

Binding Mandatory Arbitration Scrutinized



DENNIS CUEVAS, CONSUMER PROTECTION CHIEF COUNSEL

In 1925, Congress passed the Federal Arbitration Act, which allowed merchants of equal bargaining power to agree to arbitration after a dispute arose and mutually choose an arbitrator to resolve the dispute. For many companies, arbitration was conceived as an informal, expedited process for resolving routine disputes,

without having to turn to the courts for resolution. Soon thereafter, arbitration expanded to a wide range of contractual issues.

Many contracts these days for goods and services contain a binding mandatory arbitration provision. In mandatory arbitration, companies require consumers to agree to submit any dispute that arises to binding arbitration prior to completing a transaction with the company. Consumers are required to waive their right to sue, to participate in a class action lawsuit, or to appeal. Binding mandatory arbitration differs from other forms of alternative dispute resolution, such as mediation or non-binding arbitration, in that agreements to use them are made after a dispute arises and not before and as a condition of receiving the goods or services.

According to consumer advocacy groups, binding mandatory arbitration is unfair to consumers for many reasons. First, consumers are often unaware they have agreed to binding arbitration, thus depriving them of their right to make informed decisions. Binding mandatory arbitration provisions are tucked in paragraphs of fine print or provided as a separate form among many forms. Companies rarely mention or highlight the provision. If they do, it is often presented on a “take it or leave it” basis. Bind-

ing mandatory arbitration also limits consumer options for resolving a dispute. Before a problem arises, consumers are locked into binding arbitration for future disputes or problems.

Mandatory arbitration generally binds the consumer and not the businesses. Most mandatory arbitration agreements are written in such a way that companies retain their rights to take any complaint to court while consumers can only initiate arbitration. Consumer advocates also argue that arbitration does not follow well-established rules and procedures, such as those required in the court room. For example, arbitrators are not required to follow rules of discovery, which results in consumers experiencing difficulty in getting information they need to support their claims. Moreover, arbitrators are not required to take the law and legal precedent into account in making their decisions, although they are supposed to do so. Decisions typically cannot be appealed, and there are no oversight bodies to ensure that arbitrators follow fair procedure or the law.

Consumer advocates also argue that binding mandatory arbitration frequently costs more than taking a case to court. In many cases, consumers have to pay a large fee simply to initiate the arbitration process, which can deter them from even initiating a complaint. Often these

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fees are seldom less than \$750.¹ In addition, these fees do not cover the arbitrator's hourly charges, which range from \$200-\$300 per hour and split by both parties. Lastly, consumer advocates argue that arbitrators are biased. Arbitration service providers are organized to serve businesses, not consumers. Tremendous incentives exist to rule in favor of businesses if arbitrators want to be retained for future arbitrations.

Conversely, proponents of mandatory arbitration argue that it is an efficient and cost-effective way to resolve disputes. As mentioned earlier, mandatory arbitration procedures do not include extensive discovery which, in turn, affords both consumers and businesses a cheaper method to resolve their disputes. These cost savings make arbitration more accessible to lower-income claimants. In many cases, arbitration is the only dispute resolution alternative to expensive lawsuits. Another argument in favor of mandatory arbitration is that companies are able to reduce their own dispute resolution costs, which allows the firms to pass on the savings to their customers in the form of lower prices.

Mandatory Arbitration of Credit Disputes in Flux

In July 2009, Minnesota Attorney General Lori Swanson filed suit against National Arbitration Forum of Minnesota (Forum), the largest arbitration company in the country for consumer credit disputes. Attorney General Swanson alleged that the Forum represented to consumers and the public that it was independent and neutral, operated like an impartial court system, and was not affiliated with and did not take sides between the parties. The lawsuit further alleged that the Forum, while holding itself out as impartial, worked behind the scenes—alongside creditors and against the interests of ordinary consumers—to convince credit card companies and other creditors to insert arbitration provisions in their customer agreements and then appoint the Forum to decide the disputes. The Forum allegedly paid commissions to executives whose job it was to convince creditors to put mandatory arbitration clauses in their customer agreements. A week after filing suit, Attorney General Swanson reached an agreement with the Forum. While denying any wrongdoing, the Forum will get out of the business of arbitrating credit card and other consumer collection disputes. Under the settlement, the Forum will stop accepting any new consumer arbitrations or in any manner participate in the processing or administering of new consumer arbitrations. The company will permanently stop administering arbitrations involving consumer debt, including credit cards, consumer loans, telecommunications, utilities, health care, and consumer leases.

A few days later, another major arbitration firm, the American Arbitration Association, said it would stop arbitrating consumer debt collection until the process is reformed. Recently, Bank of America announced that it too will drop the requirement that forces consumers with disputes on credit cards and other accounts into an arbitration process. Bank of America's new policy applies to credit card, auto, marine, and recreational vehicle loans, as well as deposit accounts. With these recent announcements and possibly others considering dropping mandatory arbitration, there appears to be much uncertainty as to how credit card disputes will be resolved under current contracts.

¹ "Mandatory Arbitration Clauses: Undermining the Rights of Consumers, Employees, and Small Businesses," Feb. 24, 2005, available at <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7332>, Public Citizen

Legislative Initiatives

As consumer groups and law enforcement continue to address issues with binding mandatory arbitration, Congress also continues to work on reform. The Arbitration Fairness Act first introduced in 2007 was reintroduced [H.R. 1020] by U.S. Rep. Hank Johnson (Ga.) in February 2009. U.S. Sen. Russell Feingold (Wis.) introduced companion bill, S. 931. The bill, amending the Federal Arbitration Act, would prohibit mandatory pre-dispute binding arbitration in consumer, employment, and franchise disputes. It would also void pre-dispute agreements to arbitrate disputes arising under any statute intended to protect civil rights. Parties to a dispute would still be able to choose arbitration over court, but individuals would be given a choice. The bill would overturn the strong presumption in favor of arbitration that has been supported by U.S. Supreme Court decisions and the Federal Arbitration Act, at least as applied to consumer, employment, and franchise disputes. The House version is currently pending before the House Judiciary Subcommittee on Commercial and Administrative Law. The Senate version is pending before the Senate Judiciary Committee.

Lastly, a provision in H.R. 3126, the Consumer Financial Protection Agency Act of 2009 gives the new agency the authority to ban pre-dispute mandatory binding arbitration clauses. Section 125 of the legislation states, “the Agency, by regulation, may prohibit or impose conditions or limitations on the use of agreements between a covered person and a consumer that require the consumer to arbitrate any future dispute between the parties arising under this title or any enumerated consumer law if the Agency finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of consumers.”



Employee Spotlight



MARK ANDERSON

When Mark Anderson joined the NAAG staff as director of information technology in 2005, he felt as though he had that opportunity to make a difference. He uses his myriad of

tech savvy skills to ensure that all communications are running smoothly and to maintain the entire computer system infrastructure.

“I enjoy the interaction we have with the Attorneys General community and serving the needs of our members and our internal staff,” he said.

Prior to his work at NAAG, Mark served as the director of information technology at the Association for Professionals in Infection Control and Epidemiology.

Mark became interested in computers when he was young and spent countless hours working with and programming a commodore 64 that he received for his birthday. He went on to spend many years in the U.S. Army, including tours with the 3rd U.S. Infantry, The Old Guard, stationed at Ft. Myer, Va., and the 1/508th Airborne Infantry in Panama.

As a member of the 3rd U.S. Infantry Salute Guns Platoon, he was responsible for rendering honors to visiting foreign dignitaries and heads of state at the White House, Pentagon and elsewhere in the Washington D.C. area.

When the 1/508th Infantry was deactivated in 1995, his computer and communications skills came into play, serving as a mortar man whose main duty was programming and utilizing the mortar ballistic computer and communications.

Mark grew up on a farm in Iowa, but now resides in Northern Virginia. He received his master’s degree in business administration with a minor in information support management from Shenandoah University.

Outside of the office, Marks enjoys fly fishing, camping and other outside activities.

Recent Decisions Affecting the Powers and Duties of State Attorneys General



EMILY MYERS, ANTITRUST CHIEF COUNSEL

This is another in our series reporting on recent decisions from across the country affecting the powers and duties of state Attorneys General.

Wisconsin—Attorney General Not Collaterally Estopped by Previous Private Suit. *Flying J, Inc. v. Van Hollen*, No. 08-C-110

(E.D. Wis. Feb. 11, 2009)

A private party sought to enforce Wisconsin's Unfair Sales Act, which prescribes a minimum mark-up for gasoline sales in Wisconsin. The defendant, Flying J, argued that the Unfair Sales Act was unconstitutional under the Supremacy Clause because it violated the federal anti-trust laws. Flying J provided notice to the Attorney General of its challenge to the constitutionality of a Wisconsin statute. The Attorney General declined to intervene in the case. The court granted summary judgment for the defendant, because the Unfair Sales Act was held to be unconstitutional. After this decision, the state continued to require Flying J to adhere to the Act, and threatened enforcement action in connection with its gasoline prices. Flying J filed an action seeking to enjoin the state from enforcing the Unfair Sales Act.

Flying J argued that the state should be collaterally estopped from defending the statute because it did not intervene in the earlier private case. The court disagreed,

A private party necessarily has different motives for the pursuit and allocation of resources to litigation than does a governmental entity. That many of the same arguments are being parroted by the Attorney General is not surprising. The Attorney General still brings his own perspective and expertise into the equation. He should not be precluded from having his day in court only because the same issue arose in the context of a private dispute.

The court noted that the previous plaintiff had brought the action under the Unfair Sales Act to recover damages for injuries it sustained by the lower prices charged by Flying J. "The distinction between the State seeking en-

forcement and a private party . . . attempting to recover damages is obvious. The State's interest in enforcing the Act relates to the regulation of unfair competition in the sale of motor vehicle fuel."

California—Governor May Control Personnel of Separately Elected Constitutional Officers. *Schwarzenegger v. Chiang*, No. 2009-80000158, (Cal. Super.) *Schwarzenegger v. Chiang*, No. C061648 (Cal. App. 3d Dist.)

A state budget crisis led the governor to issue an Executive Order directing the state Department of Personnel Administration to implement "a furlough of represented state employees and supervisors for two days per month" from February 2009 to June 2010. The Executive Order also requested "other entities of state government not under my direct executive authority" to implement similar cost-saving measures. State employee unions challenged the order and lost. In that case, the court did not address the issue of whether the governor's order applied to the state constitutional officers, including the Attorney General. The governor sued the constitutional officers, seeking to apply the same furlough program to their offices.

The Attorney General filed a brief on behalf of the state constitutional officers arguing that the governor's Executive Order requiring furloughs of their employees would "violate the system of divided executive power embodied in the State Constitution and would interfere with the independent powers and duties that have been assigned to their offices."

The court held that the constitutional officers were "civil executive officers" under California statute, and their employees were therefore subject to the jurisdiction of the Personnel Board with respect to the non-merit aspects of their employment. Furloughs are considered a non-merit aspect of employment. The court disagreed with the contention of the constitutional officers that this would allow impermissible interference by the governor in the powers and duties of the constitutional officers, because the governor's ability to order furloughs is limited by California statute to circumstances in which the governor has a "legitimate reason to reduce the hours of state employees in this manner, one that is related to the legitimate needs of state agencies. . . in this case at least, the governor's action was not arbitrary or capricious, and does not impermissibly interfere with the powers and duties of other elected civil executive officers."

The constitutional officers appealed the ruling to the California Court of Appeal, requesting a stay of the governor's Executive Order while the case is pending. The governor did not oppose the motion for a stay, so the governor's Executive Order has not yet been applied to the employees of the state constitutional officers.

California—Attorney General Immune from §1983 Claims But Not from State Law Claims. *Cousins v. Lockyer*, No. 07-17216 (9th Cir., June 15, 2009)

Cousins, a sex offender, failed to register as required by state law was convicted and sentenced to 25 years in prison under the state’s three-strikes law. After his conviction, the California Court of Appeal issued a decision holding the statute under which he was convicted unconstitutionally vague. The state did not appeal the decision. Cousins filed a writ of *habeas corpus*, arguing that he should be released because the statute had been declared unconstitutional. The Attorney General’s office filed its answer a year later. The California Supreme Court issued the writ and Cousins was released approximately 19 months after the statute was held unconstitutional. He filed suit alleging that his prolonged incarceration violated 42 U.S.C. §1983 and several state statutes. He alleged that the Attorney General “had a duty to inform the trial court. . . and various officials in the California Department of Corrections and Rehabilitation” of the invalidity of Cousins’ conviction, and the breach of this duty violated his right to due process and his right to be free from cruel and unusual punishment. The trial court dismissed the claims against the Attorney General based on his absolute prosecutorial immunity, and Cousins appealed.

The court described the Attorney General’s absolute federal immunity when acting “within his role as an “advocate for the State” and his actions are “intimately associated with the judicial phase of the criminal process”, but noted that the Attorney General is only entitled to qualified immunity when he is not acting as an officer of the court, but is instead engaging in investigatory or administrative tasks. The court held that the Attorney General could not have hastened Cousins’ release by simply notifying the court, in a ministerial way, that the statute had been invalidated, but rather, that the Attorney General would have had to petition the court for Cousins’ release, an act the court described as “an action wholly dependant on his role as advocate for the State.” The court also rejected Cousins’ argument that the Attorney General should have set up a system to track decisions that affect the incarceration of inmates in the state. The court held that supervising prosecutors “retain absolute immunity regarding decisions to create information management systems where, as here, ‘determining the criteria for inclusion or exclusion requires knowledge of the law,’ and where, as here, the information is relevant only insofar as it relates to the prosecution of a particular case—in this instance, the AG’s distinctly prosecutorial function of going to the sentencing court to undo Cousins’ conviction.” The court did not grant the Attorney General absolute immunity with respect to Cousins’ state claims, citing California Supreme

Court precedent that prosecutors are not absolutely immune from false imprisonment claims. Any other claims based on the same facts are likewise not subject to a defense of prosecutorial immunity.

Nevada—Attorney General Cannot Prosecute Lieutenant Governor Because of Conflict Issues. *State v. Krolicki*, No. C250045 (Dist. Ct., Clark Cty. Nev. May 19, 2009)

The Lieutenant Governor of Nevada was indicted on two counts of misappropriation and falsification of accounts in connection with the state’s College Savings Program (CSP) arising from his actions when he was state treasurer. He moved to disqualify the Attorney General’s office from representing the state because several assistant attorneys general advised the Treasurer’s office about the program and about contracts that are the basis for the indictment. The attorneys prosecuting the case against the defendant had never advised the Treasurer’s office, and the Attorney General had erected a “Chinese Wall” between the prosecuting attorneys and those involved in an earlier civil investigation of the office.

Defendants stated that their defense would be based on the advice they received from the attorneys from the Attorney General’s office in connection with the program, conceding that their disqualification motion was not based on attorney-client privilege concerns. Instead, they argued that this is an “extreme case” where disqualification is necessary because of the “appearance of unfairness and impropriety in the circumstances here presented”. Although the court noted that the Attorney General should not be automatically precluded from prosecuting state officials in this type of case, it held that the circumstances here warranted disqualification. Among other things, the court noted that prosecutors from the Attorney General’s office would be



cross-examining their current and former colleagues, that the office itself had recognized a potential conflict by erecting a Chinese Wall between the prosecuting attorneys and those working on the civil investigation. Although it granted the motion, the court specifically found that there had been no impropriety or partiality in the investigation that led to the indictments.

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Pennsylvania—Attorney General Refusal to Pursue Private Criminal Complaint Is Within AG Authority.

In re Private Criminal Complaints of Rafferty, 2009 WL 782992 (Pa.Super.)

Appellant, an inmate whose parole was revoked at a hearing, filed three private criminal complaints against witnesses at the hearing and the deputy attorney general who acted as prosecutor, alleging perjury, obstruction of justice and false imprisonment. The criminal complaints were referred by the local district attorney to the Attorney General's office. The Attorney General declined to prosecute the complaints, citing lack of prosecutorial merit. The trial court affirmed that finding, and petition appealed. Petitioner argued that the Attorney General's review of the complaint was not a "policy determination" as the trial court held, but was rather based on a legal assessment of the evidence, and was therefore subject to *de novo* review, rather than review for abuse of discretion. The court cited a line of cases in Pennsylvania under which "a determination that the case lacks prosecutorial merit is a 'policy determination' subject to the aforementioned standard of review."

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Washington—Attorney General Does Not Have Duty to Defend Judge In Ethics Litigation.

Sanders v. State, 2009 WL 1332542 (Wash.)

The Attorney General filed a complaint with the Commission on Judicial Conduct after a Washington Supreme Court justice visited a state correctional facility and allegedly communicated with residents about cases pending before the court. The Commission on Judicial Conduct investigated the complaint, and the justice sought representation by the Attorney General. The Attorney General declined to represent him, and he retained private counsel. The Commission then determined that there had been a violation, and the justice was admonished. The justice sought a declaratory judgment that he was entitled to representation by the state. The trial court held for the state, and the court of appeals affirmed. The justice appealed to the state Supreme Court.

The Washington constitution provides, "The attorney general shall ... [d]efend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United

States." The relevant statute provides, "The attorney general shall also represent the state and all officials ... of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings." Although the statute is not expressly limited to official actions of state officials, the court concluded that the limitation should apply, otherwise the Attorney General would have to represent state officials even in private matters. The justice argued that the ethics complaint arose out of his official acts, but the court disagreed,

His acts involved contact with offenders who had cases pending in his court. Representation of a judge being disciplined for ethical violations is beyond the purpose of RCW 43.10.040. Its purpose is to provide defense to an official when engaged in official acts. Justice Sanders knew or should have known that his conduct was unethical; therefore, he is not entitled to representation.

The dissent argued that because the Attorney General was the complainant in this case, "Holding that the attorney general has sole discretion under RCW 43.10.040 allows the attorney general both to initiate a complaint and to control an accused judge's entitlement to a defense." The dissent also argued that because the statute speaks in mandatory terms ("shall represent"), the Attorney General has no discretion to refuse to represent a judge in connection with an ethics complaint.

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CWAG 2009 Annual Conference



COLORADO ATTORNEY GENERAL JOHN SUTHERS, CWAG CHAIR

The Conference of Western Attorneys General (CWAG) convened its Annual Conference in Sun Valley, Idaho on Aug. 2-5. It was preceded by the two-day Alliance Partnership Conference which brought 25 Attorneys General from Mexico, led by Eduardo Median Mora Icaza, the Mexico Attorney General. They met with the CWAG Attorneys General and discussed issues focusing upon drug and gun smuggling, money laundering, and human trafficking across the U.S. – Mexican border. Assistant Attorney General Tony West, U.S. Department of Justice, served as a key note speaker.

The Annual Conference focused on traditional CWAG issues such as natural resources and Indian gaming but

also included broader topics such as substance abuse programs, consumer protection, climate change, office technology, and “green” business practices. One of the many highlights was a presentation by Professor Jesse Choper, UC Berkeley School of Law, on the recent Supreme Court term and what may lie ahead in the next term. The most moving and inspirational presentation was provided by the Honorable Larry Echo Hawk, assistant secretary of Interior for Indian Affairs, and former Attorney General of Idaho. Secretary Echo Hawk challenged the Attorneys General to join him in a closer partnership addressing chronic Native American issues of poverty, disease, and unemployment.

The conference concluded with a heartfelt farewell to Attorney General Larry Long, the CWAG chair, who will retire as the Attorney General of South Dakota to accept a judicial appointment, and the welcome of Colorado Attorney General John Suthers as the new CWAG chair.

More CWAG information can be found at <http://www.cwagweb.org>.

Calendar

CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) TRAINING

September 16-17, 2009, Lincoln, NE
Contact: Paula Cotter

DEPOSITIONS AND NEGOTIATIONS

September 20-24, 2009, San Francisco, CA
Contact: Dennis Cuevas

TECHNOLOGY-BASED CRIMES AGAINST CHILDREN: CUTTING EDGE ISSUES

October 13-15, 2009, Oxford, MS
Contact: Hedda Litwin

BANKRUPTCY FROM A GOVERNMENT PERSPECTIVE

October 25-28, 2009, Nashville, TN
Contact: Karen Cordry

NAAG WINTER MEETING

November 30 - December 3, 2009, Phoenix, AZ
Attorneys General and AG staff only
Contact: Jeffrey Hunter

PRESIDENTIAL INITIATIVE SUMMIT: “VIRTUAL WORLD-REAL CRIME”

February 8-10, 2010, Ft. Lauderdale, FL

NAAG SPRING MEETING

March 1-3, 2010, Washington, DC
Contact: Jeffrey Hunter