounts to the whole scale privatization of the justice system,” said Myriam Gilles, a law professor at the Benjamin N. Cardozo School of Law. “Americans are actively being deprived of their rights.”

All it took was adding simple arbitration clauses to contracts that most employees and consumers do not even read. Yet at stake are claims of medical malpractice, sexual harassment, hate crimes, discrimination, theft, fraud, elder abuse and wrongful death, records and interviews show.

The family of a 94yearold woman at a nursing home in Murrysville, Pa., who died from a head wound that had been left to fester, was ordered to go to arbitration. So was a woman in Jefferson, Ala., who sued Honda over injuries she said she sustained when the brakes on her car failed. When an infant was born in Tampa, Fla., with serious deformities, a lawsuit her parents brought against the obstetrician for negligence was dismissed from court because of an arbitration clause.

Even a cruise ship employee who said she had been drugged, raped and left unconscious in her cabin by two crew members could not take her employer to civil court over negligence and an unsafe workplace.

For companies, the allure of arbitration grew after a 2011 Supreme Court ruling cleared the way for them to use the clauses to quash class action lawsuits. Prevented from joining together as a group in arbitration, most plaintiffs gave up entirely, records show.

Still, there are thousands of Americans who — either out of necessity or on principle — want their grievances heard and have taken their chances in arbitration.

Little is known about arbitration because the proceedings are confidential and the federal government does not require cases to be reported. The secretive nature of the process makes it difficult to ascertain how fairly the proceedings are conducted.

Some plaintiffs said in interviews that arbitration had helped to resolve their disputes quickly without the bureaucratic headaches of going to court. Some said the arbitrators had acted professionally and without bias.

But The Times, examining records from more than 25,000 arbitrations between 2010 and 2014 and interviewing hundreds of lawyers, arbitrators, plaintiffs and judges in 35 states, uncovered many troubling cases.

Behind closed doors, proceedings can devolve into legal free-for-alls. Companies have paid employees to testify in their favor. A hearing that lasted six hours cost the plaintiff $150,000. Arbitrations have been conducted in the conference rooms of lawyers representing the companies accused of wrongdoing.

Winners and losers are decided by a single arbitrator who is largely at liberty to determine how much evidence a plaintiff can present and how much the defense can withhold. To deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law, interviews and records show.

“What rules of evidence apply?” one arbitration firm asks in the question and answer section of its website. “The short answer is none.”

Like the arbitrator in Dr. Pierce’s case, some have no experience as a judge but wield far more power. And unlike the outcomes in civil court, arbitrators’ rulings are nearly impossible to appeal.

When plaintiffs have asked the courts to intervene, court records show, they have almost always lost. Saying its hands were tied, one court in California said it could not overturn arbitrators' decisions even if they caused "substantial injustice."


Stephen R. Syson, who lost an insurance case in arbitration.

Unfettered by strict judicial rules against conflicts of interest, companies can steer cases to friendly arbitrators. In turn, interviews and records show, some arbitrators cultivate close ties with companies to get business.

Some of the chumminess is subtler, as in the case of the arbitrator who went to a basketball game with the company's lawyers the night before the proceedings began. (The company won.) Or that of the man overseeing an insurance case brought by Stephen R. Syson in Santa Barbara, Calif. During a break in proceedings, a dismayed Mr. Syson said he watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)

Other potential conflicts are more explicit. Arbitration records obtained by The Times showed that 41 arbitrators each handled 10 or more cases for one company between 2010 and 2014.

"Private judging is an oxymoron," Anthony Kline, a California appeals court judge, said in an interview. "This is a business and arbitrators have an economic reason to decide in favor of the repeat players."

With so much latitude, some organizations are requiring their employees and customers to take their disputes to Christian arbitration. There, the proceedings can incorporate prayer, and arbitrators from firms like the Colorado-based Peacemaker Ministries can consider biblical scripture in determining their rulings.

The firms that run the arbitration proceedings say the process allows plaintiffs to have a say in selecting an arbitrator who they think is most likely to render a fair ruling.

The American Arbitration Association and JAMS, the country's two largest arbitration firms, said in interviews that they both strived to ensure a professional process and required their arbitrators to disclose any conflicts of interest before taking a case.

The American Arbitration Association, a nonprofit, said it allowed plaintiffs to reject arbitrators on the ground of potential bias.

JAMS, a for-profit company, said it did the same and put extra protections in place for consumers and employees. "Their core value is neutrality — their business depends on it," Kimberly Taylor, chief operating officer of JAMS, said of its arbitrators.

But in interviews with The Times, more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.

Victoria Pynchon, an arbitrator in Los Angeles, said plaintiffs had an inherent disadvantage. "Why would an arbitrator cater to a person they will never see again?" she said.

Arbitration proved to be devastating to Debbie Brenner of Peoria, Ariz., who believes she did not get a fair shake in her fraud case against a for-profit school chain that nearly left her

bankrupt. In a rambling decision against Ms. Brenner that ran to 313 pages, the arbitrator mused on singing lessons, Jell-O and Botox.

“It was a kangaroo court,” Ms. Brenner said. “I can’t believe this is America.”

FROM CRADLE TO GRAVE

An ob-gyn’s office in Tampa, Fla., now informs expectant mothers that if problems arise — a botched vaginal delivery, a flawed C-section — the patients cannot take their grievances to court. Neither can the families of loved ones who are buried at Evergreen Cemetery outside Chicago, which also requires disputes to be resolved privately.

From birth to death, the use of arbitration has crept into nearly every corner of Americans’ lives, encompassing moments like having a baby, going to school, getting a job, buying a car, building a house and placing a parent in a nursing home.

The first contact point can arise prenatally, when obstetricians seek to limit liability by requiring patients to sign agreements containing arbitration clauses as a condition of treating them.

Leydiana Santiago of Tampa was devastated when her baby was born in November 2011 with vision and hearing loss and thumbs that needed to be amputated. Ms. Santiago blamed her doctor at Lifetime Obstetrics and Gynecology for the problems. She said her doctor mistakenly determined that she had miscarried, court records show. As a result, Ms. Santiago resumed taking medication for lupus — medication that can cause birth defects.

Women’s Care Florida, which owns Lifetime, declined to comment on the case.

In April 2014, a Florida appeals court upheld a decision to force Ms. Santiago into arbitration. “I obey what appears to be the rule of law without any enthusiasm,” wrote one of the judges, Chris Altenbernd, adding that he feared “I have disappointed Thomas Jefferson and John Adams.”

Students from high school to graduate school can likewise find themselves caught in the gears. Lee Caplin discovered this when he enrolled his 15year old son at Harvard-Westlake, a private school in Los Angeles.

His son said he was bullied and harassed, and received graphic and profane death threats, including some that came from school computers. Among the threats, court records show, were, “I’m going to pound your head with an ice pick” and “I am looking forward to your death.”

Harvard-Westlake declined to comment on the case, but said that it “takes allegations of bullying very seriously.”

Afraid for his life, the teenager dropped out and the family relocated. When Mr. Caplin sued the school for failing to protect his son, he learned that even civil rights cases can be blocked from court.

The arbitrator ruled in favor of Harvard-Westlake, saying the plaintiff did not sufficiently prove that the school was “negligent.”

“It’s not a system of justice; it’s a rigged system of expediency,” Mr. Caplin said.

Many companies give people a window — typically 30 to 45 days — to opt out of arbitration. Few people actually do, either because they do not realize they have signed a clause, or do not understand its consequences, according to plaintiffs and lawyers.

Cliff Palefsky, a San Francisco lawyer who has worked to develop fairness standards for arbitration, said the system worked only if both sides wanted to participate. “Once it’s forced, it is corrupted,” he said.

Graduates entering the job market can confront even more challenging terrain. For many people, when the choice is between giving up the right to go to court or the chance to get a job, it is not a choice at all.

That is why a housekeeper in suburban Virginia said she had to sign an employment agreement with an arbitration clause that her employer had printed from the Internet. She said she regretted it later when he sexually harassed her and she had no legal recourse in court.

Circumstances are not any easier on the home front, where residents like Jordan and Bob Fogal of Houston can become stuck with a construction nightmare.

Not long after they moved into their townhouse, more than 100 gallons of water crashed through their dining room ceiling.

The couple won when they took their builder to arbitration, but they ended up with only $26,000, about a fifth of what they needed to make repairs. Unable to come up with the rest of the money and sickened from pervasive mold, the Fogals moved out.

The perils of using a secretive system can be even more acute in old age, as illustrated by numerous cases involving nursing homes.

Daniel Deneen said he was incredulous when he got a fax from a nursing home in McLean, Ill., about a client for whom he was a legal guardian.

The client, a 90-year-old woman with dementia, needed prompt care for bed sores. Unless Mr. Deneen agreed to arbitration, he said, doctors working at the nursing home would not treat her there.

“It was the most obnoxious, unfair document I have ever been presented with in over 30 years of practicing law,” Mr. Deneen said.

Once contracts with arbitration clauses are signed, nursing homes can also use them to force civil cases involving sexual assault and wrongful death out of the courts.

In May 2014, a woman with Alzheimer’s was sexually assaulted twice in two days by other residents at the Bella Vista Health Center, a nursing home in Lemon Grove, Calif., according to an investigation by the state’s department of public health. The investigation also found that the nursing home “failed to protect” the woman.

A lawyer for Bella Vista, William C. Wilson, said the company disputed the state’s findings and that the staff “makes the health and safety of its patients their top priority.”

After unsuccessfully fighting to have the arbitration clause in their agreement voided, the woman’s family settled with Bella Vista.

Between 2010 and 2014, more than 100 cases against nursing homes for wrongful death, medical malpractice and elder abuse were pushed into arbitration, according to The Times’s data.

Roschelle Powers said she found her mother, Roberta, who had diabetes and dementia, vomiting and disoriented one day in May 2013 at a Birmingham, Ala., nursing home. Ms. Powers said she alerted the home, Greenbriar at the Altamont, specifically mentioning pills she had found in her mother’s hand, according to a deposition.

A few days later, Roberta Powers’s son, Larry, said he called 911 after finding her alone and unresponsive.

A day after the ambulance took his mother to the hospital, she was dead. An autopsy showed that the 83-year-old Mrs. Powers had more than 20 times the recommended dose of metformin, a diabetes medication, in her blood.

During arbitration, the nursing home acknowledged the blood test results but said they had been the result of renal dysfunction. The arbitrator ruled in favor of Greenbriar. “There was no evidence to support the allegation that Ms. Powers somehow gained access to, and then took, more than her prescribed amount of metformin,” Joseph L. Reese Jr., a lawyer for the nursing home, said.

Perry Shuttlesworth, the family’s lawyer, said that "it was only because of forced arbitration that the nursing home got away with this." He added that “a jury would not have let this happen.”

Even when plaintiffs prevail in arbitration, patterns of wrongdoing at nursing homes are kept hidden from prospective residents and their families.

Recognizing the issue, 34 United States senators have asked the federal government to deny Medicare and Medicaid funding to nursing homes that employ arbitration clauses. “All too often, only after a resident has suffered an injury or death,” the senators wrote in a letter in September, “do families truly understand the impact of the arbitration agreement they have already signed.”

Sometimes, even death provides no escape.

Willie K. Hamb was at the funeral for her husband at Evergreen Cemetery outside Chicago when she discovered that his coffin would not be buried in the shady plot she said she had requested.

Willie K. Hamb stands in the cemetery where she wanted her husband to be buried in a simple plot.

Instead, the cemetery informed Mrs. Hamb that it would place the coffin in a wall crypt until the more than $56,000 marble mausoleum they said she had agreed to in a contract was complete.

Mrs. Hamb’s husband, known to his friends as Pudden.

Mrs. Hamb, 72 and retired, said all she could afford for her husband, known to his friends as Pudden, was the simple plot and service she had already paid $12,461 to arrange.

Service Corporation International, one of the nation’s largest providers of funeral services and the owner of Evergreen Cemetery, declined to comment.

The dispute will be resolved in a coming arbitration. Mrs. Hamb’s lawyer, Michelle Weinberg, said she was not optimistic that her client would prevail, especially since the arbitrator is a bank compliance officer.

A CRASH COURSE

Debbie Brenner enrolled in the surgical technician program at Lamson College near Phoenix in her 40s with high hopes of reinventing herself. She spent hours learning about the tools used in surgical procedures as if mastering the movements of the waltz, each handoff in graceful succession: scalpel, retractor, clamp, sutures.

Debbie Brenner, whose fraud case against a for-profit school chain was forced into arbitration and left her nearly bankrupt.

Whether the instruments featured in lessons were real, or just depictions in photographs, depended on what teachers could round up on any given day. Lamson students became accustomed to empty surgical trays and anatomical mannequins missing their plastic replicas of organs. One enterprising instructor fashioned hearts, livers and kidneys out of felt and string.

Students considered that instructor to be one of Lamson's better faculty members, more than a dozen of them said in interviews. Some teachers routinely disappeared from class, leaving tests conspicuously on the desks to be copied, they said.

Ms. Brenner, a devout Christian, said she prayed that the program's shortcomings would not diminish her job prospects. She said the enrollment officer who persuaded her to sign up for the $24,000ayear program had promised her she would easily find a job after graduation.

When Ms. Brenner completed the program with high marks in 2009, she said, Lamson failed to find her an internship. She was volunteering at Maricopa County Hospital when, she said, a surgical technician told her that most hospitals refused to hire Lamson students because they were so poorly trained. According to students, some did not even know how to properly sterilize their hands before surgery.

"It was a joke," Ms. Brenner said. "The school's brochure was all about making our dreams come true, but this was a nightmare."

Soon after, Lamson shut down the program when it was unable to place enough of its students in internships. In March 2011, Ms. Brenner and other students filed a lawsuit against the school and its owner, Delta Career Education Corporation, accusing them of fraud. The case was promptly dismissed because of an arbitration clause in the students' enrollment agreements.

Ms. Brenner, confident she could prevail in arbitration, persuaded her husband to withdraw $12,000 from his retirement account to put toward legal fees.

By the time her case was heard in March 2013, the attorney general of Arizona had sued another Delta school for defrauding students in a criminal justice program. And a federal class action lawsuit in Michigan had accused a Delta school of defrauding students out of millions of dollars in student loans. The company did not admit wrongdoing, but settled both lawsuits for a total of more than $8 million.

Arbitration would prove to be more advantageous for the company, records and interviews show.

An Excerpt From Ms. Brenner's Arbitration Decision

> "If the Students were ignorant of important facts it was through their less than diligent behavior in failing to read the Contracts. A commitment of approximately $24k and a 1 1/2 years of one's life is no small commitment, yet each of the Students dealt with this in the most cavalier manner, almost as if they were buying a Snickers at the local market."
>
> —Dennis Negron, arbitrator

Ms. Brenner's case was conducted in the Phoenix office of Gordon & Rees, one of two big law firms defending Lamson and Delta. The arbitrator, Dennis Negron, was a corporate lawyer and real estate broker who had written papers on how to limit liability because "last on your list of desires is to be sued."

As in most arbitrations, lawyers for both sides chose Mr. Negron from a list provided by an arbitration firm, in this case the American Arbitration Association.

Lawyers for Ms. Brenner and four other students grouped into the same arbitration said they anticipated victory because they believed that the evidence was overwhelmingly in their favor.

Even the school's former head of admissions, Jeff Bing, testified that he had been instructed by his superiors at Delta to increase enrollment at all costs.

Mr. Bing said it was widely known that the admissions staff, whose compensation was tied to the number of students recruited, was "overpromising" on jobs. He testified that the job placement rate for graduates was around 20 percent.

To keep the enrollment numbers up, Mr. Bing said, virtually anyone who applied was accepted. He added in an interview that the only qualification was "a pulse."

Mr. Bing and other former employees recounted in interviews with The Times how profits drove most of the decision making at Lamson.

As administrators were pressured to increase enrollment, instructors were drilled on the importance of student retention — which factored into federal aid disbursements.

Penny Philippi and Karen Saliski, two former teachers, said they were directed not to flunk anyone, including a student who skipped classes to "chase U.F.O.s."

Delta declined to comment.

An Excerpt From Ms. Brenner's Arbitration Decision

> "It is my experience that explaining our court system or arbitration to sophisticated transaction attorneys and businessmen is in many circumstances as difficult as building a hurricane proof home with Jell-O."
>
> —Dennis Negron, arbitrator

During the arbitration proceedings, even a witness for the defense expressed concerns about Lamson. Kelly Harris, who headed the school's surgical technician program, defended the quality of education offered at Lamson but said the school enrolled too many students.

Ms. Harris, in an interview with The Times, said she warned school executives that the practice would dilute the quality of training, flood the job market and make the Lamson degree worthless. They scoffed, she said.

"It broke my heart to see these kids treated as dollar signs," Ms. Harris said.

She was one of only two people who testified for the defense. Lawyers for Lamson and Delta denied that enrollment officers guaranteed jobs, adding that they were hard to come by during the recession.

In the end, Mr. Negron ruled in favor of Lamson and Delta.

Mr. Negron found that the defense had presented the "two most credible witnesses" and praised for-profit education, according to his decision, a copy of which was obtained by The Times. Mr. Negron did not return repeated calls and emails seeking comment.

"There is little doubt that for-profit technical or specialty schools, like the college, serve an invaluable service to the public," he wrote in his decision.

Mr. Negron found that the college did not make job promises during the enrollment process but may have engaged in "puffery, which each of the adult students should have known and recognized as puffery." Chiding Ms. Brenner for not being a savvier shopper, he said she had approached her decision to enroll in a "most cavalier manner" as if "buying a Snickers at the local market."

His opinion was not shared by arbitrators who ruled in favor of students in two nearly identical cases against Lamson, documents obtained by The Times show.

If the cases had played out in court, legal experts said, Ms. Brenner could have referred to those decisions to appeal Mr. Negron's.

As it stands, Ms. Brenner lost far more than the case.

Mr. Negron decided that she and the other students should pay the defense's $354,210.77 legal bill because of the "hardship" the students had inflicted on Lamson and Delta.

"I felt like I had been sucker punched," Ms. Brenner said.

REPEAT BUSINESS

Fearful of losing business, some arbitrators pass around the story of Stefan M. Mason as a cautionary tale. They say Mr. Mason ruled in favor of an employee in an age discrimination suit, awarding him $1.7 million, and was never hired to hear another employment case.

While Mr. Mason's experience was rare, more than 30 arbitrators said in interviews that the pressure to rule for the companies that give them business was real.

Companies can even specify in contracts with their customers and employees that all cases will be handled exclusively by one arbitration firm.

Big law firms also bring repeat business to individual arbitrators, according to documents and interviews with arbitrators. Jackson Lewis, for example, had 40 cases with the same arbitrator in San Francisco over a five-year period.

The JAMS arbitrator in an employment case brought by Leonard Acevedo of Pomona, Calif., against the short-term lender CashCall simultaneously had 28 other cases involving the company, according to documents disclosed by JAMS during the proceedings.

"This whole experience burst my bubble," said Mr. Acevedo, a 57yearold veteran, who lost his case in October 2014. His lawyer, James Cordes, offered a more critical take. "It clearly appears that the arbitrator was working for the company," Mr. Cordes said. "And he disregarded evidence to hand a good result to his client."

JAMS denied that its arbitrator had been influenced by CashCall.

Linda S. Klibanow, an employment arbitrator in Pasadena, Calif., acknowledged the potential for conflicts of interest but said she thought most arbitrators, many of whom are retired judges, could remain fair.

“I think that most arbitrators put themselves in the place of a jury as the fact finder and try to render a fair decision,” Ms. Klibanow said.

Elizabeth Bartholet, an arbitrator in Boston who has handled more than 100 cases, agreed that many arbitrators had good intentions, but she said that the system made it challenging to remain unbiased. Ms. Bartholet recalled that after a company complained that she had scheduled an extra hearing for a plaintiff, the arbitration firm she was working with canceled it behind her back.

A year later, she said, she was at an industry conference when she overheard two people talking about how an arbitrator in Boston had almost cost that firm a big client. “It was a conference on ethics, if you can believe it,” said Ms. Bartholet, a law professor at Harvard.

Deborah Pierce, the doctor in Philadelphia, said she did not expect to confront in arbitration the very problem she was suing her employer over: an uneven playing field.

Dr. Pierce decided to go to arbitration after learning that another female doctor had been denied a partnership by her employer, Abington Emergency Physician Associates, under similar circumstances. She also had the backing of the Equal Employment Opportunity Commission, which found that there was probable cause that Dr. Pierce had been discriminated against.

The practice is now under different management.

Dr. Pierce needed to prove the partners’ states of mind when they dismissed her, or debunk whatever reason the company gave for letting her go. Both required access to the practice’s records and witnesses.

Once in arbitration, she and her lawyers said, the arbitrator gave them a weekend to review hundreds of records the defense originally withheld.

Vasilios J. Kalogredis, the arbitrator, said he could not comment on details of the proceedings because they were confidential, though he emphasized that “everything was handled properly.”

For Dr. Pierce, the most astounding moment came when her lawyers asked Mr. Kalogredis to impose sanctions on the defense for breaking the rules of discovery and destroying evidence. He fined the defense $1,000 after investigating the matter, then billed Dr. Pierce $2,000 for the time it took him to look into it.

“I kept thinking, ‘I’m not a lawyer, but this can’t be right,’ ” said Dr. Pierce, who had to take out a second mortgage to cover her legal expenses, which included a $58,000 bill from Mr. Kalogredis.

After the ruling, Dr. Pierce’s lawyers wrote to Mr. Kalogredis’s arbitration firm questioning his qualifications. The firm, American Health Lawyers Association, responded that it was not its responsibility to verify the “abilities or competence” of its arbitrators.

Robert Gebeloff contributed reporting.

The New York Times

BEWARE THE FINE PRINT | PART III

In Religious Arbitration, Scripture Is the Rule of Law

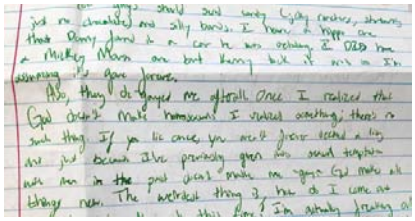
By MICHAEL CORKERY and JESSICA SILVER-GREENBERG
NOV. 2, 2015

A few months before he took a toxic mix of drugs and died on a stranger's couch, Nicklaus Ellison wrote a letter to his little sister.

He asked for Jolly Ranchers, Starburst and Silly Bandz bracelets, some of the treats permitted at the substance abuse program he attended in Florida. Then, almost as an aside, Mr. Ellison wrote about how the Christian run program that was supposed to cure his drug and alcohol problem had instead "de-gayed" him.

"God makes all things new," Mr. Ellison wrote in bright green ink. "The weirdest thing is how do I come out as straight after all this time?"

Cheri Spivey holds a photo of her son Nick Ellison, who died from taking drugs shortly after leaving Teen Challenge, a Christian substance abuse program.



In a letter to his sister, Mr. Ellison described being "de-gayed" by the Christan-run substance abuse program he was attending.

To his family and friends, Mr. Ellison's professed identity change was just one of many clues that something had gone wrong at the program, Teen Challenge, where he had been sent by a judge as an alternative to jail.

But when his family sued Teen Challenge in 2012 hoping to uncover what had happened, they quickly hit a wall. When he was admitted to the program, at age 20, Mr. Ellison signed a contract that prevented him and his family from taking the Christian group to court.

Instead, his claim had to be resolved through a mediation or arbitration process that would be bound not by state or federal law, but by the Bible. “The Holy Scripture shall be the supreme authority,” the rules of the proceedings state.

For generations, religious tribunals have been used in the United States to settle family disputes and spiritual debates. But through arbitration, religion is being used to sort out secular problems like claims of financial fraud and wrongful death.

Customers who buy bamboo floors from Higuera Hardwoods in Washington State must take any dispute before a Christian arbitrator, according to the company’s website. Carolina Cabin Rentals, which rents high end vacation properties in the Blue Ridge Mountains of North Carolina, tells its customers that disputes may be resolved according to biblical principles. The same goes for contestants in a fishing tournament in Hawaii.

An Excerpt From Higuera Hardwoods’s Policy

“Arbitration shall be by a single arbitrator experienced in the matters at issue and selected by principal and agent in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries.”

Religious arbitration clauses, including the one used by Teen Challenge, have often proved impervious to legal challenges.

Scientology forbids its followers from associating with former members who have been declared “suppressive persons,” according to people who have left the church. But this year, a federal judge in Florida upheld a religious arbitration clause requiring Luis Garcia, a declared suppressive, to take his claim that the church had defrauded him of tens of thousands of dollars before a panel of Scientologists, instead of going to court.

Pamela Prescott battled for years to prove that she had been unjustly fired from a private school in Louisiana. The crux of her case — which wound through arbitration, a federal appeals court and state court — was references in her employment contract to verses from the Bible.

In legal circles, those cases, along with the Ellison suit, are considered seminal examples of how judges have consistently upheld religious arbitrations over secular objections. They also reflect a battle in the United States over religious freedom, a series of skirmishes that include a Kentucky clerk’s refusal to issue marriage licenses to same-sex couples and a Muslim woman’s being passed over for a job at Abercrombie & Fitch because she wore a head scarf.

More than anything, the cases show the power of arbitration clauses. An investigation by the New York Times found companies have used the clauses to create an alternate system of justice. Americans are being forced out of court and into arbitration for everything from botched home renovations to medical malpractice.

By adding a religious component, companies are taking the privatization of justice a step further. Proponents of religious arbitration said the process allowed people of faith to work out problems using shared values, achieving not just a settlement but often reconciliation.

Yet some lawyers and plaintiffs said that for some groups, religious arbitration may have less to do with honoring a set of beliefs than with controlling legal outcomes. Some religious organizations stand by the process until they lose, at which point they turn to the secular courts to overturn faith based judgments, according to interviews and court records.

“Religious arbitration, at its best, ensures that people can resolve their disputes in accordance with deeply held religious beliefs,” said Michael A. Helfand, an associate professor at Pepperdine University School of Law and an arbitrator in a rabbinical court in New York. “But

both religious communities and courts need to make sure that the protections the law has put in place to make it a fair and unbiased process are actually implemented."

Few courts have intervened, saying the terms of arbitration are detailed in binding contracts signed by both parties. Some judges are also reluctant to risk infringing the First Amendment rights of religious groups, according to a review of court decisions and interviews with lawyers.

Some plaintiffs counter that it is their First Amendment rights being infringed because they must unwillingly participate in what amounts to religious activity.

"I am being forced to go before a court run by a religion I no longer believe in," said Mr. Garcia, the former Scientologist. "How could that happen?"

LEST YE BE JUDGED

Religion has long been at the center of Pamela Spivey's life. She taught Sunday school, went to Bible study camps and watched preachers on television.

So when her friends at the Park West Church in Knoxville, Tenn., suggested that she send her son Nick to Teen Challenge, she didn't ask many questions. "When you think Christian, you automatically think good," said Ms. Spivey, who goes by the name Cheri.

It certainly seemed better than the alternative. After breaking his probation sentence for drunken driving and crashing into four parked cars, Mr. Ellison faced a year in jail.

As an alternative, the prosecutor in the case agreed to Mr. Ellison's enrolling in Teen Challenge, a program that teaches participants to overcome addiction by studying the Bible and becoming more "Christ like."

Cheri Spivey, center, with her children Cameron and Katie in their Knoxville living room.

Teen Challenge was highlighted by President George W. Bush as a successful faith based program that deserved federal funding. "Government can pass law and it can hand out money," Mr. Bush said in a 2006 speech. "But it cannot love."

Like his mother, Mr. Ellison was a committed Christian, but he was never comfortable in church, his family said. He loved to write songs and poems. He had long bangs and was rarely without his Pokémon hat. But when he drank, they said, he could become violent and out of control.

Mr. Ellison was also openly gay — something his friends said was not easy in Knoxville public high school, where teachers were allowed to question evolution. "I was scared for him to be so open about it," said his friend Emily Kinser. "But I was also so proud of him."

Friends and family said Mr. Ellison drank and took drugs to escape the pressures of not fitting in. "Society is telling him he's not right," said Ms. Kinser. "He felt unwanted."

The night before he left for Teen Challenge in January 2011, Mr. Ellison was upbeat as he ate pizza with friends and family at his favorite restaurant in Knoxville.

His yearlong program in Pensacola, Fla., consisted of doing manual labor for many hours a day. Local landscaping companies, carwashes and a fish market employed the men, former participants and their families said. Teen Challenge said money from the "work assignments" helped cover some expenses and the men were not entitled to compensation, according to a participant consent form.

"This wasn't treatment, this was free labor," said Angie Helms, whose son Tyler attended Teen Challenge with Mr. Ellison.

Teen Challenge explained that working was a way for the men in the program to overcome their addiction. Work is "one of the central purposes for human existence," according to the consent forms.

Zack Sharp worked in the front office at Teen Challenge when Mr. Ellison attended. He also handed out over-the-counter medication and herbal remedies to the other men in the program. Mr. Sharp, who was 24 and had abused every substance "I could get my hands on," said he broke down and ingested some of the herbal pain medicine one day. He said he had a seizure, fell and dislocated his shoulder.

Mr. Sharp said he connected with Mr. Ellison partly because they were both gay. Coming from a conservative family in West Virginia, Mr. Sharp said he was accustomed to people trying to "heal" him — through prayer, even exorcisms. At Teen Challenge, Mr. Sharp said, he knew how to play along with attempts to make him straight. But Mr. Ellison seemed more sensitive to the pressures, he said.

In a written report in March 2011, a counselor at Teen Challenge noted that Mr. Ellison had acknowledged having "homosexual relationships" and that he would bring this up in future sessions with Mr. Ellison to "see where he stands."

About two weeks later, the counselor wrote that Mr. Ellison was making progress: "He admits that it's wrong and had agreed to ask the Lord to help him with this issue on a daily basis."

Officials at Teen Challenge, reached by phone and email, declined to comment.

There were other, subtler pressures. Mr. Ellison told his family that someone had taunted him by leaving pantyhose on his bed. He got in trouble for things like not turning off the air conditioning before going to church and for entering another student's bedroom, his disciplinary records show. For one infraction, he had to copy a passage from the Bible 200 times.

"It's ironic," Mr. Ellison wrote to his family. "The model Christians here are the ones I have the most trouble with. I want Matthew 7 tattooed onto my forehead." He was referring to the biblical passage, "Judge not, lest ye be judged."

Mr. Ellison was months into the program when he was sent home for disciplinary reasons, according to court papers.

Mr. Sharp, who credits Teen Challenge with helping him kick his addiction, said the program was unfair to those who broke the rules. He recalled at one point watching Mr. Ellison pack his bag and walk out the front gate of the facility. No one was permitted to talk to him as he left.

Ms. Spivey bought him a bus ticket home. Back in Knoxville, Mr. Ellison turned himself in to the authorities, because leaving Teen Challenge was a violation of his court order.

A prosecutor permitted Mr. Ellison to return to the Pensacola program, but he soon got into trouble again. Teen Challenge agreed to move him to another facility in Jacksonville.

About a month later, Ms. Spivey got a call while she was out walking her dog. A manager at Teen Challenge said Mr. Ellison was intoxicated and was being taken to the hospital.

Ms. Spivey said she asked to speak with her son, but was told he did not want to talk to her.

When Ms. Spivey called the hospital, she was told that Mr. Ellison had never been "seen or admitted" there, according to the lawsuit she filed against Teen Challenge.

Mr. Ellison did not have a cell phone and he did not know anyone in Jacksonville, his family said.

"Please pray for my son," Ms. Spivey posted on Facebook that evening. "He is in Jacksonville, Florida, and he is missing."

Somehow, Mr. Ellison ended up at a CVS in downtown Jacksonville, where he met a woman who drove him to her apartment. The two stayed up that night drinking, according to a sheriff's report.

At about 4 p.m., the woman told investigators, she checked on Mr. Ellison, who was sleeping on her couch. He had stopped snoring and his skin was cold. An autopsy revealed cough medicine and methadone in his system.

Ms. Spivey was outside pacing when a Knoxville police cruiser pulled up to her home before dawn on Aug. 21, 2011. She knew right away that her son was dead.

With her children Cameron and Katie, Ms. Spivey made the eight hour drive to Jacksonville.

"I just wanted to know the truth," she said.

THE PEACEMAKER METHOD

When word got out that some of the early Christians had strayed, the Apostle Paul was concerned. Among their grave offenses: incest, prostitution and suing one another in court.

Christians should not take their problems before "unbelievers," Paul wrote in his letter to the Corinthians. Disputes should be resolved inside the church.

Centuries later, Paul's writings inspired a group of lawyers in Los Angeles to develop the practice of Christian conciliation. The group's work ultimately gave rise to Peacemaker Ministries, a nonprofit that devised a legal process that draws on the Bible.

The peacemaker method is used by private schools, Christian lawyers and others. Clauses requiring Americans to use Christian arbitration instead of civil court now appear in thousands of agreements like the one Mr. Ellison signed with Teen Challenge.

"Our secular court system is darn good," said Bryce Thomas, a Christian conciliator in Hickory, N.C. "But it doesn't get into deep moral issues like sin and reconciliation."

A tall and outgoing lawyer, Mr. Thomas said he was called to leave his private practice and take up Christian conciliation full time. He works out of an office on the bottom floor of his house, where there is a crucifix on the wall near a bust of Abraham Lincoln. To clear his head, he likes to stroll around a "peace path," a garden of rhododendrons and towering trees behind his house.

"The Lord spoke to me when I was 59 and said, 'I want you to give up your law practice and do peacemaking,'" said Mr. Thomas. "I said, 'Lord, how about when I am 65?' And he said, 'No, Bryce, I need you now.'"

That was in 2006, he said, not long after a federal appeals court upheld one of his rulings, establishing an important precedent for how Christian arbitration can trump secular objections.

The dispute involved Northlake Christian School in Covington, La., and Pamela Prescott, a teacher and principal for about 12 years who said she was fired with little explanation. She blamed her termination on a new school administrator, who she said had undermined her at every turn.

He also made her feel uncomfortable, she said. At one staff meeting, the administrator surprised Ms. Prescott by washing her feet, an apparent reference to Jesus' washing his disciples' feet.

"It was creepy," Ms. Prescott recalled. "I may be a Christian. But I am also a normal person."

The oldest of five girls, Ms. Prescott was raised in New Orleans. Her father is a lawyer, but Ms. Prescott came to believe that suing another Christian was wrong.

Still, her firing had damaged her reputation, she said. The school gave her a few days to leave campus and never fully explained the reason for her termination to students and parents. No other Christian schools would hire her. "It was like I had stolen something," she said.

Ms. Prescott said she had tried to engage the school to resolve the dispute informally, but it didn't work. Feeling she had no other choice, Ms. Prescott filed a federal lawsuit, claiming sexual harassment and discrimination by the school.

When word of her lawsuit got out, parents from the school and former colleagues avoided her at church and at the local Wal-Mart, she said. Her pastor suggested she stop teaching Sunday school.

The school moved to compel Christian mediation and then arbitration, which was eventually held in a rented room at city hall in Mandeville, La. Mr. Thomas oversaw the proceedings, which resembled a civil trial with some exceptions. The arbitration began most days with a prayer. And when a teacher cried on the witness stand, Mr. Thomas allowed the woman and Ms. Prescott to hug.

The school argued that a survey of parents revealed unhappiness with Ms. Prescott's leadership. But only a small number of families had filled out the survey, and Ms. Prescott never saw the results.

Mr. Thomas dismissed Ms. Prescott's claims of harassment and gender discrimination. But he found that the school board had violated its own contract when it failed to provide Ms. Prescott with any feedback before firing her. The contract required the school to follow Matthew 18:15, which implores Christians to confront each other before raising their problems with anyone else.

"If your brother sins against you," the verse states, "go and tell him his fault between you and him alone."

Mr. Thomas awarded Ms. Prescott about $157,000 for lost income and damage to her reputation.

"This woman had no idea her job was in jeopardy," Mr. Thomas said in an interview. "They treated her badly."

In his ruling, he urged the two sides to reconcile in a way "that glorifies God." But Northlake was not ready to move on.

The school had required Ms. Prescott to agree to Christian arbitration as a condition of her hiring. But when Northlake lost, it appealed the arbitration award in federal court, arguing that Mr. Thomas's ruling was inconsistent with Louisiana law.

The case dragged on for four more years. An appeals court in New Orleans ruled that it had no ground to overturn the Christian arbitrator. Northlake appealed the case all the way to the Supreme Court, which declined to hear it.

The current headmaster of Northlake said he could not comment on the case because it involved a previous administration. He added that the school still used Christian arbitration.

In the end, Ms. Prescott said she felt vindicated, despite having spent all but $8,000 of her settlement on legal costs.

“My faith is still strong,” she said. “But I am more careful in dealing with Christians than I used to be. They are just people with no more ability to be good than anyone else.”

THE PRICE OF ENLIGHTENMENT

By the time he left Scientology, Luis Garcia had signed off on two dozen arbitration clauses in agreements with the church, requiring him to settle any dispute before a panel of fellow Scientologists.

In just about every aspect of church life, including training and making donations, members must settle any issue internally rather than going to court.

Yet, there has never been an actual arbitration in the six decade history of Scientology, according to court records and a lawyer for the church.

Mr. Garcia’s may be the first.

An entrepreneur and a native of Madrid, Mr. Garcia said Scientology gave him the confidence to open a successful print shop and yogurt store in Orange County, Calif.

Mr. Garcia and his wife, Maria, dedicated years to Scientology, taking dozens of classes to try to reach enlightenment. He estimates that his family spent $2.3 million on courses, fees and donations.

In 2008, Mr. Garcia reached the highest level in Scientology, where he said all of one’s past lives are supposed to be easily recalled. “But that didn’t happen,” he said. “That’s when I began to question everything.”

Mr. Garcia said he sent an email criticizing the church management to hundreds of Scientologists in November 2010. The church declared the Garcias “suppressives” and excommunicated them, according to a legal brief submitted by his lawyers.

Luis Garcia, pictured in front of the Church of Scientology in Santa Ana, Calif.

Mr. Garcia said he wanted back the roughly $68,000 he had paid the church for training courses he never took and other expenses, according to his lawsuit. He also demanded that the church return $340,000 he said his family had given for the construction of a “Super Power” building in Clearwater, Fla.

Neither a spokeswoman from Scientology nor a church lawyer commented on the allegations in Mr. Garcia’s lawsuit.

Mr. Garcia said he repeatedly felt pressured to give money to keep officials from blocking his path toward enlightenment or writing him up for an ethics violation.

One night in Clearwater, a church official asked Mr. Garcia for $65,000 to pay for a large cross that would sit atop the Super Power headquarters, according to the lawsuit. “She said it would be the Garcias’ cross,” Mr. Garcia recalled in an interview.

Another former Scientologist, Bert Schippers of Seattle, said he was told the cross would be dedicated in his honor after he agreed to make a donation.

Scientology moved to force Mr. Garcia’s case into arbitration. The process seemed like a farce, he said. An arbitration run by a panel of Scientologists, his lawyers argued, could not possibly be impartial. As a declared suppressive, Mr. Garcia was considered a pariah. Church members who interacted with him risked being harassed, according to court papers filed by his lawyers.

“The hostility of any Scientologists on that panel is not speculation,” his lawyers argued. “It is church doctrine.”

A church official testified that the panel would be instructed to act fairly. In a statement, a lawyer for the church said that even though Scientology had never conducted an arbitration, the church had a set of procedures it used to resolve disputes with members.

In his decision, Judge James D. Whittemore of Federal District Court in Tampa said the Garcias were bound by the terms of the contract they had signed with the church. While acknowledging that Mr. Garcia may have a “compelling” argument about the potential bias of the process, Judge Whittemore said the First Amendment prevented him from even considering the issue.

“It necessarily would require an analysis and interpretation of Scientology doctrine,” wrote Judge Whittemore, who was appointed by President Bill Clinton. “That would constitute a prohibited intrusion into religious doctrine, discipline, faith and ecclesiastical rule, custom or law by the court.”

Mr. Garcia said he was still deciding whether to go through with arbitration.

Judge Whittemore’s ruling has also been a blow to the network of former Scientologists who have spoken out against the church.

“I do not understand why the courts are going along with it,” Mr. Schippers said.

Mr. Garcia’s lawyer, Theodore Babbitt, said the ruling might have scuttled many future lawsuits against the church. “Arbitration,” Mr. Babbitt said, “is inoculating the Church of Scientology from liability.”

THE ELUSIVE TRUTH

In Jacksonville, Ms. Spivey’s family tried piecing together her son’s final hours, picking up clues wherever they could.

At Teen Challenge, they pressed the staff for the name of the employee who supposedly took Mr. Ellison to the hospital. The treatment facility declined to identify him, the family said.

The local CVS where Mr. Ellison was seen hours before his death allowed the family to review video from its security cameras, which showed Mr. Ellison walking out of the store with a bottle of soda around 1 a.m.

The woman who picked him up near the CVS said he wanted to call home, but her cell phone was out of minutes.

Most of the family's questions remained unanswered. They still did not know whether the pressure Mr. Ellison felt at Teen Challenge about being gay exacerbated his drug abuse. Or how he ended up on his own in a strange city with no money or cell phone.

Ms. Spivey said she was convinced that only a lawsuit could force Teen Challenge to explain what had happened. But the contract that Mr. Ellison signed when he enrolled in the program stated that any dispute had to go to Christian conciliation.

His family said they thought it was hypocritical that Teen Challenge was willing to collect food stamp subsidies to feed participants in the program, but insisted on the separation of church and state when it came to their legal case.

The conciliation would start as a mediation. If mediation fell apart, the case would move to formal arbitration, a process that could include prayer.

From Mr. Ellison's Contract With Teen Challenge

> "The undersigned parties accept the Bible as the inspired Word of God. They believe that God desires that they be reconciled in their relationships in accordance with the principles stated in First Corinthians 6:1-8, Matthew 5:23-24 and Matthew 18:15-20."

Ms. Spivey said even though her faith had deepened since her son's death, she did not want to take part in an arbitration involving religion. "I didn't want to do worksheets on the Bible and then kiss and make up," she said. "I wanted to find out what happened to Nick."

In an appeal filed in Florida state court, Ms. Spivey's lawyer, Bryan S. Gowdy, focused on the First Amendment's protection of religious freedom — including the right not to exercise it.

Mr. Gowdy quoted James Madison, who wrote that the "religion then of every man must be left to the conviction and conscience of every man."

But the judges in the First District Court of Appeals were satisfied that there was no constitutional conflict.

The appeals court found that the rules of Christian conciliation were not that different from those governing secular arbitration and included only a "scattering of religious elements," which served to "solemnize the process and to promote and advance conciliation as a spiritual goal."

If she still had a problem, the court ruled, Ms. Spivey could let someone else represent Mr. Ellison's estate.

Ms. Spivey decided to go ahead with the mediation, though she said she worried how Christian panelists would view her son because of his homosexuality and drug addiction.

Peacemaker Ministries, which would run the process, said the mediation would incorporate prayer and scripture, according to a motion Ms. Spivey's attorney filed in Florida circuit court. Lawyers for both sides were also told that if they attended, they could not advocate on their clients' behalf. Ms. Spivey had to pay a $5,000 retainer and a $750 fee to Peacemaker Ministries, her lawyer said in court papers.

Dale Pyne, chief executive of Peacemaker Ministries, said he understood Ms. Spivey's reluctance about conciliation since it was her son who had signed the arbitration agreement, not her. But he said the process helped "those in conflict to reconcile their issues and their relationships." He added that "most of that is highly unlikely in a court process."

Last year, Ms. Spivey decided to settle with Teen Challenge. She said she felt she was neglecting her other two children by obsessing over the case, which had gone on for more than two years. She declined to disclose the settlement amount.

Ms. Spivey said that without a court trial, she was never able to learn what happened to her son, not just on the night he died, but during his stay at Teen Challenge.

His family still does not know why he wrote the letter saying he was no longer gay, or whether he meant it. “I don’t actually believe it,” his sister Katie said.

Mr. Ellison did not mail the letter. His family found it in his duffel bag at the apartment where he died. It was mixed in with clothes, family pictures and his Bible.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