The AAA and JAMS, if they consider an arbitration covered by their consumer protocols, will limit the consumer’s arbitration costs to $200 or $250. Some arbitration agreements also limit the consumer’s arbitration costs. But in other cases—when the arbitration agreement does not limit fees, when the AAA or JAMS does not apply the consumer protocols to a given case, or if an arbitration proceeding is before another provider—fees can add up to thousands of dollars. In those situations, costs include not only filing fees, but the consumer will have to pay half the cost for the arbitrator’s services, which can amount to thousands of dollars a day. A District of Columbia Circuit Court judge noted over twenty years ago (when fees were significantly lower):

\[\text{...think that some courts still subscribe to the fond, but misguided, view that employment arbitration is invariably quick and cheap. The simple truth is it just ain’t necessarily so. When we researched the subject in connection with the appeal in Cole [v. Burns], we found that . . . JAMS/Endispute arbitrators charged an average of $400 per hour, but fees of $500 or $600 per hour were not uncommon. CPR Institute for Dispute Resolution estimated arbitrators’ fees of $250–$350 per hour and fifteen to forty hours of arbitrator time in a typical employment case results in total arbitrators’ fees of $3,750 to $14,000 in an “average” case. . . . I was recently told of a case in which a private mediator billed the parties $25,000 for one day of work!}^{66}\]

The upshot for companies is that high arbitration costs favor them—and harm consumers—by deterring valid claims. As one state court noted, requiring consumers to pay filing fees and arbitration costs that are often much more than the amount of the consumers’ actual claims effectively deters consumers from bringing these claims at all, and thus represents “the antithesis of access to justice.”^{62}

Arbitration fees can create problems for consumers even when the arbitration clause designates the American Arbitration Association or JAMS and, pursuant to the AAA’s Consumer Rules or JAMS’s rules, the business is obligated to pay almost all the costs of the arbitration. Increasingly in such cases, businesses faced with an individual demand for arbitration refuse to pay the arbitration fees, creating serious problems for consumers when the arbitration provider refuses to conduct the arbitration without being paid, and court has been foreclosed to the consumer. The consumers must pay the fees themselves or ask a court to find that the business has waived its right to arbitrate.^{58}

Arbitration clauses may also list the AAA as an arbitration provider but specify that the AAA’s Commercial Rules apply. Under those rules the consumer would have to pay a large filing fee and half the arbitrator’s costs. The consumer reading the arbitration agreement would have no way of knowing that the AAA would possibly refuse to apply its Commercial Rules and instead apply its Consumer Rules that limit the consumer’s costs.

Footnotes

66 [66] Harry T. Edwards, Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?, 16 Ga. St. U. L. Rev. 293, 306–307 (1999) (citations omitted). See also Elizabeth Rolph, Erik Moller & Laura Peterson, Rand Inst. for Civil Justice, Escaping the Courthouse 1, 44 (1994) (concluding, based on a study of ADR in Los Angeles, that arbitration fees “usually greatly exceed those levied by the courts”); Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 S. Ct. Rev. 331, 384 (“The AAA charges an administrative fee for its services that is generally higher than court filing fees, and . . . most [arbitrators] must be paid by the parties, sometimes at handsome hourly rates.”); Frederick L. Miller, Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection, 78 Mich. Bar J. 302, 303 (1999) (“Courts are subsidized; arbitration forums are not. Filing fees for commercial cases (which include cases brought by consumers) at the AAA start at $500, for claims under $10,000, and go up from there. Additional administrative fees are charged for each day of arbitration. The arbitrators themselves charge an hourly fee. . . . The AAA may require a party to deposit in advance sums of money to cover anticipated arbitrators’ fees or administrative costs. Failure to pay fees and charges in full may result in suspension or termination of the arbitration proceeding.”); Dennis Nolan, Labor and Employment Arbitration: What’s Justice Got to Do With It?, 53 Disp. Resol. J. 40, 47–48 (1998) (“[S]haring the arbitrator’s fees and expenses might prove an insurmountable barrier for the putative grievant. Even a relatively simple case can cost several thousand dollars; a complicated case could easily run several times that. Few grievants can afford that much of a commitment, even if an arbitrator could order reimbursement in the event the grievant prevails.”); Beth E. Sullivan, The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry, 26 Fordham Urb. L.J. 311, 331–332 (1999) (“[W]ith arbitration filing and
administration fees totaling thousands of dollars per case, and hourly rates ranging from $200–$700, arbitration can be extremely expensive for plaintiffs, especially in more complex cases, and particularly in light of the fact that plaintiffs are almost always required to pay at least half of the costs. As such, an out-of-work plaintiff facing a ‘deep pocket’ defendant may be severely disadvantaged.”)

67 [67] Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 603 (Wash. Ct. App. 2002). See also Lelouis v. W. Directory Co., 230 F. Supp. 2d 1214 (D. Or. 2001) (employment case) (“The higher cost of arbitration—at least from the plaintiff’s perspective—also is significant because it is another example of how this arbitration agreement is slanted to favor [the corporation’s] interests at the employee’s expense.”); Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091 (Alaska 2009) (employers may not require their employees to arbitrate their wage and hour claims unless the employer is willing to pay all of the costs of arbitration).


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