Mandatory arbitration, common foe of car buyers, bank customers and porn stars, under attack

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Mandatory arbitration, common foe of car buyers, bank customers and porn stars, under attack By L.M. Sixel March 22, 2018 0 Photo: SCOTT MCINTYRE, STR / NYT IMAGE 1 OF 5 Some auto dealers are opting out of mandatory arbitration, finding that the courts offer a better forum for resolving disputes. Mandatory arbitration has long been a standard clause of contracts to buy cars, open bank accounts and take jobs, blocking consumers, investors and employees from bringing disputes to court and forcing them to use a forum widely viewed as favoring companies. But mandatory arbitration is coming under increasing attack in the courts, Congress and state legislatures, and those attacks are beginning to make dents in a practice once viewed as unassailable. Congress, for example, is considering legislation that would ban mandatory arbitration in cases of sexual harassment in the workplace, and state attorneys general, including Ken Paxton of Texas, are urging lawmakers to act. In California, a new law prohibits employers from requiring workers to arbitrate workplace claims in other states. And the Supreme Court, which has long upheld arbitration clauses, is reconsidering whether a typical provision that prohibits employees from joining class action lawsuits, violates the National Labor Relations Act. “There has definitely been some erosion,” said Rick Anderson, a Houston consumer lawyer. “It’s not a full-on attack, but you do see a judicial and administrative look at whether or not some arbitrations are appropriate.” Media attention has also focused on cases in which companies have used arbitration to shield themselves from egregious practices. Wells Fargo, for example, forced its customers to arbitration to settle claims related to the thousands of fake accounts that the bank’s employees set up to meet sales quotas, provoking such an outcry that the California Legislature last year passed a law that prohibits financial services firms from triggering arbitration clauses in cases of fraud.Several factors have come together to prompt these second looks, including the #MeToo movement, which has exposed sexual harassment and assault in the workplace, and efforts by the porn actress Stephanie Clifford, known as Stormy Daniels,

and the former Playboy model Karen McDougal to challenge arbitration clauses in nondisclosure agreements involving alleged affairs with President Donald Trump. Trump has denied the affairs. Companies, meanwhile, are beginning to rethink arbitration; Microsoft, for example, recently dropped mandatory arbitration for sexual harassment claims. In Texas, corporate lawyers say many of their clients are getting rid of arbitration clauses, finding that the high costs and finality of arbitration — rulings can't be appealed in court — are not always such a good deal for them. Alex Brauer, a Dallas lawyer, said one his clients soured on mandatory arbitration after losing in a dispute with a supplier. The arbitrator assessed damages of just $1, but under the rules of that arbitration, the loser must pay the winner's legal costs. Brauer's client was hit with a $200,000 bill. "We try to appeal but the courts say, 'No, you signed up for this,'" said Brauer, who declined to name the client. "You don't know what you'll get." Mandatory arbitration clauses, often buried in the fine print, are written into a dizzying array of contracts, including home building, banking, payday loans, cell phones, rental cars, medical services, nursing homes, employment and car buying and leasing. People who sign these contracts waive their rights to sue and agree to settle disputes through binding arbitration, a process that is secretive, expensive and final. An estimated 60 million U.S. private-sector non-union employees — or 56 percent of the total workforce—are covered by mandatory arbitration policies, according to the Economic Policy Institute, a Washington think tank. Arbitration became part of the American legal landscape in 1925, when federal legislation opened the door to resolving business disputes with arbitrators. The scope of arbitration expanded vastly during the 1980s, after a series of Supreme Court decisions struck down state laws requiring arbitration notices to be clearly labeled, upheld high arbitration fees and ruled that arbitration clauses could prohibit consumers, investors and employees from joining class action lawsuits. Companies say that arbitration is a fair, less costly and faster way to resolve disputes. But consumer groups, worker advocates and other critics say arbitration unfairly favors corporations and employers. A two-year study by the Consumer Financial Protection Bureau, for example, found that consumers win only 9 percent of arbitration cases that they bring against financial companies. Consumer and employment lawyers continue to push back against arbitration clauses. In state and federal courts in Texas, arbitration provisions have been challenged hundreds of times in cases ranging from bounced checks to sexual assault to construction contracts. The challenges typically focus on narrow issues, targeting rules that require far-flung arbitration venues and provisions that don't allow for reimbursement of attorney fees. Victories, however, remain rare. Rich Tomlinson, a consumer lawyer at Lone Star Legal Aid, which provides legal aid to low income residents in Houston and East Texas, estimates he has challenged arbitration provisions a couple of dozen times — mostly without success.

“The best you can do is knock provisions in the clause that are totally unfair,” Tomlinson said, “but the courts still say you have to go to arbitration.” The best hope for reducing the role of arbitration in consumer and employment contracts may be the companies themselves. Bank of America, for example, has dropped mandatory arbitration in contracts for car loans, recreational vehicle loans, deposit accounts and other financial products, as well as credit cards. David Komiss, a Bellaire lawyer who represents the Houston Independent Automobile Dealers Association, said he advises his member companies to avoid arbitration Most disputes go to small claims courts — which handle civil cases up to $10,000 — and both sides get a chance to present their cases without all the formality of introducing evidence, calling witnesses and proving damages, he said. Judges have experience evaluating witness credibility and it doesn’t cost anything to use the courthouse, except modest filing fees that run about $124. “I’m not trying to say arbitration is a bad thing,” said Komiss, estimating that all of his automotive clients have taken his advice. “I like the judicial system handling it because you know what to expect.” For Priority Energy Services, a Louisiana oilfield services company with operations in Houston, arbitration didn’t turn out as expected as fees and costs climbed to least $500,000 to handle 40 individual claims by employees, who alleged they were denied overtime pay, according to court records. The company, which included mandatory arbitration in its employment contracts, tried to force their employees to split the costs, but the American Arbitration Association, which is the designated coordinator of the company’s arbitration program, does not permit fee splitting, outside of an initial $200 filing fee assessed to workers. Priority Energy asked the federal court in Tyler to force employees to split the fees or let the company out of arbitration arrangement, but the court rejected both requests in December. Priority’s expenses were quickly spiraling to $1 million, between the arbitration fees, defense costs and other legal bills, said Dan Pipitone, the Houston lawyer who represented Priority. The company settled with the employees for $700,000, he said. Pipitone, who didn’t draft the arbitration clause, said he advises clients not to use them in employment contracts, since, as Priority learned, costs can quickly pile up and employees can use that as leverage to wrest settlements from companies. “That’s a pretty big hammer,” Pipitone said. Legal specialists expect further erosion in mandatory arbitration, particularly if the Supreme Court determines that employers cannot use arbitration clauses to prohibit workers from filing and joining class action lawsuits. The court consolidated three cases to determine whether company rules against employees pursing work-related disputes on a collective basis violates the National Labor Relations Act, which gives employees the right to join together to improve wages and working conditions. A ruling is expected later this year. The #MeToo movement is targeting mandatory arbitration as more women come forward to report sexual abuse. Some labor experts say mandatory arbitration perpetuates

sexual harassment in the workplace because the secretive process keeps women from learning about other victims while protecting abusers who move on to other targets. Two senators — Democrat Kirsten Gillibrand of New York and Republican Lindsey Graham of South Carolina —introduced a bill in December to ban arbitration in sex discrimination cases, including harassment, compensation, promotions, hiring and firing. Rep. Cheri Bustos, D-Ill., introduced a similar bill in the House. Attorney generals in all 56 states and territories recently sent a letter urging Congress to ban mandatory arbitration of sexual harassment claims to “help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.” lynn.sixel@chron.com twitter.com/lmsixel L.M. Sixel Business Writer, Houston Chronicle