

Revisiting binding mandatory pre-dispute arbitration clauses

Legislators look to preclude such clauses in consumer and employment matters.

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On July 12, 2007, Senators Feingold and Durbin in the Senate (S.1782) and House members Johnson, Barrow, Lewis, Schakowsky, Braley, Cummings, Gonzalez, Cohen and Ellison (H.R.3010) introduced two bills to preclude the inclusion of binding mandatory pre- dispute arbitration clauses in agreements affecting consumers and employees.

For more than 15 years, corporations large and small have introduced into their agreements with consumers and employees binding mandatory arbitration clauses which not only eliminate access to a public judicial forum for the resolution of disputes, but also impose a cadre of provisions seeking to eliminate statutory rights and remedies available to consumers and employees who seek to resolve their disputes.

These add-on provisions include shifting costs to the consumer or employee; limiting or prohibiting certain types of damages including compensatory, emotional distress and punitive damages; provisions prohibiting classwide adjudication of disputes including modest damage disputes in which a class action for consumers or employees is the only viable alternative; stringent confidentiality, gag order-type provisions; and provisions that provide a public judicial forum to the corporate entity but only a private arbitral forum to the consumer or employee.

In 1992, when a classwide challenge to Bank of America's attempt in California to impose binding mandatory arbitration on its 12 million credit card and checking account customers was filed, few corporations of any size had arbitration clauses in their customer agreements. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779.) Cal.Rptr.2d 273. At present, upwards of 60 percent of all consumer and employee agreements now have arbitration provisions. A very significant amount of litigation in the last 15 years has been targeted at these clauses, contending that they were imposed without notice and contain unconscionable provisions prohibited by federal law under the Federal Arbitration Act (FAA), 9 U.S.C. section 1, *et seq.*, and state arbitration counterparts. Much of that litigation has been in California. (See *Ting v. AT&T*, 182 F.Supp.2d 902 (N.D. Cal. 2002), *cert. denied*, 540 U.S. 811 (2003); *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.)

In recent years, numerous courts have considered whether arbitration clause provisions that ban[1] class actions are unconscionable under a state's general laws.[2] The Supreme Courts of California, New Jersey and Washington have conclusively ruled that the prohibition of classwide adjudication of disputes involving modest damage claims in consumer cases violate the general laws of each of those states. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148; *Muhammad v. County Bank of Rehoboth Beach, Delaware* (2006) 189 N.J. 1, 20-21, 912 A.2d 88, *cert denied* 127 S.Ct. 2032; *Scott v. Cingular Wireless* (Wash. 2007) 161 P.3d 1000.)[3]

These courts all reasoned that the denial of class action adjudication in these circumstances was tantamount to the elimination of both the right to bring a claim and the right to obtain a remedy. "Courts have previously held that class actions are a critical piece of the enforcement of consumer protection law. The reason is clear. Without class actions many meritorious claims would never be brought." *Scott*, 161 P.3d at 1006, *citing Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808; *Discover Bank*, 36 Cal.4th at 162-63 (["'a company which wrongfully extracts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation'."]).

Arbitration Fairness Acts of 2007

It is time for Congress to amend the FAA by passing the Arbitration Fairness Acts of 2007 to ensure that in the absence of true voluntary consent, consumers and employees may not be subject to binding mandatory arbitration pre-dispute clauses.

Congress has already enacted two pieces of legislation, both signed by President Bush, which prohibit binding mandatory arbitration in two contexts. In 2003, Congress passed a bill to prevent automobile manufacturers such as Ford and General Motors from imposing binding mandatory arbitration provi-

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sions in contracts they had with automobile dealers nationwide following protests by automobile dealers that their right to a jury trial and public accountability was being foreclosed by compulsory arbitration provisions. Last year, Congress passed HR 5122, a bill to prohibit members of the military from being subjected to binding mandatory arbitration provisions in any agreements with lenders. Section 670, the Talent-Nelson Amendment, states: "Notwithstanding section 2 of title 9, or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member [of the U.S. armed forces] or dependent of such member, or any person who was a covered member or dependent of that member when the agreement was made."

The Federal Arbitration Act (FAA) was enacted 82 years ago for the primary purpose of permitting commercial entities of relatively equal bargaining strength to negotiate dispute resolution provisions in contracts between them. Snippets of legislative history have been pointed to by the United States Supreme Court to support the notion that Congress in 1925 sought to bind everyday consumers to the provisions of the FAA. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280 (1995), but, as these two pieces of legislation indicate, that plainly was not Congress's intent.

Passage of the Arbitration Fairness Acts of 2007 is essential to ensure that millions of Americans are not denied access to public justice for the resolution of important disputes involving consumer protection and employee discrimination and harassment because they have no choice about obtaining a good or service or obtaining or keeping a job. It is time, again, for Congress to reaffirm the primacy of courts and juries for the resolution of disputes affecting significant rights and remedies for consumers and employees nationwide.

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Endnotes:

[1] The term used in many cases—"waiver"—is a misnomer since it implies that consumers or employees have understood and consented or agreed to a provision that prevents the classwide adjudication of disputes. *See, e.g., Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 161-63. A waiver is the intentional relinquishment of a known right. *Engalla v. Permanente Medical Group* (1997) 15 Cal.4th 951, 983. There is no evidence in any of these cases that consumers or employees either knew *or* consented to such a provision.

[2] *See Scott v. Cingular Wireless* (Wash. 2007) 161 P.3d 1000, 1006 (listing cases).

[3] *See also Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003), *affd. in rel. part* 182 F.Supp.2d 902 (N.D.Cal. 2002), *cert. denied* 124 S.Ct. 53 (2003).

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