



Anti-Arbitration Bill Will Wipe Out Benefits, Burden Courts, and Limit Recourse for Many Consumers

What Happens to the Hundreds of Thousands of Arbitration Cases Filed Every Year?

The so-called “Arbitration Fairness Act” (H.R. 3010, S. 1782) will eradicate many of the long-standing and well-recognized benefits of arbitration for consumers, businesses, and employees, as well as the overall benefits to society in the form of lower prices for goods and services.

Bill Will Nullify Hundreds of Millions of Existing Agreements - The legislation will retroactively nullify all existing pre-dispute arbitration agreements with respect to “employment, consumer or franchise disputes” as well as disputes that arise under any statute “intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” This will affect hundreds of millions of existing agreements, causing widespread uncertainty among consumers and employees of their recourse should a dispute arise.

Eliminating Pre-dispute Arbitration is to Eliminate Arbitration - If both parties do not commit to arbitration before a problem occurs, they are not likely to choose it once a dispute arises. Inevitably, either the consumer (or employee) or the business will believe they have an incentive to go to litigation instead. For example, one study of employment arbitrations found that only 6% of arbitrations in 2001 and 2.6% in 2002 were the result of post-dispute agreements to arbitrate; and a survey found that 95% of management attorneys said they would not agree to arbitration if they thought they could prevail in court (Lewis Maltby, “*Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*,” 2003).

Leaves Limited Recourse to Consumers With Small Claims - Most disputes resolved today by arbitration are relatively small and individualized, such as a billing dispute with a cable company, a malfunctioning computer, or an employee’s allegedly wrongful discharge. They are not likely to meet the federal or state requirements to proceed as a class action lawsuit, or to have a high enough potential value to attract a lawyer to take the case individually. Studies found that plaintiffs’ attorneys require a minimum of \$60,000 in damages, ask for a retainer, and require a 35% contingency fee in employment cases (Elizabeth Hill, “*Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*,” 2003; William M. Howard, “*Arbitrating Claims of*

Employment Discrimination,” 1995). Without arbitration, many consumers and employees will have little recourse – they simply will not be able to afford to go to court.

Ignores Existing Protections - Current law already contains clear protections against unfair arbitration clauses, and courts have struck down numerous arbitration clauses on that basis. The three leading arbitration providers have adopted policies designed to provide consumers and employees with due process and fair arbitration procedures. Today, more and more arbitration agreements give consumers the option of going to small claims court (as mandated by at least one of the major arbitration providers) and require companies to pay all or most of the costs of arbitration.

Could Dump Tens of Thousands of Cases Into Swamped Courts - Forcing a significant number of arbitration cases into court would wreak havoc on our judicial system. For example, in 2002, the American Arbitration Association alone handled 200,000 cases. That is 80% of the civil cases handled in federal court in 2006 (Deborah R. Hensler, *“Our Courts, Ourselves: the Transformation of the U.S. Court System,”* 2003). And the courts are already laboring under an intense caseload. In 2006, more than 50,000 cases had been pending in federal court between one and two years, and 23,000 for two to three years (U.S. District Courts, *“Civil Cases Pending by Length of Time Pending,”* 2006). Resolving cases in state courts takes even longer, with the time required to resolve a civil case averaging more than two years (U.S. Department of Justice, *“Civil Trial Cases and Verdicts in Large Counties,”* 2001).