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NEWS

RULINGS

VERDICTS

Search &gt;&gt;

Thursday, February 20, 2014

Previous

Next

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## Piecemeal repeal of the Federal Arbitration Act

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If you have ever purchased consumer goods or services (including hiring a lawyer or seeing a medical professional), you have likely agreed to arbitrate any disputes arising out of these transactions. Businesses value arbitration as a powerful tool which streamlines the process of resolving disputes and shields them from frivolous claims in unfavorable

jurisdictions. Plaintiffs' advocates argue that consumers are forced to exchange their right to a day court for a private system that is unfairly biased against them. Examples of abuse exist on both sides. But after nearly 90 years, it is unclear whether the congressional mandate favoring arbitration as a means to resolve disputes will continue to stand given recent developments in federal legislative challenges to the arbitration status quo.

Consumer arbitration has come a long way in the last two decades; today, reputable administrators provide a high quality, fair and efficient system to resolve disputes. In 1998, the American Arbitration Association put in place a "Consumer Due Process Protocol" establishing 15 principles that embody the essential features that should be incorporated into arbitration programs to ensure that consumers are treated fairly. These principles were developed by a committee of consumer representatives, dispute resolution providers, academics, retired judges and government officials. In 2009 the AAA implemented and created another protocol for use in connection with debt collection matters which were inundating already overtaxed courts.

Why then is enforcing an agreement to arbitrate consumer or employment disputes so controversial? By choosing arbitration to resolve disputes, where the Federal Arbitration Act applies, businesses shield themselves from class actions. The U.S. Supreme Court's recent decision in *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011), highlighted this longstanding principle and ignited opposition from those who support class litigation.

Class actions are a valuable tool to vindicate consumer and employee rights, but they too are not without controversy. In the mid-2000s, a significant legislative effort to reign in an epidemic of abuse with respect to class actions resulted in the enactment of California's Proposition 64 and the federal Class Action Fairness Act. In enacting CAFA, Congress found that the abuses of class actions resulted in widespread harm including large attorney fees awards to class counsel with little or no value received by class members, adverse effects on interstate commerce, and undermined public respect for the judicial system.

The Supreme Court's reiterated support of the FAA in *Concepcion* gave rise to legislative challenges to arbitration. Section 1028 of the Dodd-Frank Act gave the

### Litigation

#### US attorney investigating Countrywide for possible civil charges

Several years after the Department of Justice declined to pursue criminal charges against Countrywide Financial Corp. executives over risky lending strategies, former leaders of the mortgage giant remain under investigation, sources say.

#### Athletes, NCAA seek early victory in antitrust suit

A class of athletes will try to convince a federal judge Thursday that antitrust laws should apply to the NCAA, and a "quick look" is all that is needed to determine the organization's rules are anti-competitive.

### Large Firms

#### Law firm 'growth' is an obsession — not a strategy

Bigger has not been better for clients or law firms, it has just been bigger. By **Edwin B. Reeser**

### Real Estate

#### Real Estate Deals

A roundup of recent real estate activity and the lawyers involved.

### Criminal

#### San Francisco judge probes leak in gang murder case

A federal judge demanded attorneys involved in a sprawling gang murder case swear under oath they did not leak a sensitive police report to an attorney who has used it in a habeas appeal in a separate case.

### California Courts of Appeal

#### Appeals court rules for homeowner in construction defect case

California's Right to Repair Act cannot be used by builders to escape liability for negligence and breach of implied warranty suits in construction defect cases, a 2nd Appellate District panel held Wednesday.

### Labor/Employment

#### Wal-Mart says settlement unfair to retailer

Lawyers for the company argued Tuesday that the \$1.7 million deal lets the primary employers off the hook while increasing Wal-Mart's own potential liability.

Consumer Finance Protection Bureau authority to prohibit or restrict the use of pre-dispute arbitration in consumer contracts involving financial products or services - but after first conducting a study. The study is well under way with preliminary findings reported in December 2013. However, the study raises many questions that should be examined in more detail. For example, with California courts already operating in "crisis mode" because of a fiscal deficit, will they be able to absorb an increase in the volume of cases that could result from an outright ban on pre-dispute arbitration?

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## With California courts already operating in 'crisis mode' because of a fiscal deficit, will they be able to absorb an increase in the volume of cases that could result from an outright ban on pre-dispute arbitration?

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In May 2013, Sen. Al Franken, D-Minn., introduced the "Arbitration Fairness Act of 2013" which would invalidate the use of arbitration agreements in employment, consumer, antitrust and civil rights disputes. It exempts labor unions from this ban, allowing them to benefit from the use of arbitration to resolve disputes with their employers. While the name "Arbitration Fairness Act" sounds conspicuously similar to the "Class Action Fairness Act," the similarity ends there. CAFA did not prohibit class litigation; it merely leveled the playing field by providing companies with the option to remove some lawsuits from local to federal courts to avoid hostility toward out-of-town defendants. If passed, the Arbitration Fairness Act would eviscerate the FAA and put an end to arbitration in the consumer and employee context.

The dispute over the use of arbitration to resolve consumer and employee disputes has evolved into a showdown between class action proponents and businesses. On one hand, arbitration is often criticized as depriving people of certain rights, but class actions have similar drawbacks. Class actions are a statutory exception to the general rule that a person is entitled to be heard in court before being bound by the court's decision. In reality, the vast majority of class members have no control over when a lawsuit is filed, who the attorneys are, how it proceeds, and they will not have an opportunity to be heard in court or affect the outcome of the case. They will, however, be bound by the decisions that others make for them in their absence.

On the other hand, standardized contracts presented on a take-it-or-leave-it basis (otherwise known as "contracts of adhesion") are simply the way business is done in today's fast-paced economy. Consequently, most people do not have the opportunity to negotiate contracts in the consumer and employment context, and having a reasonable opportunity to read and understand such contracts is a basic principle of fairness. California courts wrestling with difficult issues related to the fairness of arbitration clauses in this context were also censured by the Supreme Court in *Concepcion* for applying a lower standard of unconscionability to contracts that included an arbitration clause.

Arbitration, when administered by reputable service providers, is a valuable tool for businesses, consumers and employees who want to resolve disputes privately in a convenient, less formal, and efficient setting. Repealing the nearly century-old FAA by foreclosing the avenue of private pre-dispute resolution may not be in the best interests of anyone. The federal judiciary is predicting "commercial uncertainty, lost opportunities, and unvindicated rights" as a result of the proposed budget in 2014. It may be time to examine other potential solutions that won't increase burgeoning court dockets such as incorporating the fairness principles adopted by reputable arbitration providers into the FAA or using these principles as a touchstone for the unconscionability analysis of an agreement to arbitrate.

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[Previous](#)   [Next](#)

### Mergers & Acquisitions

#### Weil, Fenwick handle \$19 billion Facebook deal

Facebook Inc. tapped Weil, Gotshal & Manges LLP to handle its \$19 billion cash and stock acquisition of Mountain View-based messaging application developer WhatsApp Inc. in a deal announced late Wednesday.

### Judges and Judiciary

#### State and tribal courts partner to hear certain cases

El Dorado County Superior Court will partner with a local tribal court to streamline family and juvenile cases involving tribal members.

### Criminal

#### Exonerations up, but more work to do

It is great to get wrongfully convicted people out of jail, but let's keep them from going in. By **Linda Starr**

### Government

#### Unisex facilities legislation goes too far

Lawmakers misread the public when they passed AB 1266, the bill mandating that public school facilities, including bathrooms, be open to all students. By **Mark Pulliam**

### Litigation

#### Piecemeal repeal of the Federal Arbitration Act

Repealing the nearly century-old FAA by foreclosing the avenue of private pre-dispute resolution may not be in the best interests of anyone. By **Ron Naves**

### Labor/Employment

#### NLRB proposed rules will permit 'ambush' union elections

These "ambush" or "quickie" election rules would make union organizing much easier. By **Robert Millman and Andrea Milano**

### Corporate Counsel

#### Isobel A. Jones

General counsel and secretary of Annie's Inc. Berkeley

### Judicial Profile

#### Patrick T. Meyers

Superior Court Judge Los Angeles County (Norwalk)

### Education

#### Preparing students for Korea's new legal market

Law firms have been eager to enter South Korea market following a free trade agreement with the United States that went into effect in 2012. Now,