

From the Daily Journal

April 2008

Anti-Arbitration Suit Could Impact Congressional Debate

By Lawrence Hurley

Daily Journal Staff Writer

WASHINGTON - San Francisco City Attorney Dennis Herrera waded headlong into a debate in Congress about the future of mandatory arbitration when he filed suit against a private arbitration firm last month.

The suit, which was filed March 24 in San Francisco Superior Court, accuses National Arbitration Forum Inc., a provider of arbitrators for credit card companies, of improperly favoring defendants. Representatives for big business allege anti-arbitration groups in Washington - including trial lawyers - orchestrated the case.

This is a topical issue in Washington, where the Democratic-controlled Congress has repeatedly attacked the rise in the use of arbitration agreements as part of many routine contracts, including those for cell phones and credit cards.

They say mandatory arbitration denies people their legal rights, including the right to a jury trial.

It's a stance that's popular within the plaintiffs' bar, which happens to be a major Democratic donor, but few Republicans are persuaded.

Both the American Association for Justice, the trial lawyers' main lobbying arm, and Public Citizen, a consumer rights group, support a ban on mandatory arbitration.

Several bills relating to mandatory arbitration are pending, including one - the Arbitration Fairness Act - that would ban pre-dispute mandatory arbitration agreements, the kind of agreements Minnesota-based National Arbitration Forum, known as NAF, helps to enforce.

Among those calling for reform is Rep. Linda Sanchez, D-Lakewood, who chairs the House Judiciary Subcommittee on Commercial and Administrative Law.

In addition to co-sponsoring the Arbitration Fairness Act, Sanchez also supports a narrower bill that would ban mandatory arbitration agreements in automobile contracts.

In an interview Tuesday, Sanchez said the San Francisco lawsuit "has the potential to help" the debate in Washington by bringing to light more information about a system few people know about.

That's because most details of arbitration settlements are kept private, she added.

"There very definitely appears to be bias, or the potential for bias built into the system" that leads to results unfavorable to consumers, Sanchez said.

San Francisco's lawsuit names Delaware-based bank FIA Card Services and Columbia Credit Services, a Sacramento-based debt collection agency, as co-defendants.

NAF may present itself as a company that provides neutral arbitration services, but "in reality, NAF is retained by debt collectors and serves their interests alone in a non-neutral, biased, and unfair manner," the suit says.

The complaint alleges, among other things, that NAF ordered consumers to pay inappropriately high attorneys' fees, improperly increased some of the awards, and ignored identity theft claims made by plaintiffs.

Of 18,075 arbitrations resolved by the company in California that went to a hearing between 2003 and 2007, consumers won only 30, the complaint highlights. Not all of these cases involved FIA Card Services, but all were related to outstanding debts of some kind, according to the suit.

"The lengths to which the National Arbitration Forum Inc., FIA Card Services and Columbia Credit Services have gone to ensure that California consumers lose in arbitrations against debt collectors is shocking," Herrera said in a statement. "These companies are violating every lawful business practice in the book - including their own - in order to line their own pockets at the expense of consumers."

The lawsuit is intended to "protect California consumers from these nefarious practices," he added.

NAF stressed in a statement that both "published studies and empirical data indicate that arbitration outcomes are the same or better than court, where similar subject matter is at issue."

The company's process for resolving disputes "satisfies or exceeds objective standards of fairness," the statement added.

Opponents of the legislation, including the U.S. Chamber of Commerce's Institute for Legal Reform, the Financial Services Roundtable, and the American Insurance Association, note that the lawsuit echoes some of the complaints raised in a report issued by Public Citizen last year.

They also assert that any changes to the law would benefit trial lawyers because mandatory arbitration reduces opportunities for class action lawsuits.

Lisa A. Rickard, president of the Chamber's Institute for Legal Reform, was dismissive of Herrera's decision to get involved.

"It's clear the San Francisco city attorney cut and pasted the trial lawyer-backed Public Citizen study, with all of its misleading information, directly into his lawsuit," she said.

The Institute for Legal Reform has also attacked the conclusions made in the Public Citizen study.

It commissioned Professor Peter Rutledge, of Catholic University's Columbus School of Law, to do his own analysis.

He concluded that arbitration "improves access to justice, enhances the likelihood of recovery, delivers speedier results and is a superior option to the courts." The win rate for plaintiffs in court is no better than it is in arbitration in most instances, he noted.

Herrera's office, while conceding that lawyers were aware of the Public Citizen report, disputed Rickard's characterization of how it got involved in the case.

Spokesman Matt Dorsey said the investigation was based on specific allegations concerning NAF.

The city attorney's office is not a party to the efforts in Washington to change the law, he added.

Furthermore, although the office may be known for actively seeking public interest lawsuits on behalf of consumers, "we are not doing to the bidding of advocacy organizations," Dorsey said.

Deepak Gupta, a staff attorney for Public Citizen, also laughed off the claims.

"We don't tell the city of San Francisco what to do," he said.

Whatever the origins of the lawsuit, it will have an impact on the political debate because it is the first one filed by a governmental body on the issue, according to F. Paul Bland Jr., a lawyer with Washington-based public interest law firm Public Justice and a supporter of the legislation.

"It's exactly what the bill is aimed at in my view," he said. "I think it's significant because for a great deal of the debate about arbitration is abstract and hard to follow."

What the lawsuit alleges NAF to have done is "so outrageous and egregious, it's not hard to follow," Bland added.

Back in Washington, Rep. Sanchez has already held three hearings on mandatory arbitration but her subcommittee has not yet held a vote on either of the bills she supports.

She said a vote sometime this year is possible, although that would leave little time for the legislation to pass the 110th Congress before it recesses sometime before the November elections. The ranking Republican on the subcommittee, Rep. Chris Cannon of Utah, opposes the legislation and has defended the mandatory arbitration process. A Senate version of the Arbitration Fairness Act, introduced by Sen. Russ Feingold, D-Wis., has also made little progress.

© 2008 Daily Journal Corporation. All rights reserved.