

Civil Justice Reform – Legal Service Providers

Proposed Ban On Consumer Arbitration Would Further Clog Overburdened And Underfunded Courts

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A weak economy reduces the tax revenues necessary for the normal operation of state government. State court systems are no exception. Decreasing tax receipts often force legislatures to decrease the judicial branch's customary allocations in succeeding years. The current economic downturn and the resulting decrease in court funding are forcing court administrators to make drastic service cuts that, in many cases, are hobbling judicial operations.

In this difficult climate, arbitration is a fair and cost-effective way to resolve consumer disputes that also serves to reduce the burden on overcrowded court dockets. Still, detractors of contractual arbitration are pushing Congress to pass legislation – the so-called Arbitration Fairness Act of 2007 (“AFA”) – that would channel countless consumer disputes to the increasingly stressed court dockets. This article examines the current budgetary struggles in America's courts, the growing number of consumer debt disputes on court dockets, and the damaging effects the passage of the AFA would have on both.

Courts Trim Functions To “Barely Serviceable” Levels

A nationwide review of recent news coverage reveals the depth and breadth of proposed and actual budgetary cuts in court systems across the country.

- In New Hampshire, unpaid fur-loughs for all judicial staff – including judges – were proposed to aid the judiciary in complying with state-mandated budgetary reductions.¹

- Florida's judicial budget crisis is especially dire, requiring administrators to potentially slash an additional 250 positions this fall, after already laying off 222 staff members during the summer.²

- Alabama court administration has warned that budget cuts may require it to lay off 300 to 600 staff members, or up to 27 percent of its workforce, to deal with budgetary shortfalls.³

- Budget reduction mandates forced 23 layoffs at a Michigan district court, leading one court administrator to comment that the cuts rendered the court “barely able to function.”⁴

Several other states have experienced similarly sharp budget reductions and have slashed court staffing and services after state revenues have fallen short of expectations.⁵

Considered alone, these severe cuts to court budgets threaten the ability of

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courts to provide for the just and efficient resolution of disputes. When the conditions requiring cuts also produce an increase in caseloads, the problem is compounded.



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Consumer Interests Suffer In Overcrowded Courts

At the same time the weakened economy is reducing funding for the judiciary, it also generates increased caseloads as debts go unpaid and wind their way into court. A recent exposé on circuit court filings in Cook County in Chicago reveals that consumer debt lawsuits are now “clogging courtrooms.” One judge alone was assigned 12,000 debtor cases at one time – a 100 percent increase in such cases compared to two years ago.⁶ With 119,000 debtor lawsuits pending at one time, and 60,000 default judgments entered against debtors during the 2007 court year, Cook County Circuit Court has been “turned into a frenetic debt collections machine.”⁷ At the Tarrant County Courts in Fort Worth, Texas, debt collection caseloads are similarly increasing, accounting for 1,000 of the 1,200 cases filed in May 2007.⁸ The *New York Times* reported in early October that 350,000 cases filed this year in New York City Civil Court will involve consumer debt on credit cards.⁹ Civil court filings have nearly tripled since 2000.

The catalytic effect of judicial budget cuts when caseloads increase during troubled economic times exacerbates the problem. In Minnesota, for example, default judgments have increased during sluggish economic times. Sue Dosal, head of Minnesota's state court administrator's office, observes, “In bad economic times, we tend to see our business go up, not down.”¹⁰ This increase in “business” is significant, with an overall increase in default judgments of 67 percent from 2006 to 2007,¹¹ and it coincides with a \$19 million shortfall in the judiciary's budget, necessitating cuts in court hours, staff, and positions that “test the patience of all involved.”¹² Minnesota's cuts will also result in a 9 percent forced vacancy rate in the judiciary, closing of court locations, and a reduction of the jury per diem.¹³

New Jersey observers note a similar trend. While the state judiciary has placed ten additional judges on the bench this year, the state has simultaneously asked state court administrators to eliminate \$25 million from their budget, which would translate to a loss of 300 judiciary positions.¹⁴ At the same time, foreclosures and debt cases are responsible for a surge in state court activity and a backlog of cases in the tens of thousands.¹⁵ One reporter recently examined New Jersey small claims dockets and found that “debt collection dominates” as the subject matter among the 500,000 total cases filed in the last year.¹⁶

Arbitration Allows Courts To Do More With Less

The use of ADR will continue to mitigate the combined effects of increased caseloads and shrinking budgets on courts' ability to resolve consumer disputes. For example, observers in New Jersey have pointed out that a higher volume of court cases has not totally clogged courtrooms because the state utilizes mediation to stem the tide of consumer disputes. About 70 percent of cases not ending in default judgment are resolved through a state-supported ADR process.¹⁷ The converse is also true; eliminating ADR methods further burdens courts during tough economic conditions.

Congress is currently considering the AFA, a measure that would broadly prohibit a wide range of consumer, employment, and franchise disputes from proceeding to arbitration.¹⁸ Instead, all such disputes would be channeled to court litigation and become part of the crushing backlog of cases pending before America's overextended courts. In July of 2006, the *Boston Globe* found “a court system compromised” in Massachusetts, with many debtors intimidated, steamrolled, and even threatened with jail in courts unable to properly handle the steady wave of debt collection cases.¹⁹ In today's worsening economic climate, it takes little imagination to see the *Globe's* description of debtor's courts writ large across the country if the AFA is enacted into law and compels essentially all consumer disputes to litigation.

The AFA Harms Rather Than Helps Consumers

What is the real motivation behind efforts to deny parties the right to utilize contractual arbitration? At the same time that increased caseloads spell trouble for the courts, bloated dockets can mean additional “business” for lawyers. Many supporters of the AFA – often special interest groups supported by trial lawyers – ostensibly object to arbitration because of its alleged “increased costs” to consumers. In reality, most arbitration rules and many arbitration agreements provide for the reduction, elimination, or shifting of fees assessed to the consumer.²⁰

Furthermore, this calculation of arbitration “costs” also does not take into account additional fees for legal representation often necessitated by court litigation, which would include a typical contingency fee of one-third of the consumer's ultimate recovery.²¹ In effect, allowing a consumer to vindicate his or her rights in an arbitral forum often reduces the need for costly legal representation, which is at the crux of the trial lawyers' objections to arbitration and their advocacy for the AFA.

AFA supporters maintain that arbitration is “costly” and that court litigation is cost-free and available in unlimited quantities. The obvious reality is that all Americans pay for court litigation through allocation of collected tax revenues. This is amply supported by the link between dwindling budgets and soaring caseloads. Taking this connection

to its logical end, the AFA would result in a broad channeling of consumer disputes to courts and even more severe judicial gridlock.

Increased caseloads and a continuing budget crunch in the judiciary mean that the present moment is a terrible time to consider reducing the available private dispute resolution options. Passing the AFA will simply double down on America's courts. Under the guise of consumer protection, the AFA will actually prevent consumer and non-consumer parties alike from accessing expedient, inexpensive resolution of contractual disputes.

¹ Maddie Hanna, Courts Could Offer Unpaid Fur-loughs; System Must Trim \$2.7 Million This Year, *CONCORD MONITOR*, Sept. 20, 2008.

² Jordana Mishory, Majority of 250 New State Cuts to Come from Trial Positions, *MIAMI DAILY BUS. REV.*, Aug. 20, 2008, at 1.

³ Eric Velasco, Courts May Face Layoffs if Funds Low, *BIRMINGHAM NEWS*, May 2, 2008, at 1.

⁴ Joe Lawlor, Layoffs Leave City “Barely Able to Function”, *FUNT JOURNAL*, July 12, 2008, at 4.

⁵ See, e.g., Ryan Gabrielson, County Facing Budget Cuts Due to \$20 Million Shortfall: Drop in Tax Revenue Worse Than Expected, *MESA TRIB.*, Sept. 16, 2008 (to cut additional \$20 million after recently cutting \$42 million); Alyson M. Palmer, Judges Face Hard Choices to Meet Budget, *FULTON COUNTY DAILY REPORT*, Sept. 8, 2008, at 1 (asked to submit plans for 6, 8, or 10 percent cuts for next fiscal year); Diana Bowley, Piscataquis County Court Changes Aim to Lessen Costs, *BANGOR DAILY NEWS*, Aug. 12, 2008, at 2 (moving all civil cases in one county to another's courthouse); Emily Battle, More on the Court Building: Clerk Reduces Hours After Budget Is Cut, *FREDERICKSBURG FREE LANCE-STAR*, July 13, 2008 (eliminating public court services two afternoons a week); Natalie Singer, Budget Cuts Shake Up King County Court System, *SEATTLE TIMES*, June 5, 2008 (\$3.7 million reduction in King County budget); Brandon Ortiz, State Courts Hope to Avoid Layoffs, Continue Services with Less Money, *LEXINGTON HERALD-LEADER*, Apr. 5, 2008 (noting a \$55.7 budget shortfall and suggesting court layoffs).

⁶ Ameet Sachdev, Debt Collectors on the Offensive, Clogging Courts, *CHI. TRIB.*, June 8, 2008, at 1.

⁷ Id.

⁸ Teresa Mcusic, Unpaid Credit-Card Bills Giving Rise to Lawsuits, *FORT WORTH STAR-TELEGRAM*, Aug. 31, 2007.

⁹ Jim Dwyer, In Civil Court, One Nation, Under Debt, *NEW YORK TIMES*, Oct. 10, 2008.

¹⁰ Pam Louwagie, Got Some Court Business? Better Check Hours First, *MINNEAPOLIS STAR-TRIB.*, Mar. 19, 2008.

¹¹ Randy Furst, Defaults on Loans Surge in Minnesota, *MINNEAPOLIS STAR-TRIB.*, Feb. 23, 2008.

¹² Paul Levy, Fewer Clerks, Shorter Hours: Budget Cuts Slow Wheels of Justice, *MINNEAPOLIS STAR-TRIB.*, Sept. 19, 2008.

¹³ Betsy Sundquist, Minnesota Judiciary Already Struggling to Manage Financial Shortfall, *ST. PAUL LEGAL LEDGER*, Aug. 9, 2008.

¹⁴ Dana E. Sullivan, Coming: 10 Additional Judges: Trenton's Bench Surge, *N.J. LAWYER*, June 30, 2008, at 1253.

¹⁵ Tom Hester, Courts Are Hard-Pressed to Deal with Hard Times, *NEWARK STAR-LEDGER*, May 1, 2008, (the 20 describing a backlog of 27,000 cases even before cutting an anticipated 300 additional positions).

¹⁶ Margaret McHugh, New Rules Taking a Swipe at Debtors: Collections Up Amid Bankruptcy Changes, *NEWARK STAR-LEDGER*, Nov. 26, 2007, at 19.

¹⁷ Id.

¹⁸ *Arbitration Fairness Act of 2007*, H.R. 3010, S. 1782, 110th Cong. (2007).

¹⁹ Beth Healy, Debtor's Hell: Part 2: A Court System Compromised, *BOSTON GLOBE*, July 31, 2006, (“the small-claims courts have mutated into a system that often ignores individual rights and shows favoritism toward collectors and their lawyers”).

²⁰ See, e.g., *American Arbitration Association Consumer Arbitration Costs* (also providing for pro bono services or fee waivers in some situations); *National Arbitration Forum Code of Procedure* (also providing for consumer requests under the Code to waive fees altogether).

²¹ Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States 39 (2004).