New York Times Discovers Courts Have Been Privatized – 20 Years Too Late

By Pam Martens: November 4, 2015

The New York Times has just completed a three-part investigative series on the evisceration across America of the U.S. Constitution's guarantee of a right to a jury trial under the Seventh Amendment, which mandates: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Just as corporate prisons and corporate charter schools are proliferating across the American landscape with attendant horror stories, the doors to the Nation's taxpayer funded courts have been largely closed to the average citizen. Consumers of everything from credit cards to phone service to nursing homes cannot obtain the product or service without surrendering their access to the U.S. court system through fine print buried in the corporate contract. The privatized system is referred to as pre-dispute arbitration or mandatory arbitration or forced arbitration. Many corporations impose it as a condition of employment as well.

The Times writes:

> "Over the last 10 years, thousands of businesses across the country — from big corporations to storefront shops — have used arbitration to create an alternate system of justice. There, rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found."

The Times, admirably, exposed a litany of abuses in rigged arbitration proceedings that left people worse off than before the arbitration. As Debbie Brenner of Peoria, Arizona tells The Times, "It was a kangaroo court. I can't believe this is America." Brenner's case against a corporate run school for surgical technicians over failing to deliver on its promises was heard by a lawyer from the roster of arbitrators hearing cases for the American Arbitration Association (AAA), Dennis Negron. The proceeding was conducted in the corporate law offices of the firm representing the corporate school.

In addition to the $24,000 Brenner had paid to the school for tuition and the $12,000 her husband had withdrawn from his retirement account to pay for her legal expenses, Negron assigned the school's legal fees of $354,210.77 to Brenner and fellow students who had also brought claims.

This Friday, it will be exactly 15 years ago that the National Organization for Women in New York City (NOW-NYC) and I protested in front of the corporate offices of the American Arbitration Association on Madison Avenue. We issued a press release to the media, including the New York Times, that revealed the following:

> "AAA has an incestuous relationship with corporate America. According to its 1999 Annual Report, the following corporations are represented on its Board of Directors: Boeing, PetsMart, Prudential Property & Casualty Insurance, Sprint, AXA Financial, Monsanto, GE, McDonalds, Essex Boat Works, Walt Disney, General Mills, FedEx, Freddie Mac, Pfizer, BellSouth, Pitney Bowes, Waste Management, Goya Foods, Texaco, Kansas City Southern, Cushman & Wakefield, Cooper Industries, DaimlerChrysler, Dow Chemical, Commonwealth Edison, International Dairy Queen, Coors Brewing, Hallmark Cards, Hartford Financial."

Our press release also put a spotlight on the following at AAA:

> "…the neutrality of its arbitrators has been seriously called into question by a memo written January 14, 2000 by Paul L. Van Loon, Regional Vice President at the time of AAA. In this memo, Mr. Van Loon tells the very arbitrators who may be called upon to adjudicate claims: 'Part of our marketing effort for 2000 will be to develop business contacts with corporations headquartered in Northern California. Meeting with corporate counsel and CEOs will allow us the opportunity to develop personal relationships and explore the use of ADR in their business. To accomplish this, I am asking for your help. If you have a contact with a corporation and you can make the introduction for us, please print your name next to the corporation listed… Allowing us to make a 'warm' call will make the connection more meaningful. If you would like to make the call with us, please indicate it on the sheet…"

Wall Street On Parade decided to take a look at who is currently on the Board of Directors of the American Arbitration Association. According to Bloomberg Business, the AAA Board includes lawyers from some of the most prominent go-to law firms for Wall Street and corporate America: Michael Mukasey of Debevoise & Plimpton LLP; Daniel Price of Sidley Austin; Guillermo Aguilar-Alvarez of King and Spalding; Albert Bates Jr. of Duane Morris LLP; and John Fellas of Hughes Hubbard & Reed LLP, among others.

The major problem with The Times investigation is that it makes only a few fleeting references to Wall Street – the longest purveyor of a private justice system dating back decades and the only industry in America that shuttles *all* claims by both customers and employees into mandatory arbitration hearings. (Under the Dodd-Frank financial reform legislation passed in 2010, whistleblower claims are now exempted from mandatory arbitration agreements.)

The Times has been on notice of the systemic abuses in the securities industry's mandatory arbitration hearings since at least June 9, 1994 when Margaret Jacobs, writing for the Wall Street Journal, penned an in-depth seminal piece on the kangaroo courts routinely masquerading as justice on Wall Street. Jacobs wrote:

> "Helen L. Walters says her boss called her a 'hooker,' a 'bitch' and a 'streetwalker.' Sometimes he brandished a riding crop in front of her and once he left condoms on her desk.
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> "Ms. Walters, then a trading-room secretary at a California brokerage firm, filed a complaint against him alleging sexual harassment. In a formal hearing, he readily admitted to the whip and the condoms, and to using all of those epithets. Her case, legal scholars agree, seems a textbook example of illegal harassment as defined by the Supreme Court: a situation in which a 'reasonable person' would find the work environment 'hostile or abusive.' "

Walters lost her case because arbitrators in security industry proceedings are not required to follow legal precedent or case law, or write reasoned decisions. It is almost impossible to succeed in a court appeal of a mandatory arbitration decision – no matter how egregious the ruling is.

On July 20, 2000, the Public Investors Arbitration Bar Association (PIABA) issued a statement charging the National Association of Securities Dealers (NASD), with rigging its computerized system of selecting arbitrators. PIABA stated: "In direct and flagrant violation of federal law, the NASD systematically evaded the Securities and Exchange Commission approved 'Neutral List Selection System' arbitration rule requiring arbitrators to be selected on a rotating basis. Instead, the NASD secretly programmed its computers to select some arbitrators on a seniority basis – just what the rule was designed to prevent."

This is a dramatically different process from a jury pool in a court system where jury members are randomly selected from tens of thousands of citizens.

PIABA had discovered the manipulation when its attorneys attempted to test the arbitrator selection system at a conference in

Chicago on June 27, 2000. PIABA said in their statement that "this rule violation tainted hundreds or even thousands of compulsory securities arbitrations – many still ongoing. In every such instance, the substantive rights of public investors to a neutral panel have been cynically violated. Many public investors were thus twice cheated: first, by an NASD member firm that fraudulently conned them out of their life's savings, and second by the NASD Arbitration Department's rigged panels."

In 2002, Bloomberg Press released *Tales from the Boom Boom Room: Women vs Wall Street*, by business reporter, Susan Antilla. The book included a full chapter on mandatory arbitration, titled "Attacking the No-Court System." The book covered in detail a Federal lawsuit in which I and other women on Wall Street sued Smith Barney, the New York Stock Exchange and the NASD for closing the Nation's courts to civil rights claims under mandatory arbitration contracts and for the sexual, physical and harassment abuses perpetuated under this enshrined system of impunity.

In 2006, Penguin Group's Portfolio imprint published the Gary Weiss book, *Wall Versus America: The Rampant Greed and Dishonesty That Imperil Your Investments*. Part of the Weiss book dealt with the tortuous saga of Rand Groves attempting to achieve justice against the Wall Street powerhouse, Merrill Lynch, in an arbitration proceeding and then a court appeal. Weiss leaves little doubt that the system is rigged from the top down and the bottom up.

As recently as August of 2014, Gretchen Morgenson authored a report for The Times about a licensed employee, Sean Martin, working for Deutsche Bank Securities, a German bank affiliate with a major presence on Wall Street. Martin had seen improper conduct in the firm involving giving hedge funds early access to internal information and reported it to superiors. He was demoted and had his pay cut. He landed in an arbitration conducted by the Financial Industry Regulatory Authority (FINRA), the successor to the NASD. According to Martin's lawyer, the three arbitrators excluded key, material evidence from Martin's case and then refused to withdraw when requested to do so.

While the proliferation of locking U.S. citizens out of the very courts their taxes pay for is worthy of a three-part investigative series in The Times, to fail to relate it to the 30 years of systemic abuses in Wall Street's private justice system, which spawned the metastasizing of this disease, denies the reader the proper historical context.

We hope The Times will correct this failing and do a separate, focused investigative series on Wall Street's kangaroo courts.

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