Forced Arbitration Is Not Like Uber

Don't buy the line that coerced arbitration is fair or free-market.

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It's been a bad week for the U.S. Chamber of Commerce and pro-business Republicans on the issue of forced arbitration. That issue has gone, in just a few days, from being an obscure and somewhat dry lawyers' debate to one that has a real chance to resonate with voters.

On Sunday, the New York Times and CBS television both waded into the longstanding debate, siding with consumer advocates (and pro-market Republicans) against forced arbitration clauses, those controversial fine-print items found in so many consumer contracts nowadays that effectively deprive us of our right to sue when we're injured or cheated by companies we do business with.

The Times published a long investigative report (fully rolled out over three days: part I, part II, part III) that documents the ongoing explosion of forced-arbitration clauses and the problems associated therewith: biased arbitrators, secretive proceedings, unfair outcomes, non-transparent decisions.

The series tells of a woman who was forced to pay a hidden, $600 penalty for cancelling her phone service; she couldn't afford arbitration and was blocked from mounting a lawsuit with other, similarly disgruntled consumers. In the end, she broke down and paid the contested penalty.

We learn of a man whose credit score was ruined by an erroneous $125 late fee; barred from court, he has spent three years and $35,000 fighting it in arbitration.

And the Times even reports incidents of arbitrators going to sporting events with the same corporate officials who are parties to their case; or laughing and chumming it up with company representatives in the snack bar before proceedings begin; or winning repeat business in seeming gratitude for having rendered numerous favorable decisions in the past.

Behind all of this, we catch a glimpse of a coalition of corporate lawyers and legal scholars that in the 1990s set out to, in effect, privatize the dispute-resolution system (a band whose number included a young corporate lawyer named John G. Roberts, now chief justice of the United States).

The same day the Times series began, CBS aired an episode of "The Good Wife," titled "Payback." In it, a student who has been cheated by her college struggles to obtain redress thanks to a fine-print clause in the admission contract. Only when she threatens to organize her fellow students in a college-wide debt strike (refusing to repay their loans, en masse) does the college relent.

These days, arbitration clauses are everywhere, and they aren't really voluntary. If they were, no one would be objecting to the problems documented by the Times and dramatized by CBS. We'd have alternatives. But we don't.

On Monday, the Chamber fired off a scathing broadside against the Times series for being biased in favor of trial lawyers. Walter Olson, one of the trial lawyers' most outspoken critics, took a similar tone, referring to a snappy argument: "Here is how you should think about this [issue]: Attorneys are the taxi cartels, and arbitration is Uber. And the incumbents want their competitor banned."

Well, no.

There's nothing terribly Uber-like about these clauses, which are imposed on a pre-dispute, and increasingly on a take-it-or-leave-it, basis, and are increasingly difficult for the consumer to avoid because they've become ubiquitous. That makes them effectively unconscionable. (Uber, for those readers who don't know, is the popular, web-based ride-sharing service that, as far as I can tell, is 100 percent voluntary. Forced arbitration, by contrast, is voluntary for only one party, the company.)

If forced arbitration is Uber, then darkness is light, hot is cold, and Ewoks are Wookiees. And "Big Momma" 3 is funny.

Contrary to what pro-business Republicans like to insinuate, the rise of coerced arbitration is not the product of free choice and market forces but of public policy. Washington has intentionally tilted the playing field in that direction.

The Federal Arbitration Act of 1925 makes binding arbitration clauses "valid, irrevocable, and enforceable" in federal courts, except when they are unconscionable. Prior to that time, courts were reluctant to enforce binding arbitration before an actual dispute had arisen, precisely on natural-justice grounds. Then, in 2011 and 2013, the Supreme Court in two major cases read the act in ways that effectively narrow that "unconscionability" exception out of existence.

The net effect has been to turn the Seventh Amendment on its head: Instead of preserving, federal law now increasingly restricts our right to a civil jury trial.

Olson is right about one thing. The trial lawyers do behave like a cartel. And so do corporate interests. One is reminded of Newton's Third Law. For every predatory trial lawyer, there is an equal and opposite crony capitalist; for every rent-seeking ambulance-chaser, a rent-seeking businessman. But the businessman has this advantage: He operates on a playing field tilted in his favor by force of law.

Olson's Uber analogy is backward. It is corporate America that is the cartel, trying to shield itself from accountability. What is Uber-like is the movement to restore consumers' freedom to choose.