EXHIBIT 3
DATE 2/11/2009
HB 322

TESTIMONY TO THE MONTANA LEGISLATURE

HEARING ON HOUSE BILL NO. 322, THE FAIRNESS IN ARBITRATION ACT

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INTRODUCTION AND SUMMARY

A very large and rapidly growing number of corporations require their customers and employees to agree to pre-dispute binding mandatory arbitration as a consideration of doing business with or working for the corporations.[2] While federal law provides that these arbitration agreements are generally enforceable, the Federal Arbitration Act leaves considerable room for state laws to protect consumers and employees against some significant abuses of mandatory arbitration.

The proposed legislation, House Bill No. 322, sets forth an important safeguard against the abuse of mandatory pre-dispute arbitration: it gives individuals access to information about their arbitrators. Currently, only corporate "repeat players" in arbitration have access to this information. To put this proposal in context, this testimony will describe some of the concerns and abuses of pre-dispute arbitration as it is currently widely practiced in Montana and throughout the country. Part I will address the informational imbalance between individuals and

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[1] Mr. Bland's resume is attached as Exhibit 1 to this testimony.

[2] The concerns addressed in this testimony all relate to "pre-dispute arbitration agreements," meaning contract provisions agreed to in advance of any dispute or claim that require a party to take any claims that may later arise to arbitration instead of to court. The concerns discussed here do not relate to post-dispute arbitration, in which two parties to an existing dispute agree after the dispute arises to submit that dispute to arbitration.

large companies. Part II will then address the fact that private arbitration companies are under great pressure to devise systems that favor the corporate repeat players who draft the arbitration clauses (and thus decide which arbitration companies will receive their lucrative business). The significance of this incentive to favoritism and abuse is highlighted, as Part III of this Testimony establishes, by the fact that there is no meaningful judicial review of arbitrators' decisions. Part IV will establish that the disclosure provisions in House Bill No. 322 are not preempted by the Federal Arbitration Act.

BACKGROUND ON PUBLIC JUSTICE.

Public Justice (formerly Trial Lawyers for Public Justice) is a national public interest law firm dedicated to using trial lawyers' skills and resources to advance the public good. We specialize in precedent-setting and socially significant litigation, carrying a wide-ranging docket of cases designed to advance the rights of consumers and injury victims, environmental protection and safety, civil rights and civil liberties, occupational health and employee rights, protection of the poor and the powerless, and overall preservation and improvement of the civil justice system.

Public Justice was founded in 1982 and is currently supported by more than 3,000 members around the country. More information on Public Justice and its activities is available on our web site at www.publicjustic.net. Public Justice does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, respond to informational requests from legislators and persons interested in legislation, and have occasionally been invited to testify before legislative and administrative bodies on issues within

our expertise. In keeping with that practice, we are grateful for the opportunity to share our experience with respect to the important issues the Legislature is considering today. In this connection, we have extensive experience with respect to abuses of mandatory arbitration, having litigated (often successfully) a large number of challenges to abuses of mandatory arbitration in state and federal courts around the nation.

I. THE DISCLOSURE PROVISIONS IN HOUSE BILL NO. 322 WOULD FILL GAPS IN THE CURRENT LAW.

A recent study by Public Citizen analyzed data from more than 30,000 consumer arbitrations conducted in California by the National Arbitration Forum ("NAF") from January 1, 2003, to March 31, 2007.[3] Importantly, Public Citizen found that a small number of arbitrators were responsible for a disproportionate number of cases and that they reliably ruled against consumers. A mere 28 arbitrators decided nearly 90 percent of the cases. Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 16 (2007), http://www.citizen.org/documents/ArbitrationTrap.pdf. NAF's busiest arbitrator in California, Joseph Nardulli, once did 68 arbitrations in a single day—averaging about one every eight minutes—and awarded companies every penny of the nearly $1 million that they demanded from consumers. *Id.* Because large companies frequently appear before arbitrators, they are familiar with the individual arbitrators and their friendliness to business. Under the disclosures required pursuant to California law, consumers were for the first time able to gain access to this information as well and could therefore object to an arbitrator, like Nardulli, who ruled in favor

[3] Disclosure of this data was required by California law. Cal. Code Civ. Proc. § 1281.96.

of businesses 97% of the time. *See id.*

A federal court in the Ninth Circuit Court of Appeals has acknowledged that a non-transparent system of arbitration may be unfair to consumers because it perpetuates a disparity in knowledge between consumers and businesses. If a business repeatedly has cases before a particular set of arbitrators, it will know much more than consumers about which arbitrators to select. This knowledge is important. When a situation is created where only corporate repeat players have ready access to information about arbitration decisions, consumers are disadvantaged. Such a system puts the corporate repeat player "in a vastly superior legal posture since as a party to every arbitration it will know every result and be able to guide itself and take legal positions accordingly, while each [consumer] will have to operate in isolation and largely in the dark." *Ting v. AT&T*, 182 F. Supp. 2d 902, 933 (N.D. Cal. 2002) (footnote omitted), *aff'd in relevant part and reversed in part on other grounds*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 319 S. Ct. 53 (2003).

Without required disclosures, arbitration is all too often secretive, with strict confidentiality rules sometimes limiting what can be publicly revealed either about the underlying facts of a dispute or about the arbitrators' rulings. Reporters are generally not allowed to be present in arbitrations, and proceedings are closed to the public. These characteristics are not inherent to arbitration, but too often become part of the process.

In addition, some arbitration clauses and the rules of some arbitration providers require that all parties to a dispute keep all facts about both the dispute and the arbitrator's resolution of the dispute "confidential." Furthermore, "[a]rbitrators have no obligation to the court to give their reasons for an award," *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363

U.S. 593, 976 n.8 (1960), and it is common for arbitrators to provide no written explanation for their decisions. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 397-98. Even when arbitrators do produce written decisions, "arbitrators' decisions are not intended to have precedential effect even in arbitration (unless given that effect by contract), let alone in the courts." *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998).

This secrecy tends to reduce the ability of consumer attorneys to effectively represent their clients. *See* Marcus Nieto & Margaret Hosel, *Arbitration in California Managed Health Care Systems* 22 (2000) ("[P]laintiffs in California health care claims generally do not have information about arbitrators' decision records before selecting a neutral arbitrator. In contrast, health care plans do have information about the win-lose decisions of arbitrators. This information gap may favor health care plans."); Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 683-84 (1996) ("[A] consumer's attorney often relies on public information gained from other lawsuits to build her own claims of negligent or intentional misconduct. Repeat-player companies can gain similar information through private channels. Thus, by requiring private arbitration the company may again deprive the consumer of certain relief she might have obtained through litigation." (citations omitted)).

II. PRIVATE ARBITRATION COMPANIES HAVE POWERFUL INCENTIVES TO STRUCTURE THEIR ARBITRATION SYSTEMS TO FAVOR THE CORPORATIONS THAT WRITE THE STANDARD FORM CONTRACTS IN WHICH ARBITRATION COMPANIES ARE SELECTED.

There are a number of different private arbitration companies who compete to be selected by corporations in their standard form contracts with consumers and employees. Arbitration work is often very lucrative, and arbitrators know that if they rule against a corporate defendant too frequently or too generously (from the standpoint of that corporation), they will lose the work. Companies imposing arbitration clauses on their employees and consumers through standard form contracts of adhesion sometimes justify their actions with rhetoric about arbitration being cheaper and faster and fairer than litigation in court. From numerous conversations with lawyers both for corporations and advocates for individuals generally, and participation in multiple mediations and settlement negotiations, I can unequivocally testify that the nearly universal perception among both plaintiff-side and defense-side lawyers is that arbitrators are more likely to have a pro-defense attitude than judges or juries. As one indication of the truth of this point, for each of the past five years, state and federal courts around the country have published more than 200 reported cases a year involving challenges to mandatory arbitration clauses where individual consumers or employees were attempting to maintain their rights to pursue their cases in court and where the corporations were attempting to force the cases into arbitration.

There is some empirical evidence and a good deal of commentary suggesting that arbitrators have a tendency to favor "repeat player" clients.[4] In the consumer law context, the

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[4] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1476 D.C. Cir. 1997); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Emp. Pol'y J. 189 (1997)

repeat player will generally be the corporate defendant. *See* James L. Guill & Edward A. Slavin, Jr., *Rush Unfairness: The Downside of ADR*, Judges' J., Summer 1989, at 8, 11 (1989) ("[A]n arbitrator's decision might be influenced by the desire for future employment by the parties . . . . Some arbitrators openly solicit work. They write to parties noting their availability, sometimes enclosing samples of their awards.") (citations omitted); Kirby Behre, *Arbitration: A Permissible Or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 Pub. Cont. L.J. 66 (1986) (discussing possibility "that an arbitrator will make a decision with an eye toward his role in future disputes involving one or both of the parties--that is, an arbitrator's decision might be influenced by the desire for future employment by the parties.").

A. Corporations Often Blackball Arbitrators Who Rule In Favor of Individuals, and the Rosters of Potential Arbitrators Tend to Be Heavily Tilted In Favor of Corporate Defendants.

One particularly troubling aspect of the repeat-player syndrome is the tendency of corporate repeat-players to blackball arbitrators who might rule against them. This tendency was revealed by a study of mandatory arbitration in managed care cases in California, which found a small number of cases in which an arbitrator awarded a plaintiff more than one million dollars against a health maintenance organization (HMO). Marcus Nieto & Margaret Hosel, *Arbitration in California Managed Health Care Systems* 22-23 (2000). In each instance, that was the only

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(study finding that employees recover a lower percentage of their claims in repeat player cases than in non-repeat player cases); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 60-61 (1997); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 684-85 (1996).

HMO case that the arbitrator ever handled, *id.*, suggesting that every time an arbitrator entered a substantial verdict against an HMO, the arbitrator was unable to get any further work from an HMO in the state. That same study also found that arbitrators were twenty times more likely than judges to enter summary judgment for defendant HMOs.

There have also been two publicly disclosed episodes of arbitrators who were handling cases for NAF being blackballed after ruling for consumers against NAF's most prominent client, MBNA Bank. The first comes in the form of an article entitled "Arbitration and the Godless Bloodsuckers" written by Richard Neely, a former justice of the West Virginia Supreme Court in the September/October issue of The West Virginia Lawyer. After retiring from the bench, Justice Neely was approached by NAF to serve as one of its independent-contractor arbitrators, and he agreed to do so. His experience turned out to be very different from what he expected, though. He concluded that "banks have converted apparently neutral arbitration forums into collection agencies to exact the last drop of blood from desperate debtors." Among other things, he disclosed that NAF "sends the arbitrator a judgment form already filled out so that all the arbitrator need do is check the appropriate box and sign his or her name. It looks like a collection agency to me!" He also reported that when he did not award a bank the full amount of attorneys' fees it asked for, that he found himself barred from handling anymore cases involving that bank. He explained that banks, as "professional litigants," can make use of their superior knowledge to help ensure that their cases are heard by NAF arbitrators who will rule for them.

The second episode of an NAF arbitrator being blackballed comes from Harvard Law Professor Elizabeth Bartholet. Professor Bartholet had also served as an independent contractor arbitrator for NAF, until she resigned as a result of having been blackballed by a credit card

company after she ruled against it in a single arbitration. *See* Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008. At the time that the credit card company decided to block her from hearing any more cases involving itself, she was scheduled to hear a number of other consumer cases. *See Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Prof. Elizabeth Bartholet, Harvard Law School) *available at* http://judiciary.senate.gov/hearings/ hearing.cfm?id=3485 (select "Elizabeth Bartholet" from "Witness Testimony" menu). NAF sent out letters to the consumers falsely stating that she would no longer be the arbitrator in their cases, because she had a scheduling conflict. *Id.* The professor did not have a scheduling conflict, however; NAF sent out this explanation to conceal the fact that in reality she had been blackballed by a lender who didn't like how she had ruled in a past case. *Id.*

In addition to the possibility that individual arbitrators may be blackballed, there are many indications that private arbitration companies themselves are subject to financial pressures if they irritate corporate defendants. *See* Eric Berkowitz, *Is Justice Served*, LA Times Magazine, October 22, 2006:

> Declaring that contractual restrictions on class suits are 'inappropriate,' JAMS announced in 2004 that it would start to 'ensure fairness' by ignoring such prohibitions and letting class arbitrations go forward. But then Citibank, Discover Card and American Express fought back, writing JAMS out of their arbitration accords. Within months, JAMS reversed itself. . . .

While many arbitration service providers are very secretive about the identity and background of their arbitrators, a good deal of anecdotal evidence indicates that they are heavily disproportionately drawn from lawyers who specialize in representing corporate defendants.

Consider the following illustrations, which Public Justice respectfully suggests are illustrative of much broader patterns:

- Enclosed as Exhibit 2 hereto is an illustrative "strike sheet" from an insurance case handled by the American Arbitration Association ("AAA"), which sets out details about how each and every prospective AAA arbitrator has a conflict with the insurance industry.
- Public Justice was involved in a case in Alabama involving a lawsuit against a title insurance company for fraud and breach of contract. Our client was offered a list of potential arbitrators from AAA, and every potential arbitrator on the list either worked directly for a title insurance company or was an attorney at a law firm that did substantial work defending insurance companies.
- In another case, where an arbitration clause was enforced by a state's high court, an employer required an employee to submit his claims to arbitration before an arbitration panel composed of partners of the accounting firm he was suing. *See Dean Hottle v. BDO Seidman, LLP*, 846 A.2d 862 (Conn. 2004).
- In one case, NAF chose as an arbitrator in a case filed by a consumer against ITT Capital Finance Corp. an arbitrator whose law firm represented a host of other ITT entities. See Exhibit 3 hereto.
- Several consumer attorneys have told Public Justice that they sought to become AAA arbitrators, only to be told that the AAA lists in their state are filled, but then they later learned that more corporate defense lawyers have subsequently been added to the list. There is also evidence that even when arbitrators do find for plaintiffs, they tend to make

smaller awards to individuals with employment and civil rights claims, *Armendariz v. Foundation Health Psychare Servs.*, 6 P.3d 669 (Cal. 2000), or to individual medical malpractice plaintiffs, Marcus Nieto and Margaret Hosel, *Arbitration in California Managed Health Care System*, 21 (2000), than do courts or juries.

B. Some Arbitrators' Advertisements and Solicitations to Potential Corporate Clients Confirm the Dependency of Arbitrators Upon Corporate Goodwill.

Perhaps as the most blatant proof that some arbitration companies see their role as aiding corporate defendants against consumer plaintiffs, Public Justice respectfully urges the Legislature to look at some of the advertising material aimed at potential corporate clients of NAF. (This is one of the largest arbitration firms in the U.S., handling hundreds of thousands of consumer cases each year.) NAF makes promises that sharply favor the interests of corporate defendants and place individual plaintiffs at an obvious disadvantage. Consider the following examples:

- One NAF solicitation sent generically to multiple potential corporate clients states in huge print that NAF is "The alternative to the million dollar lawsuit." See Exhibit 4 hereto.
- In a letter dated April 16, 1998, from NAF's Director of Arbitration to Alan Kaplinsky, NAF warns Mr. Kaplinsky that the "class action bar" is threatening to bring lawsuits involving the Y2K issue, and states that the "*only* thing" that will "prevent" such suits is the adoption of an NAF arbitration clause "in every contract, note and security agreement."[5] The approach in this letter is not that of an even-handed neutral, but of an

[5] Mr. Kaplinsky is a prominent corporate defense lawyer who represents banks. In an article entitled "Excuse me, but who's the predator: Banks can use arbitration clauses as a

advocate advising defense counsel how to defeat a mutual adversary ("the class action bar"). See Exhibit 5 hereto.

- BusinessWeek revealed one of the most shocking examples of NAF marketing to debt collectors when it described a September, 2007, PowerPoint presentation aimed at creditors—and labeled "confidential"—that promises "marked increase in recovery rates over existing collection methods." Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.
- NAF sends marketing letters urging potential clients to contact NAF to see "how arbitration will make a positive impact on the bottom line" and tells corporate lawyers that "[t]here is no reason for your clients to be exposed to the costs and risks of the jury system." *See* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post, Mar. 1, 2000, at 01.

These sort of promises are flatly inappropriate. NAF wishes to supplant the publicly accountable system of courts and juries, but it has not held itself to the same ethical standards as those imposed on courts and juries. NAF is promising would-be corporate clients that it will protect them from significant potential liabilities by preventing consumers with small claims from having any meaningful means of relief. NAF is effectively promising corporate defendants that its procedures will insulate them from a broad category of potential liabilities. If a judge were to solicit business from a party that might come before it with strong ex parte hints that the

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defense," *Bus. Law.* 24 (May/June 1998), Kaplinsky wrote that "Consumers have been ganging up on banks. But now the institutions have found a way to defend themselves." *Id.* at 24. The article makes clear that mandatory arbitration is this "defense" for financial institutions against consumer claims, and notes that "[a]rbitration is a powerful deterrent to class action lawsuits." *Id.* at 24-26.

solicited party would get a good deal in the judge's courtroom, there is no doubt that this would be improper or sanctionable behavior.

III. ARBITRATORS ARE IMMUNE FROM ANY MEANINGFUL JUDICIAL REVIEW.

Judicial review of arbitration is less than minimal; it approaches non-existent. The general rule is that judicial review of arbitrators' decisions "is very narrow; one of the narrowest standards of judicial review in all of American jurisprudence." *Lattimer-Stevens Co. v. United Steelworkers of Am. Dis. 27*, 913 F.2d 1166, 1169 (6th Cir. 1990).[6] Consider a couple of illustrations:

- The U.S. Court of Appeals for the Seventh Circuit remarked in a recent decision that courts should not review arbitrators' interpretations of contracts even if they are "wacky," so long as the arbitrator attempted to "interpret the contract at all." *See Wise v. Wachovia Securities, Inc.*, 450 F.3d 265, 269 (7th Cir. 2006).

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[6] *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("the court will set aside [an arbitrator's] decision only in very unusual circumstances."); *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 706 (7th Cir. 1994) ("[j]udicial review of arbitration awards is tightly limited."); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998) ("judges follow the law . . ., while arbitrators, who often . . . are not lawyers and cannot be compelled to follow the law and their errors cannot be corrected on appeal (there are no appeals in arbitration), although there are some limitations on the power of arbitrators to flout the law."); *Di Russa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (to modify or vacate an arbitration award, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case), *cert. denied*, 118 S. Ct. 695 (1998); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998) (arbitrator's decision may only be overturned for manifest disregard of the law in "severely limited" circumstances, where a court finds that "the arbitrators knew of a governing legal principle yet refused to apply it . . .").

- The U.S. Court of Appeals for the Third Circuit considered an arbitrator's decision that "inexplicably" cited and relied upon language that was not included in a key document. The court held, though, that "such a mistake, while glaring, does not fatally taint the balance of the arbitrator's decision in this case. . . ." *Brentwood Medical Associates v. United Mine Workers of America*, 396 F.3d 237 (3d Cir. 2005). This vividly demonstrates how narrow the review of arbitration decisions is – they are upheld even when they are based upon "glaring mistakes" of law.
- In a case involving baseball player Steve Garvey, the U.S. Supreme Court held that "courts are not authorized to review the arbitrator's decision on the merits" even if the arbitrator's fact finding was "silly." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2002).
- In another case, the California Supreme Court held that even when an arbitrator's decision would "cause substantial injustice" on its face, that it was not subject to judicial review. *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992).
- In a case decided recently by the U.S. Court of Appeals for the Eleventh Circuit, the court angrily decried persons who try to "convert arbitration losses into court victories," and noted that the only basis for challenging an incorrect arbitration decision is where a party can prove with "clear evidence" that the arbitrator was conscious of the law and deliberately ignored it; that a "showing that the arbitrator merely misinterpreted, misstated or misapplied the law insufficient." *B.L. Harbert International, LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006). The court went on to state that parties who challenge arbitration awards should be sanctioned more often for asking for judicial

review, and that this would be "an idea worth considering" in order to discourage future challenges to arbitration.

The law governing judicial review of arbitration also encourages arbitrators not to give any reasons for their decisions, because then it is entirely impossible to attack their decisions. *See Fellus v. AB Whatley, Inc.*, 2005 WL 9756090 (N.Y. Sup. Ct. Apr. 15, 2005) (in the absence of a reasoned decision supporting an arbitration award, there was no basis for court to decide whether arbitrator manifestly disregarded the law); *H&S Homes v. McDonald*, 2004 WL 291491 (Ala. Dec.17, 2004) (in the absence of an explanation of damages awarded by arbitrator, court had no basis to determine whether arbitrator manifestly disregarded the law; arbitrator's failure to give reasons for the award did not itself constitute manifest disregard of the law). As a result, many arbitrators have told me that they are discouraged by the major arbitration firms from producing written decisions in most cases, because doing so basically gives arbitrators a means of putting themselves beyond any scrutiny. The upshot of all this is clear – arbitration is largely a system above and beyond the law.

This lack of judicial review undermines the public function of litigation. "By closing off access to proceedings, eliminating judicial precedent, and allowing parties to write their own laws, we compromise society's role in setting the terms of justice." *See* Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 695 (citations omitted). *See also* Mike Ward, *Texas' chief justice calls for overhaul of state courts,* American-Statesman, February 21, 2007 ("'A privately litigated matter may well affect public rights,' [Chief Justice Wallace] Jefferson said. 'Its resolution may ultimately harm the public good or, because those decisions are secret, impede an innovation to a

recurring problem, much to the detriment of Texas citizens.'"

IV. THE DISCLOSURE PROVISIONS IN HOUSE BILL NO. 322 ARE NOT PREEMPTED BY THE FEDERAL ARBITRATION ACT

Public Justice's view is that the disclosure provisions of the bill are not preempted by the FAA. The FAA has been held to preempt state laws that single out arbitration clauses for worse treatment than other types of contracts when these laws interfere with the enforcement of agreements to arbitrate. The disclosure requirement, however, does not interfere with the enforcement of agreements to arbitrate. Private arbitration companies could readily comply with these disclosure requirements without interfering with any agreement to arbitrate. This legislation merely places obligations on the arbitration company that come into effect only after the completion of an arbitration proceeding.

It is important to recognize that the FAA does not generally override all state arbitration acts. The U.S. Supreme Court has stated that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). Accordingly, this bill's disclosure provisions can only be preempted if they "actually conflict" with federal law, either because it is "impossible for a private party to comply with both . . . requirements" or because the sate laws "stand [ ] as an obstacle to the accomplishment and execution of the full purposes" of Congress. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). The disclosure provisions of House Bill No. 322 do not conflict with the FAA because the FAA contains no rules governing arbitrator disclosures or ethics.

As further proof that arbitrators can readily comply with these disclosure requirements without undermining the FAA on the enforcement of agreements to arbitrate, it is important to note that all of the major private arbitration companies are already make disclosures pursuant a disclosure statute that California enacted in 2002.

CONCLUSION

In all too many cases, the promise of fair and inexpensive arbitration is not kept for Montana and other American consumers. The current system suffers from a lack of transparency, which permits and even encourages these abuses.

If the members of the Legislature have any questions about issues related to mandatory arbitration, Public Justice would be happy to address them in supplementary written submissions.

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- 2006 Recipient of the National Consumer Law Center's Vern Countryman Award, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well being of vulnerable consumers."
- Has argued and won more than 20 cases that have led to reported decisions, for consumers, employees or whistleblowers in four of the U.S. Courts of Appeal and the high courts of six different states.
- 2002 San Francisco co-Trial Lawyer of the Year; 2001 Maryland Trial Lawyer of the Year.
- Former co-chair and member of the Board of Directors of the National Association of Consumer Advocates.
- Has presented at more than 100 continuing legal education or professional conferences in more than 25 states; has testified in U.S. Senate Judiciary Committee, a subcommittee of the U.S. House Judiciary Committee, several state legislatures and before federal and state administrative agencies; has been quoted in more than 100 newspapers or magazines throughout the country and has appeared in several radio and TV stories.
- Co-author, ***Consumer Arbitration Agreements*** (published by the National Consumer Law Center).
- Named one of the 500 "Most Important Plaintiffs' Lawyers in the U.S." by *Lawdragon Magazine*
- Has argued and won a number of appeals where courts struck down contract terms banning consumers from bringing class actions, including: ***Ting v. AT&T***, 319 F.3d 1126 (9th Cir. 2003), *cert. denied,* 124 S. Ct. 53 (2003) (also striking from AT&T's arbitration clause secrecy term and terms imposing excessive costs upon consumers); ***Discover Bank v. Superior Court (Boehr)***, 113 P.3d 1100 (Cal. 2005)(co-argued with co-counsel Brian Strange); ***Scott v. Cingular Wireless***, 161 P.3d 1000 (Wash. 2007); **Fiser v. Dell Computer Corp.**,188 P.3d 1215 (N.M. 2008) (argued as *amici*, co-argued with plaintiffs' counsel Austin Tighe).
- Has successfully argued several appeals where courts rejected claims that various federal laws preempted state laws that would benefit consumers: ***Singh v. Prudential Health Care Plan, Inc.***, 335 F.3d 278 (4th Cir. 2003), *cert. denied*, 540 U.S. 1073 (2003) (claims under Maryland HMO Act were within ERISA's Savings Clause and did not conflict with ERISA's Enforcement Clause); ***Ting v. AT&T***, 319 F.3d 1126 (9th Cir. 2003), *cert. denied,* 124 S. Ct. 53 (2003) (Federal Communication Act does not preempt state contract law); **McKee v. AT&T Corp.**, 191 P.3d 845 (Wash. 2008) (same); ***Sweeney v. Savings First Mortgage***, 897 A.2d 1037 (Md. 2005) (federal law does not preempt state statute limiting mortgage brokers' fees); ***Wells v. Chevy Chase Bank***, 832 A.2d 812 (Md. 2003), *cert. denied*, 541 U.S. 983 (2004) (Home Owners Lending Act does not preempt state contract law claims against credit card issuer).

His other successful oral arguments include the following decisions:

- ***United States v. United States ex rel Thornton***, 207 F.3d 769 (5th Cir. 2000) (relators under *qui tam* provisions of the False Claims Act are entitled to receive a statutory share of the value of some non-cash proceeds of a settlement between the U.S. and the defendants).
- ***Dua v. Comcast/Harvey v. Kaiser***, 805 A.2d 1061 (Md. 2002) (statute that retroactively stripped consumers of accrued cause of action violated several provisions of state constitution).
- ***Toppings v. Meritech Mortgage***, 569 S.E.2d 149 (W.Va. 2002) (co-argued with Dan Hedges of Mountain State Justice) (where a lender's arbitration clause designates an arbitration forum that is paid through a case volume fee system, and the arbitration forum's income is dependent on continued referrals from the creditor, this so impinges on neutrality and fundamental fairness that the clause is unconscionable and unenforceable).
- ***Raymond James Fin. Servs., Inc. v. Saldukas***, 896 So.2d 707 (Fl. 2005) (broker waived right to compel arbitration, even though investor proved no prejudice); ***Lewallen v. Green Tree Servicing, LLC***, 487 F.3d 1085 (8th Cir. 2007) (also finding waiver of right to compel arbitration by a lender).
- ***Chisolm v. TranSouth Financial Corp.***, 184 F.R.D. 556 (E.D. Va. 1999) (certifying class in RICO case involving revolving repossession car churning scheme).

Formerly Chief Nominations Counsel, U.S. Senate Judiciary Committee, 1989-1990

EDUCATION: Harvard Law School – J.D. 1986; **Georgetown University** – A.B. 1983