A weak economy reduces the tax revenues necessary for the normal operation of state government. 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 in many cases, 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 current budgetary struggles in America’s courts, the growing number of consumer debt disputes over credit card accounts, 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 newspaper coverage reveals the depth and breadth of proposed and actual budgetary cuts in court systems across the country.

• In New Hampshire, unpaid furloughs for all judicial staff – including judges – are being used 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 in 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 courts to provide for the just and efficient resolution of disputes. When the condition of requiring cuts also produce an increase in case-loads, the problem is compounded.

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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 court ability to resolve consumer disputes. For example, observers in New Jersey have pointed out that a higher volume of court cases has not totally overflowed courtrooms because the courts utilize 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.7 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 ban consumer arbitration in situations where the AFA would simply double down on America’s courts. Under the guise of consumer protection, the AFA will actually prevent consumers from accessing expedient, inexpensive resolution of contractual disputes.

1 Maddie Hanna, Courts Can’t Offer Unpaid Furloughs: System Must Trim $2.7 Million This Year, Courthouse News, Aug. 20, 2008, at 1.

2 Jordan Mahony, Majority of 250 New State Cuts to Court Budgets: Survey, MICHIGAN BUSINESS JOURNAL, May 1, 2008, at 1.


5 Maddie Hanna, Bench Surge, N.J. LAWYER, May 20, 2008, at 20 (moving all civil cases in one county to another’s courtroom); Emily Battle, More on the Court Building: Clerk Reduces Hours After Budget Is Cut, FORT WORTH STAR-LEADER, July 1, 2008, at 1, 11 (describing a backlog of cases pending between America’s overextended courts). In July of 2006, the Boston Globe found “a court system compromised” in Massachusetts, with many debtors intimidated, steamed-rolled, 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 seek to deny a consumer her rights because of its alleged “increased costs” to consumers. In reality, most arbitration rules and many arbitration agreements provide for reduction, elimination, or shifting of fees assessed to the consumer.12

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.13 In effect, allowing a consumer to vindicate 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.

Arbitration supporters maintain that arbitration is “costly” and that court litigation is cost-free and available in unlimited amounts. In obvious reality, 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 mechanisms. The AFA would simply double down on America’s courts. Under the guise of consumer protection, the AFA will actually prevent consumers from accessing expedient, inexpensive resolution of contractual disputes.

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