

M E M O R A N D U M

TO: Council, ABA Section of Dispute Resolution

FROM: R. Larson Frisby

SUBJECT: Federal Legislative Update

DATE: February 3, 2010

The following is a brief update on the status of federal ADR legislation and other related matters that may be of interest to the Council:

1. Proposed “Arbitration Fairness Act”

H.R. 1020, introduced in February 2009 by Rep. Hank Johnson (D-GA), would amend the Federal Arbitration Act to invalidate all mandatory pre-dispute agreements to arbitrate employment, consumer, and franchise disputes. The measure, known as the “Arbitration Fairness Act,” also would invalidate pre-dispute agreements to arbitrate disputes “arising under any statute intended to protect civil rights.” Any agreements to arbitrate entered into after a dispute has arisen, however, would continue to be enforceable. A companion bill, S. 931, was introduced by Sen. Russell Feingold (D-WI) last April. Unlike the House bill, S. 931 would create a new Chapter 4 to Title 9 and would not amend Chapter 1 of that Title (i.e., the Federal Arbitration Act). In addition, S. 931 provides a more specific definition of “civil rights dispute” than the House bill and only covers franchise disputes in which the franchisee has its principal place of business in the United States. H.R. 1020 currently is pending in the House Judiciary Subcommittee on Commercial and Administrative Law, while S. 931 is pending in the Senate Judiciary Committee. Rep. Johnson and Sen. Feingold introduced similar legislation in the 110th Congress, but both measures died when Congress adjourned late last year.

The ABA House of Delegates adopted new policy in August 2009 (Resolution 114) opposing legislation that would invalidate pre-dispute agreements to arbitrate international commercial disputes or that is intended to protect discrete classes as an amendment to the Federal Arbitration Act, 9 U.S.C. Ch. 1 (FAA). After this new policy was adopted, ABA representatives met with senior staff of the House Judiciary Subcommittee on Commercial and Administrative Law and with Rep. Johnson’s counsel last November. During that meeting, the ABA urged them to consider a

number of technical amendments to H.R. 1020 crafted by the ABA that would prevent the bill from inadvertently interfering with international commercial arbitration and that would achieve the sponsors' policy objectives without amending the FAA. Individual leaders of the ABA Dispute Resolution, International Law, and Litigation Sections also met with the senior counsel to Sen. Feingold prior to the adoption of the ABA's formal policy and persuaded him to incorporate some of these changes in the Senate bill before it was formally introduced last April.

2. Arbitration Limitations in "Wall Street Reform and Consumer Protection Act"

On December 11, 2009, the House passed comprehensive financial regulatory reform legislation, H.R. 4173, which contains a number of significant arbitration provisions. The massive reform bill, known as the "Wall Street Reform and Consumer Protection Act," includes many different financial reform bills that House Financial Services Committee Chairman Barney Frank (D-MA) chose to combine into one legislative package. The arbitration provisions in the bill include the following:

- Section 4208, contained in the "Consumer Financial Protection Agency Act" title of the bill (the "CFPAA"), would authorize the Director of the new agency to issue regulations prohibiting or imposing conditions on the use of any pre-dispute arbitration agreement between a consumer and a provider of consumer financial products or services (i.e., a "covered person" under the bill) "if the Director finds that such a prohibition or imposition of conditions or limitations are in the public interest and for the protection of consumers." The Director would not be permitted to restrict a consumer from entering into a voluntary arbitration agreement with a covered person, however, after a dispute has arisen.
- Section 4507 of the CFPAA would establish protections for employees who are discharged or discriminated against for providing the new agency or any other governmental entity with information about violations under the Act, or for refusing to participate in any illegal activity. These employee protections include the right to file a complaint with the Secretary of Labor, the right to bring an action in the appropriate U.S. District Court, and a ban on pre-dispute agreements to arbitrate disputes under this section. Section 4507 further provides that an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes involving an employee's refusal to engage in illegal activity unless the new agency "determines by rule that such provision is inconsistent with the purposes" of the CFPAA.
- Section 7201 of the "Investor Protection Act" title of the bill would grant the Securities and Exchange Commission (SEC) the authority to issue rules prohibiting, or imposing conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, municipal securities dealer, or investment advisor to arbitrate any future dispute between them arising under the federal securities laws or rules "if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors."

- Section 7202 would require the Comptroller General to conduct a study to review the costs to parties of an arbitration proceeding conducted by the Financial Industry Regulatory Authority (FIRA) and overseen by the SEC as opposed to litigation, the percentage of recovery of the total amount of a claim in such an arbitration proceeding, and other issues. The Comptroller General also would be required to submit a report to the House Financial Services Committee and the Senate Banking, Housing and Urban Affairs Committee that includes the results of the study and recommendations for improving the FIRA/SEC arbitration system.
- Section 9106 of the “Mortgage Reform and Anti-Predatory Lending Act” title of the bill would amend the Truth in Lending Act to prohibit pre-dispute agreements to arbitrate any controversy involving residential mortgage loans or lines of credit, other than reverse mortgages. The section also would prohibit any other pre-dispute agreement to resolve such controversies using any other “nonjudicial procedure.” Post-dispute agreements to arbitrate or to utilize another nonjudicial procedure to resolve such controversies would continue to be enforceable under Section 9106.

The draft Senate version of the financial reform package, known as the “Restoring American Financial Stability Act,” contains similar arbitration provisions to those in the House-passed bill referenced above, except the Senate bill contains no counterpart to Section 9106 in the House bill.

Senator Christopher Dodd (D-CT), Chairman of the Senate Banking, Housing and Urban Affairs Committee, recently expressed a willingness to delete the CFPAA title (and presumably, the CFPAA-related arbitration provisions outlined above) from the broad Senate bill and instead enhance the consumer protection powers of one or more existing federal agencies if such a change would generate sufficient bipartisan support to pass the measure. Although Chairman Dodd and Sen. Richard Shelby (R-AL), the Committee’s Ranking Republican, continue to negotiate, no markup or other action has been scheduled on the Senate’s financial reform package.

3. Franken Amendment to FY 2010 Defense Appropriations Act

On December 19, President Obama signed the Fiscal Year 2010 Defense Appropriations Act (P.L. 111-118; H.R. 3326), which includes language proposed by Sen. Al Franken (D-MN) that sharply limits employment-related arbitration by federal contractors. Section 8116 of the legislation, known as the “Franken Amendment,” prohibits all federal contractors with contracts larger than \$1 million from requiring their employees or independent contractors, as a condition of employment, to arbitrate Title VII civil rights disputes, claims of sexual assault/harassment, or related torts arising under such alleged violations (including employment related disputes involving allegations of negligent hiring, supervision or retention). The measure also requires each such federal contractor to certify that it requires each covered subcontractor (i.e., those with federal contracts larger than \$1 million) to agree not to enter into or enforce any such pre-dispute arbitration agreement. Section 8116 also authorizes the Secretary of Defense to waive these restrictions for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary determines that the waiver is “necessary to avoid harm to national security interests of the United States” and meets certain other requirements.

4. Arbitration for Terminated Auto Dealers

On December 16, President Obama signed the Consolidated Appropriations Act (P.L. 111-117; H.R. 3288), which includes language granting certain terminated U.S. auto dealers the right to seek reinstatement of their dealerships through binding arbitration. Section 747 of the Act requires auto manufacturers that received federal government assistance under the Emergency Economic Stabilization Act of 2008 to provide each dealership terminated between October 3, 2008 and December 31, 2009 with a summary of Section 747 and the specific criteria on which the dealership was terminated. Section 747 then grants each such dealership the right to binding arbitration with the relevant manufacturer, as long as the election occurred within 40 days of the date of enactment. The measure also requires the selected arbitrator to balance the economic interests of the dealership, the manufacturer, and the public at large and then decide, based on a balancing of those and other specific factors listed in the bill, whether or not the dealership should be restored to the dealer network of the relevant manufacturer.

5. Nursing Home Arbitration

Congress also is considering legislation designed to ban certain types of nursing home arbitration agreements. H.R. 1237, also known as the “Fairness in Nursing Home Arbitration Act,” would amend the Federal Arbitration Act to invalidate all mandatory pre-dispute arbitration agreements between a long-term nursing home facility and a resident of that facility or a person acting on behalf of the resident. The bill, introduced by Rep. Linda Sanchez (D-CA), also provides that the validity or enforceability of such arbitration agreements shall be determined by the court, rather than the arbitrator. H.R. 1237 is now pending in the House Judiciary Committee while S. 512, a Senate companion bill introduced by Sen. Mel Martinez (R-FL), is pending in the Senate Judiciary Committee. Rep. Sanchez and Sen. Martinez introduced similar legislation during the 110th Congress, and although those measures were approved by the House and Senate Judiciary Committees, respectively, both bills died in late 2008 when Congress adjourned.

In February 2009, the ABA House of Delegates adopted new policy (ABA Resolution 111B) supporting legislation like H.R. 1237 and S. 512 that prohibit mandatory, binding, pre-dispute arbitration agreements between a long-term care facility and a resident of such facility or person acting on behalf of such resident. The new ABA policy also calls for refinements to the legislation “that would accomplish these objectives through a method other than amendment to Chapter 1 of the Federal Arbitration Act; and if practicable, would narrow the scope of the arbitration prohibition to disputes relating to the resident’s health care and supportive services.”

6. Proposed Consumer Fairness Act

Legislation aimed at curbing mandatory arbitration of consumer transactions also is pending in Congress. H.R. 991, sponsored by Rep. Luis Gutierrez (D-IL), would amend the Consumer Credit Protection Act, 15 U.S.C. 1601 *et seq.*, to prohibit pre-dispute binding arbitration agreements in any consumer transaction or consumer contract. The legislation, known as the “Consumer Fairness Act,” also provides that in addition to being unenforceable, pre-dispute consumer arbitration agreements would “be treated as an unfair and deceptive trade act or practice under Federal or State

law.” Any agreement to arbitrate entered into after a dispute has arisen, however, would continue to be enforceable under the bill. H.R. 991 was referred to the House Financial Services Committee, but no further action has been scheduled on the measure. Rep. Gutierrez introduced similar legislation in earlier Congresses, but those measures never advanced.

7. Mediation and Arbitration of Labor and Employment Agreements

Congress also is considering several measures that would require the use of alternative dispute resolution to resolve certain types of labor and employment disputes.

a. “Card Check” Legislation

Organized labor and the business community have continued to battle during the 111th Congress over so-called “card check” legislation that would make it easier for unions to organize. H.R. 1409, introduced by Rep. George Miller (D-CA), and S. 560, introduced by the late Sen. Edward Kennedy (D-MA), would amend the National Labor Relations Act to require the National Labor Relations Board (NLRB) to certify a bargaining representative without directing an election if a majority of the employees sign cards requesting union representation. This would mark a substantial change from current law, under which a union will only be recognized in a particular workplace if a majority of workers vote for the union by secret ballot. The legislation, known as the “Employee Free Choice Act,” also provides that if an employer and the newly-certified employee representative are unable to reach a collective bargaining agreement within 90 days after bargaining is commenced, either party may notify the Federal Mediation and Conciliation Service (FMCS) and request mediation of the dispute. If the FMCS is unable to facilitate an agreement through mediation within 30 days, the FMCS would be required to refer the matter to an arbitration board, whose decision would be binding for a period of 2 years unless amended by written consent of the parties.

H.R. 1409 is pending in the House Education and Labor Committee, while S. 560 is pending in the Health, Education, Labor and Pensions Committee. Although the legislation has strong support in the House, it does not yet appear to have the 60 votes needed in the Senate to overcome a threatened filibuster. The prospects for the legislation dimmed further in January when Republican Scott Brown won the special election to fill the seat previously held by Senator Kennedy, thereby eliminating the Democrats’ 60-vote supermajority in the Senate that is needed to overcome filibusters of controversial legislation.

b. Labor Relations First Contract Negotiations Act

H.R. 243, a somewhat less contentious bill introduced by Rep. Gene Green (D-TX) in January 2009, would amend the National Labor Relations Act to provide that if an employer and a newly-certified employee representative are unable to reach a collective bargaining agreement regarding the terms and conditions of employment within 60 days, the employer and representative would be required to mediate the dispute. The mediator would be selected jointly by the employer and the employees’ representative, but if they are unable to agree upon a mediator, either party could request that FMCS select the mediator. The bill further provides that if the parties are unable to

reach a settlement within 30 days after the selection of a mediator, either party may transfer the dispute to the FMCS for binding arbitration. Unlike H.R. 1409 and S. 560, however, H.R. 243 does not contain controversial “card check” provisions. H.R. 243 was referred to the House Education and Labor Committee, but no further action has been scheduled. Rep. Green introduced similar measures in the last four Congresses (H.R. 652, H.R. 93, H.R. 101, and H.R. 142, respectively), but none of the bills came to a vote.

8. Reauthorization of State Mediation Programs

Last June, Sen. Pat Roberts (R-KS) introduced legislation designed to encourage mediation of agricultural disputes throughout the country. S. 1375 would reauthorize the Certified State Mediation Program through 2015. That program, carried out by the U.S. Department of Agriculture’s Farm Service Agency, provides federal matching grants to state mediation programs around the country. Currently, 35 states are certified to receive matching funds under the program. To receive federal funding, a state program must meet certain criteria and must provide at least 30 percent of the program’s operating costs. The program was created in 1987 as a means of resolving credit and loan disputes between USDA and producers, but since that time, Congress has expanded its scope to include many other types of disputes as well, including wetlands remediation, conservation compliance, grazing, pesticides, and other issues deemed appropriate by the Secretary of Agriculture. The program was last reauthorized in June 2005 (P.L. 109-17, formerly, S. 643 and H.R. 1930), and is set to expire in 2010 unless a new reauthorization measure is enacted.

Although S. 1375 was referred to the Senate Agriculture, Nutrition and Forestry Committee, and the House companion bill, H.R. 3509, was referred to the House Agriculture Committee, no further action has been scheduled on either measure.

9. Arbitration of Disputes Under USERRA

In January 2009, Senator Robert Casey (D-PA) introduced legislation to amend the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), including provisions that would invalidate mandatory pre-dispute employment arbitration agreements under that Act. S. 263, also known as the “Servicemembers Access to Justice Act,” would void “any clause of any agreement between an employer and an employee that requires arbitration of a dispute” arising under USERRA, except where the parties “knowingly and voluntarily” agree to arbitrate after the dispute arises. The bill also would not preclude the enforcement of any of the rights or terms of a valid collective bargaining agreement. S. 263 further provides that the validity or enforceability of an arbitration agreement covered by the bill would be determined by a court, rather than the arbitrator. Although S. 263 was referred to the Senate Veterans’ Affairs Committee, no hearings or other action has been scheduled on the measure.

A companion bill, H.R. 1474, was introduced in the House by Rep. Arthur Davis (D-AL) in March 2009. H.R. 1474 was referred to the House Veterans’ Affairs, Armed Services, and Oversight and Government Reform Committees, but no further action has been scheduled.

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Copies of the legislation described above or any other federal legislation involving ADR issues can be obtained directly from the U.S. Congress web site at <http://thomas.loc.gov>, or by contacting Larson Frisby in the American Bar Association's Governmental Affairs Office at (202) 662-1098.