



## **110<sup>th</sup> Congress: Trial Lawyer Assault on Arbitration Through Legislative Efforts/Earmarks**

The national trial bar is reinvigorated both in money and mission and a top priority is eliminating pre-dispute arbitration agreements. Passing anti-arbitration legislation “is one of the most important steps Congress can take,” said Kathleen Flynn Peterson, president of the American Association of Justice (formerly the Association of Trial Lawyers of America) in a statement.

According to its magazine *Trial*, AAJ held a “Lobby Day” on the issue and “plans to hold additional briefings for House staffers and to lobby members of Congress.” This is part of stepped up activity at both the federal and state levels as well as increased sophistication in public outreach efforts.

The national trial bar knows that it is too early to ask their Congressional allies for a full frontal assault on prior legal reform successes, such as the Class Action Fairness Act and Private Securities Litigation Fairness Act. Instead, the group is seeking more subtle payoffs through targeted legislation. A number of examples of their attacks against arbitration are listed below.

- *End Mandatory Use of Arbitration Agreements*: S. 1782/H.R. 3010, “The Arbitration Fairness Act” would prohibit the inclusion of arbitration clauses in consumer, employment, brokerage, and franchise contracts between parties prior to a conflict. It will retroactively nullify the hundreds of millions of existing pre-dispute arbitration agreements and cause widespread uncertainty about whether a particular contract is still enforceable. It is pending in the Senate and House Judiciary Committees and multiple hearings have been held on the legislation.
- *Farm Bill-related Legislation*: S. 221, “The Fair Contracts for Growers Act,” which was voted out of the Senate Judiciary Committee, would eliminate pre-contractual mandatory arbitration clauses by meatpackers. Similar legislation was introduced in the House (H.R. 2135) and added to the House Farm Bill during subcommittee mark-up. Similar language was included in the Senate’s version of the Farm Bill. The full House

Agriculture Committee, however, significantly scaled back the anti-arbitration language by amending the language to require the Department of Agriculture to promulgate certain “best practice” rules/requirements for meatpacking arbitration agreements. The arbitration language is expected to be an issue during the final House/Senate Conference Committee negotiations on the final Farm Bill package.

- *Arbitration in Mortgage Agreements:* The House passed H.R. 3915, the “Mortgage Reform and Anti-Predatory Lending Act of 2007,” which prohibits arbitration clauses in residential mortgages.
- *Arbitration in Bankruptcy and Mortgage Agreements:* Language prohibiting the use of arbitration in bankruptcy-related disputes involving consumers was included in S. 2636, the “Foreclosure Prevention Act of 2008” and unsuccessful attempts were made to have this legislation considered on the Senate floor.
- *Arbitration in Employment Disputes:* S. 2245/H.R. 5129, the “Civil Rights Act of 2008” would, among other things, deem arbitration clauses between an employer and an employee unenforceable. At least one House hearing has been held on this legislation.
- *Arbitration in Automobile Agreements:* H.R. 5312, the “Automobile Arbitration Fairness Act of 2008” mandates that controversies arising out of a motor vehicle sale or lease contract may not be settled by arbitration, unless all the parties agree to it in writing after the controversy arises. This legislation was the subject of a House Judiciary Subcommittee hearing on Commercial and Administrative Law.
- *Home Building Contracts:* H.R. 1519, the “American Homebuyers Protection Act” would prohibit homebuilders from requiring arbitration in a homebuyer’s contract.
- *Consumer Contracts:* H.R. 1443, “The Consumer Fairness Act of 2007” would amend the Consumer Protection Act to treat consumer arbitration agreements as an unfair and deceptive trade practice and declare such provisions to be unenforceable.
- *Mortgage Contracts:* H.R. 2061, the “Predatory Mortgage Lending Practices Reduction Act” includes, among other provisions, the same broad Consumer Protection Act language as in H.R. 1443 described above.
- *Military Reservists:* H.R. 3393, the “Reservist Access to Justice Act of 2007” would, among other things, prohibit the use of arbitration in employment/re-employment disputes between members of the uniformed services/reservists and employers.