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On Arbitration Fairness: Stop the ABA From Taking the Corporate Side Against Civil Rights and Consumers

by Paul Bland

I've gotten caught up in scores of e-mails and requests from angry lawyers asking "what can I do about the ABA getting hijacked?" This blog post has my answer.

It's a pretty well-recognized phenomenon that lawyers who principally represent individuals against corporations have their own



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organizations, such as the American Association for Justice, state Associations for Justice and trial lawyers' associations, the National Association for Consumer Advocates, and the like. Lawyers who generally represent corporations against individuals have their own organizations as well, such as the Defense Research Institute. In theory, the American Bar Association ("ABA") is supposedly an umbrella organization that welcomes all lawyers, and largely doesn't take sides in the battles between plaintiffs' lawyers and defense lawyers.

It sounds like all that's right about to change. In the last week or so, the Leadership Council of the ABA Section on Dispute Resolution, has decided to inject the ABA into a major political battle entirely on the side of defense lawyers and their clients and entirely against plaintiffs' lawyers and their clients. This Leadership Council has decided that the ABA should come in 100% against the civil rights community, every consumer rights organization in the United States, and a variety of other public interest organizations, and be 100% on the side of the American Bankers' Association, the cell phone industry, and similar groups.

Background: The Battle Over Arbitration Fairness

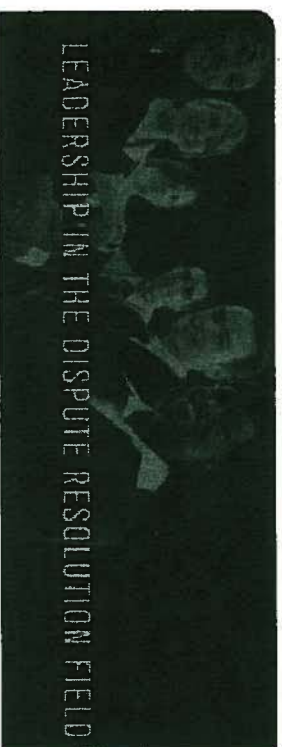
The battle centers around the Arbitration Fairness Act ("AFA"), which would prohibit pre-dispute binding mandatory arbitration clauses in all contracts involving employment, consumer transactions, medical care, and franchise disputes. In the U.S. Senate, the lead sponsor of the AFA is Senator Russ Feingold (D-Wis.), and in the House, it is Rep. Hank Johnson (D-Ga). The legislation had more than 100 co-sponsors in the House. It is strongly supported by a large coalition of civil rights and consumer groups. As the enforcement of fundamental civil rights laws and consumer protection laws has been increasingly undermined by pre-dispute binding arbitration, a large and rapidly growing number of persons have come to see this as one of the central civil rights issues of our time. There has been extensive testimony at Congressional hearings, extensive academic commentary, and a growing tide of rage from consumers and employees who are angry at the rapidly expanding use of mandatory arbitration.

The industry has fought back, of course. The Chamber of Commerce and its various allies have commissioned polls (which generally use extremely misleading questions to imply that the consumers, not the credit card companies and nursing homes, will be selecting the arbitration companies), have hired tons of lobbyists, and have funded studies designed to show that credit card companies are pushing their consumers into arbitration for their consumers' own benefit.

The leading political strategy of the Chamber has been legislation introduced by Sen. Jefferson Sessions (R-Citibank) that supposedly is a "compromise." Leading bank defense lawyer Alan Kaplinsky has openly spoken of having drafted this legislation at several public events. The gist of the Sessions Bill is to permit corporations to continue to use pre-dispute binding mandatory arbitration (and particularly to use arbitration to ban class actions by consumers or employees), but to require (a) that a technical opportunity be given to "opt-out" of arbitration in advance; and (b) to list several vague procedural protections to make arbitration fairer.

It is safe to say that nearly every lawyer who represents individual consumers and employees strongly supports the AFA, and strongly opposes the window dressing Sessions bill. It is safe to say that the Chamber of Commerce strongly supports the Sessions bill, and that no defense lawyer eager to have any clients can speak out in favor of the AFA.

The ABA Dispute Resolution Section Steps Into the Fray



Amazingly--rather than staying neutral in the battle between corporate America and the civil rights and consumer community, rather than stay neutral in this battle between the defense and plaintiffs' bar--the Dispute Resolution Section of the ABA has suddenly decided to weigh in and throw the weight of the entire ABA against the AFA and for the Sessions approach.

I've had several dozen plaintiffs' attorneys tell me bluntly that if the ABA does, in fact, take the corporate position and oppose the civil rights community, that they will immediately resign from the ABA. It's hard to say how many lawyers will actually resign from the ABA. For one thing, the corporate power grab is not yet that well known. But if the ABA follows the lead of the leadership of its Section on Dispute Resolution, it's safe to say that the ABA will become less of an organization that can claim to represent and be comprised of lawyers of all stripes, and the ABA will become an organization of corporate defense lawyers. (Since the Defense Research Institute already serves that role, a good question at that point will start to be "what is the purpose of the ABA at all?")