Businesses, Consumers at Odds Over Proposed Arbitration Act

By Neal M. Eiseman
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Sen. Russell Feingold, D-Wis., last month reintroduced his "Arbitration Fairness Act" to the 111th Congress and, in view of the inroads the Democrats made in last November's national election, many observers believe this time it stands an excellent chance of being enacted into law. If that comes to pass, it will mark the death knell of pre-dispute arbitration clauses in consumer, employment and franchise agreements.

The proposed legislation is a reaction to "mandatory arbitration" clauses often found in the fine print of brokerage, cell phone, HMO or credit card agreements, and it would also nullify the acts of corporations who insist that their employees agree to such provisions as a condition of employment. It is intended to circumvent federal judges who, mindful of the strong policy favoring arbitration as annunciated in the Federal Arbitration Act, have issued pro-business decisions enforcing arbitration clauses across-the-board.[FOOTNOTE 1] Last month, for example, the U.S. Supreme Court in *14 Penn Plaza v. Pyett*[FOOTNOTE 2] ruled valid under federal law collective bargaining agreements that clearly and unmistakably require union members to arbitrate (rather than litigate) age discrimination claims.

The proposed Senate legislation includes a new provision specifically intended to reverse *14 Penn Plaza,* thereby permitting employees to enforce employment discrimination claims in court. Unfair labor practices and other types of garden variety collective bargaining disputes are exempt from the proposed legislation.

Proponents of the Arbitration Fairness Act believe that individual consumers and employees lack equal bargaining power when dealing with large companies. They see mandatory arbitration clauses as inherently unfair and intended to force an individual to forfeit his or her day in court and instead proceed before a private arbitration company whose arbitrators are unaccountable and may actually be predisposed to rule in favor of big business.

"Americans are sick and tired of a system that so strongly favors big corporations over consumers and in this case robs them of their constitutional right to their day in court," Feingold contends on his Web site. "Americans are often given no choice but to give up their rights if they want to sign credit card agreements, cell phone contracts, job applications or other basic contracts. It's time for Congress to side with consumers and employees and end the practice of forced arbitration, which stacks the deck against the people Congress is supposed to represent."

The House version of the bill, sponsored by Rep. Hank Johnson, D-Ga., was introduced on Feb. 12, 2009[FOOTNOTE 3]and has been referred to the House Judiciary Committee. It differs from its 2007 predecessor in one important respect. The proposed 2007 Act was ambiguously worded and arguably could have been interpreted as not only barring mandatory arbitration provisions in consumer, employment and franchise disputes, but also in any contracts between parties of unequal bargaining power. Senator Feingold stated that the proposed legislation was never intended to be so broad, but critics of the 2007 Act seized on the language and, in any event, the act never made it out of either its Senate or House subcommittee.

This time around the House version contains no reference to "unequal bargaining power;" rather, in addition to consumer, employment and franchise disputes, it expressly prohibits pre-dispute arbitration clauses governing disputes arising under any statute intended to protect civil rights.

The proposed legislation also seeks to amend the Federal Arbitration Act[FOOTNOTE 4] by providing that "the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such

agreement." This specific language is intended to address a concern that if any initial inquiry involving arbitration is left up to the arbitrator to decide, the dispute is likely to remain in arbitration.

CONGRESSIONAL FINDINGS

To no one's surprise, the Arbitration Fairness Act of 2009 is championed by a coalition of consumer and employment rights groups who believe in earnest that arbitration should be a choice, not a mandate, and that consumers are too often "strong-armed" into arbitrating disputes outside their state and into relinquishing the right to participate in class action lawsuits. As in the 2007 version, the 2009 House version contains seven specific "congressional findings" which explain why its supporters contend there is a pressing need to negate pre-dispute arbitration provisions in consumer, employment and franchise contracts. The findings are that:
(1) The Federal Arbitration Act was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) The series of U.S. Supreme Court decisions have changed the meaning of the act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their rights to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that the rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publically accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.

(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the system against individuals, including provisions that strip individuals of substantive statutory rights, bar class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.

BATTLE LINES ARE DRAWN

The proposed 2009 Act has its detractors. Critics claim there is nothing "fair" about it and take serious issue with its legislative findings. William K. Slate, II, president and CEO of the American Arbitration Association, has dubbed it "inhospitable to arbitration"[FOOTNOTE 5] and the U.S. Chamber of Commerce views the proposed legislation as effectively eliminating arbitration. Its Institute for Legal Reform just released a poll stating that 71 percent of likely voters oppose removing arbitration agreements from consumer contracts and 82 percent prefer arbitration over litigation as a means to settle a serious dispute with a company.[FOOTNOTE 6]

The U.S. Chamber of Commerce also points to a new study titled "Consumer Arbitration Before the American Arbitration Association" which noted that consumers with disputes worth less than $10,000 only paid an average of $96 to resolve the dispute.[FOOTNOTE 7] Conducted by the Searle Civil Justice Institute of Northwestern University School of Law, the study found that the average claimant spent $219 in arbitration for claims between $10,000 to $75,000 and the disputes were settled in average of less than seven months. In 301 cases, consumers won some relief 53 percent of the time and recovered an average of $19,255 whereas business claimants won relief 84 percent of the time and recovered an average of $20,648.

The study pointed out that the American Arbitration Association (AAA), which adheres to the Consumer Due Process Protocol,[FOOTNOTE 8] a set of principles for a fundamentally fair alternative dispute resolution process, deliberately refused to administer any arbitrations where the arbitration provisions were unfair per se to the consumer or employee.

"You need not throw the baby out with the bath water. Rather, fix pre-dispute arbitration for consumers and employees via reference to our Due Process Protocols," says the AAA's Slate.[FOOTNOTE 9] The protocols are designed to ensure that (i) arbitrators are truly neutral and make appropriate disclosures to ensure impartiality and (ii) the arbitration's cost, location, time-limits and access to information are "reasonable" to consumers. They also contain a "carve-out" permitting, if both parties agree, to seek relief in a small claims court.

Proponents of the 2009 Act point to their own studies as evidence for the need for the legislation. Public Citizen, a non-profit organization with 100,000 members which represents consumer interests through lobbying, litigation, research and education, issued a report in September 2007. Titled "How Credit Card Companies Ensnare Consumers,"[FOOTNOTE 10] it focused upon the use of binding mandatory arbitration by the credit card industry. This eight-month examination, based solely upon arbitration awards issued by the National Arbitration Forum, concluded that mandatory arbitration was a "rigged game in which justice is dealt from deck stacked against consumers."

The same study also concluded that (i) corporations -- not consumers -- chose binding mandatory arbitration; (ii) in more than 19,000 cases, 94.7 percent of the decisions were for business; (iii) arbitrators have a strong financial incentive to rule in favor of the companies that file cases against consumers because they can make hundreds of thousands of dollars a year conducting arbitrations; (iv) the National Arbitration Forum arbitrations were shrouded in secrecy with a lack of due process safeguards and (v) the arbitrations often cost consumers more than had they proceeded in court.

One thing is certain: the battle lines have been drawn and when the proposed legislation is submitted to both houses of Congress, the fireworks will fly.

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:::::FOOTNOTES:::::

FN1 In 2001, the U.S. Supreme Court in *Circuit City Stores Inc. v. Adams*, 522 U.S. 105, 121 S.Ct. 1302 (2001), upheld the validity of pre-dispute arbitration provisions and employment agreements, noting that, "There are real benefits to arbitration in the employment context, including avoidance of litigation costs compounded by difficult choice-of-law questions and by the necessity of bifurcating the proceedings where state law precludes arbitration of certain types of employment claims but not others." Last year in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S.; 128 S.Ct 1396 (2008), the U.S. Supreme Court declared that the Federal Arbitration Act's limited grounds to vacate and modify arbitration awards constitute the sole and exclusive remedies available for any party seeking to overturn an award. By so ruling, the Court refused to enforce language in an arbitration provision providing that a judge may vacate an award if an arbitrator erred in applying the law.

FN2 NYLJ, April 2, 2009 at pages 1 and 6.

FN3 H.R. 1020.

FN4 Chapter 1 of Title 9 of the United States Code.

FN5 March 30, 2009 American Arbitration Association press release at www.adr.org.

FN6 U.S. Chamber of Commerce press release, April 2, 2009, entitled "Voters Strongly Back Arbitration, New Poll Shows" at www.uschamber.com.

FN7 March 12, 2009 ABA Journal article captioned "Consumers Won More Than Half of Arbitrations Studied" at www.abajournal.com.

FN8 March 30, 2009 American Arbitration Association press release at www.adr.org.

FN9 See American Arbitration Association's Web site at www.adr.org.

FN10 Publication number B9915 at www.citizen.org.