Mandatory Arbitration Limits Access, Experts Warn

New York Law Journal (Online)

March 8, 2017 Wednesday

New York Law Journal

Length: 594 words

Byline: Len Maniace

Body

An all-star panel of arbitrators and attorneys this week warned that the growing use of mandatory arbitration in consumer and employee contracts is restricting public access to the courts.

By clicking online agreements or signing work contracts, members of the public are waiving their right-often unwittingly-to settle legal disputes before a judge, said Stephen Younger, a partner with Patterson Belknap and past president of the New York State Bar Association who arbitrates high-stakes cases.

"I'm willing to bet that everyone in this room has signed an arbitration clause that you didn't know about," Younger told more than 300 attorneys at the Southern District courthouse on Tuesday during a wide-ranging discussion of arbitration tends.

The arbitration clauses prohibit plaintiffs from joining together in class action suits, which are often the only way ordinary consumers or employees can afford the costs of a legal challenge to large companies, critics say.

The U.S. Supreme Court is scheduled to weigh in on the controversy in its 2017 term. Earlier this year, it accepted three cases focusing on the right of workers to band together in seeking legal redress of workplace issues. In two of the cases, Epic Systems Corp. v. Lewis and Ernst & Young v. Morris, federal appeals courts have upheld that right. Another case, NLRB v. Murphy Oil, that right was rejected by a third appeals court.

Pervasive use of arbitration clauses in consumer and employment fields presents a problem of fairness in the case of unequal power, according to Kenneth Feinberg, a leading expert in alternative dispute resolution. "You need the credit card, so you sign the agreement," he said after the program.

The same power inequality holds true for job seekers, Feinberg told the audience. "Employees have no choice if they want the job, other than to sign."

The dispute typically breaks down along political lines, with Republicans generally upholding businesses' use of mandatory arbitration clauses, while Democrats oppose it, said Theodore Wells, a partner at Paul, Weiss, Rifkind, Wharton & Garrison who investigated the New England Patriots' alleged "Deflategate" for the NFL. The controversy over deflated footballs was essentially a collective bargaining question: did NFL executives have the right to suspend a unionized player-quarterback Tom Brady-under the league's arbitration rules? Brady lost an appeal of the case and served the four-game suspension last year.

Arbitration became a federal matter in 1925 with the Federal Arbitration Act, which gave the courts a role in enforcing these settlements. That "modest start," however, has been turned "upside down" in a series of rulings by the U.S. Supreme Court, said Southern District Judge Richard Berman, who moderated the discussion. Neither the language nor the intent of the act provide for the widespread use of mandatory arbitration now taking place, Berman said.

The Supreme Court's 2011 ruling in AT&T Mobility v. Concepion is often viewed as a turning point concerning consumer contracts. That 5-4 decision allows companies to require individual arbitration settlements if contracts contain arbitration clauses that waivers of class actions.

Next term's Supreme Court hearing would decide whether the Federal Arbitration Act, or the National Labor Relations Board, the federal agency charged with investigating and remedying unfair labor practices, should hold sway in workplace disputes.

Also moderating the discussion was Esta Bigler, director of the ILR Labor & Employment Law Program at Cornell University.

Classification

Language: ENGLISH

Publication-Type: Newspaper

Subject: ALTERNATIVE DISPUTE RESOLUTION (90%); APPEALS (89%); AGREEMENTS (87%); CONTRACTS LAW (87%); LAW COURTS & TRIBUNALS (87%); LITIGATION (72%); LABOR MEDIATION & ARBITRATION (72%); LAWYERS (72%); SETTLEMENT & COMPROMISE (72%); MAJOR US LAW FIRMS (72%); JUDGES (72%); EMPLOYMENT CONTRACTS (71%); APPEALS COURTS (71%); APPELLATE DECISIONS (71%); CONSUMERS (71%); LABOR & EMPLOYMENT LAW (71%); SUITS & CLAIMS (68%); SUPREME COURTS (67%); BUSINESS & PROFESSIONAL ASSOCIATIONS (66%); ASSOCIATIONS & ORGANIZATIONS (66%); EMPLOYMENT SEARCH (66%); CLASS ACTIONS (66%)

Company: PAUL WEISS RIFKIND WHARTON & GARRISON LLP (84%); EPIC SYSTEMS CORP (68%); PATTERSON BELKNAP WEBB & TYLER LLP (58%); ERNST & YOUNG GLOBAL LTD (55%)

Organization: NEW YORK STATE BAR ASSOCIATION (57%); SUPREME COURT OF THE UNITED STATES (56%)

Industry: LAWYERS (72%); MAJOR US LAW FIRMS (72%); CREDIT CARDS (50%)

Geographic: NEW YORK, USA (79%); UNITED STATES (79%)

Load-Date: March 9, 2017