

THE MOST IMPORTANT PIECE OF PENDING LEGISLATION NOBODY HAS HEARD OF YET

By Rachel S. Fleishman



Does your business use mandatory arbitration clauses in any of its contracts with its clients or employees? Chances are, if your business enters into contracts, there are probably mandatory arbitration clauses in at least some of them. Legislation currently pending before Congress may eventually put an

end to the widespread use of such mandatory arbitration clauses, which have proliferated in employment contracts, credit card agreements, HMO contracts, securities broker contracts and other contexts in recent years. According to Senator Russell Feingold, the Senate sponsor of the Arbitration Fairness Act of 2007, “mandatory arbitration clauses are slowly eroding the legal protections that should be available to all Americans.” The purpose of the Arbitration Fairness Act, Senator Feingold says, “is to ensure that citizens once again have a true choice between arbitration and the traditional civil court system by making unenforceable any pre-dispute agreement that requires arbitration of a consumer, employment or franchise dispute.” One important caveat to the Arbitration Fairness Act bears mention: it is not intended to apply to arbitration systems agreed to in collective bargaining.

Although legislation similar to the Arbitration Fairness Act has been introduced in Congress in the past several years and has failed to become law, there are some indications that the result may ultimately be different this time. For one, the Arbitration Fairness Act is co-sponsored by some of the Senate’s heavyweights, including Senators Robert Byrd (D-WV), Edward Kennedy (D-MA), John Kerry (D-MA) and Patrick Leahy (D-VT). The level of interest in the legislation has been further demonstrated by the fact that

the Committee on the Judiciary held a day of hearings on December 12, 2007, at which testimony was presented by, among others, the Senior Vice President of The American Arbitration Association, an Associate Dean from the University of Houston Law Center and a consumer who described having been victimized by a mandatory arbitration provision. A source at the Committee on the Judiciary predicts that, with such an array of heavyweights interested in this legislation, a vote is likely to be scheduled on the Arbitration Fairness Act in the coming months.

It is far too early in the legislative process to predict whether the Arbitration Fairness Act is likely to pass in its current form, or any form. However, the potential impact of such legislation, if it passes, has led us at Tarter Krinsky & Drogin LLP to identify this issue as one of potential importance to our clients. We will continue to follow the progress of the Arbitration Fairness Act and will provide updates, as appropriate. In the meantime, we do not recommend that our clients stop using mandatory arbitration clauses in their contracts. However, on a case-by-case basis, it might be appropriate to incorporate additional language into any such provisions, in the event that legislation is passed that would invalidate mandatory arbitration clauses in some circumstances. If you have questions about the contracts you are currently using with your customers or employees, or about contracts you are signing as a customer or employee, please feel free to contact us for individualized advice.

About Rachel S. Fleishman, Counsel

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