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*56 ARBITRATION OPPONENTS BARKING UP WRONG BRANCH

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*57 Introduction

Lost in the hue and cry of the "battle over arbitration"--replete with charges of businesses "stealing" the right to trial by jury and "Republicans on the Alabama Supreme Court" denying Firestone victims their day in court--is the fact that arbitration is predominantly a creature of federal, not state, law. The twin pillars upon which any legal analysis concerning the enforceability of an arbitration agreement must begin are the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et. seq., and Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995). Any reasonable reviewer of these laws must conclude that opponents of consumer arbitration should approach Congress, the original author of the FAA, with their complaints. For if, as [Montgomery attorney] Tom Methvin suggests, Congress never intended the FAA to extend into the area of consumer contracts as was mandated by the United States Supreme Court in Terminix, and valid policy concerns should be considered in determining when and how arbitration clauses legitimately can be inserted into consumer agreements, if at all, should not these concerns be addressed to Congress?

Instead, we have witnessed what appears to be an expensive and certainly inflammatory campaign designed to pressure state court judges--and particularly members of the Alabama Supreme Court--to disregard clear and unequivocal federal law and U.S. Supreme Court precedent and in an activist manner maneuver around the federal mandate of the FAA through utilization of state contract law. This effort was most clearly apparent in the recent elections for the Alabama Supreme Court, manifested in those infamous placards proclaiming arbitration a license to steal. Several weeks before the November election the words "Vote Democratic" were added to these placards, suggesting implicitly, if not explicitly, that all that was or should be involved in this complex legal determination involving federal statutory law, U.S. Supreme Court precedent and Alabama law concerning contract formation, was a party label.

Further lost in the politicization of these complex legal issues are important constitutional principles involving the separation of powers and freedom of contract. The gist of the anti-arbitration group's argument against arbitration is at bottom a policy argument centered on the fairness of inserting arbitration clauses in standard form consumer agreements, presented on a "take it or leave it" basis. Certainly, these are legitimate policy questions upon which reasonable people can disagree. That being said, it should be troublesome to those adherents to the Constitutional notion of separation of powers that some appear to force a litigation solution to a legislative mandate. Moreover, one must consider, absent congressional action, the damage that would be wrought to Alabama's general law of contracts if, as Mr. Methvin suggests, the Supreme Court of Alabama uses every means available to circumvent otherwise lawful contracts only to strike down the arbitration clause contained in those contracts. For, as will be shown, arbitration agreements, though disfavored and abhorred by some, are favored by Congress and no court may invalidate arbitration on any "special" or "disfavored" basis. Rather, general contract law principles must be applied equally to arbitration agreements as any other contract provisions. Thus, in terms of Alabama's general law of contracts, the court must "throw the baby out with the bath water," so to speak, in order to invalidate arbitration agreements.

Arbitration Is Purely a Matter of Contract

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Absent an agreement, arbitration is not mandated by law. Thus, no party can force another party to agree to arbitrate. Parties choose by contract to give up their right to a jury trial and to settle their disputes by arbitration. This freedom to contract is enshrined in both the United States Constitution and the Alabama Constitution of 1901. U.S. Const. art. I, § 10; Const. of Ala., 1901, art. I, § 22.

Indeed, the U.S. Supreme Court has consistently endorsed a contractual approach to arbitration. See, e.g., Doctor's Assocs., Inc v. Casarotto, 517 U.S. 681 (1996); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643 (1986); see also Stephen J. Ware, Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto, 31 Wake Forest L. Rev. 1001 (1996) ("The contractual approach rests on the principle that arbitration law is a part of contract law and courts should treat arbitration agreements, with few exceptions, like they treat other contracts"). Thus, when the Alabama Supreme Court specifically enforces an agreement to arbitrate, it is not, as Mr. Methvin suggests, taking away the right to trial by jury; rather, it is appropriately following well-settled Supreme Court precedent and honoring the constitutional guarantee of freedom of contract. See Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) (holding that "arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit").

When Congress enacted the FAA it adopted a national policy to promote the arbitration of disputes by encouraging and enforcing arbitration agreements. The U.S. Supreme Court has repeatedly resisted efforts to dilute this policy through judicial doctrines that show hostility toward arbitration. Indeed, the Supreme Court has issued a series of rulings that have reinforced the primacy of the FAA and the application of uniform federal substantive law in resolving issues concerning the enforceability of arbitration agreements. See, e.g., ***58** Doctor's Assocs., Inc v. Casarotto, supra at 686-88 (1996) (state statute conditioning the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally was preempted because it impermissibly singled out arbitration agreements for special treatment); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (confirming that "the basic purpose of [the FAA] is to overcome courts' refusals to enforce agreements to arbitrate" and that the Act "preempts state law"); Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) (primary purpose of the FAA is to eradicate the historical reluctance of courts to enforce arbitration agreements); Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983) "[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect ... is to create a body of federal substantive law of arbitrability ....").

In addition, the Supreme Court has held that all disputes over contract inter-pretation should be resolved consistent with the liberal federal policy favoring arbitration agreements:

[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense of arbitrability.

Moses H. Cone, supra at 24-25.

Any state law, such as Ala. Code § 8-1-41(3), Alabama's anti-arbitration statute, or any contract interpretation that frustrates this federal policy favoring arbitration is displaced. Congress's ability to preempt state law is, of course, found in the Supremacy Clause of the United States Constitution, which states as follows:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Consistent with the Supremacy Clause any conflict between state law and federal law arising out of a valid exercise of federal authority is resolved in favor of the federal law. See, e.g., Testa v. Katt,

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330 U.S. 386 (1947); Mondou v. New York, New Haven, & Hartford R.R. Co., 223 U.S. 1 (1912); Claflin v. Houseman, 93 U.S. 130 (1876). The United States Constitution struck the balance in favor of the federal government more than two centuries ago. See, e.g., Bonito Boats, Inc. v. ThunderCraft Boats, Inc., 489 U.S. 141 (1989) (state statute held preempted under Supremacy Clause).

Given these axiomatic principles, it is somewhat remarkable that the opponents of arbitration would go to such great lengths to try to subvert core constitutional principles involving the separation of powers. All rhetoric aside, it is the legislative, not the judicial, branch to which arbitration opponents should voice their concerns.

Arbitration Is a Legislative Enactment

In our constitutional system of government, the powers of government are separated. In Alabama, this idea is most vividly illustrated by Section 43 of the Alabama Constitution, which provides as follows:

In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

Any activist attempt by the judiciary to thwart the legislative will upsets this constitutional balance of powers. See Parker v. Hilliard, 567 So.2d 1343 (Ala. 1990).

Yet this is precisely what Mr. Methvin and others apparently are calling for--they are asking the courts of this state to ignore the plain language of a federal statute and the healthy federal policy favoring arbitration, and decide, by judicial fiat, to frustrate and subvert both the statute and the policy behind it. Not only does such an effort run afoul of our constitutional balance of power, it flies in the face of settled rules of statutory construction mandating that the judiciary give effect to legislative enactments, absent some constitutional infirmity. See, e.g., National Coal Ass'n v. Chater, 81 F.3d 1077 (11th Cir. 1996) (holding that where Congress plainly expresses its intent in a statute, courts must give effect to that intent). And, in addition to the plain language of the FAA requiring arbitration agreements to be specifically enforced, U.S. Supreme Court precedent requires that any doubts concerning any arbitrable issues be resolved in favor of arbitration. See Moses H. Cone, supra.

After Sisters of the Visitation v. ***59** Cochran Plastering Co., 2000 WL 264243 (Ala.) there may now be some room to argue whether the FAA actually applies to a given transaction; however, once it is determined that the FAA applies, and it virtually always will, particularly in the type of standard consumer contracts about which Mr. Methvin complains, then there is little left for a court to do but to carry out its constitutional role in our system of government and enforce the agreement to arbitrate.

With this in mind, a more productive and appropriate use of arbitration opponents' time would be to petition Congress with their concerns. In fact, Senator Jeff Sessions recently has introduced an amendment to the FAA entitled the "Consumer and Employee Arbitration Bill of Rights" that, at a minimum, appears to be a starting point for addressing many of the concerns voiced by Mr. Methvin and other opponents of arbitration.

This amendment to the FAA would, among other things:

. Require arbitration contract clauses to have a heading in large, bold print that would say whether arbitration is binding or optional;

. Give all parties to arbitration an equal voice in selecting a neutral arbitrator;

Give consumers and employees the right to a fair hearing in a nearby or reasonably convenient forum;

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. Grant consumers and employees the right to conduct discovery and present evidence, cross-examine witnesses represented by the other party and hire a stenographer to produce a record of the hearing;

. Provide for reimbursement of costs to consumers under certain circumstances, and waive fees in case of hardship; and

. Grant consumers the right to opt out of arbitration into small claims court if that court has jurisdiction over the claim and the claim doesn't exceed $50,000.

Also, at the state level, 49 states have adopted some form of the Uniform Arbitration Act, originally promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws. In February 2000, a Revised Uniform Arbitration Act, (RUAA) was proposed. The RUAA, in part, provides regulation for those procedural areas of arbitration not pre-empted by the FAA, such as discovery, consolidation of claims, arbitration immunity and arbitrator disclosure of potential conflicts of interest. The RUAA, as contemplated by Mastrobuono, supra, also gives effect to more substantive choice of law provisions routinely included in commercial and consumer contracts.

Clearly, legislative bodies, at both the federal and state levels, are aware of arbitration's importance as a method of resolving disputes and are capable of addressing any legitimate concerns brought to them. If, however, opponents of arbitration fail to pursue these legislative options and continue to approach the judiciary with their perceived abuses, not only does the principle of separation of powers suffer, the stability of the whole of contract law--on which our entire commercial system depends--is threatened.

Arbitration Should Not Destroy Contract Law

It is beyond question that arbitration is a matter of contract. Arbitration opponents and advocates can at least agree on this. Mr. Methvin's criticisms of arbitration, however, rest on an implicit assumption that arbitration clauses are different, more suspect, than other contract provisions. Such an assumption runs squarely afoul of Casarotto. At its simplest, Casarotto teaches courts that they must place arbitration agreements upon the same footing as other contracts. See also Volt Information Sciences, supra at 478 ("An arbitration agreement is placed upon the same footing as other contracts, where it belongs"). Mr. Methvin would ignore these holdings and would seek to persuade the courts of Alabama to adopt special, more lenient rules applicable to arbitration agreements, but not applicable to contracts generally.

Nowhere is this more clear than in Mr. Methvin's discussion of Ex parte Napier, 723 So.2d 49 (Ala. 1998) and Anniston Lincoln Mercury Dodge v. Conner, 720 So.2d 898 (Ala. 1998), cases wherein the Alabama Supreme Court upheld the validity of arbitration agreements in contracts entered into by persons claiming difficulties with reading and understanding English. Mr. Methvin takes the court to task for its decisions, even though the court's decisions are grounded on horn-book principles of contract law.

It has long been the rule in Alabama that one is not relieved of one's contractual obligations if one neglects to read a contract, or, if one cannot read, "neglects to have it read." See Mitchell Nissan, Inc. v. Foster, 2000 WL 804452 (Ala.) (quoting Beck & Pauli Lithographing Co. v. Houppert & Worcester, 104 Ala. 503, 16 So. 522 (1894)). Apparently, though, this century-old rule should not apply in the arbitration context and, in its stead, there should be a much looser doctrine of unconscionability than any we have ever seen.

***60** The Alabama Supreme Court, in both Ex parte Napier and Anniston Lincoln Mercury Dodge v. Conner, appropriately relied on Casarotto in refusing to single out the arbitration agreement for special, suspect treatment. In short, the court simply followed clear Supreme Court precedent, and refused to recognize any argument regarding unconscionability that would not be applicable to contracts generally.

Further, Mr. Methvin approvingly cites the California Court of Appeals decision in Badie v. Bank Of America,

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67 Cal. App. 4th 779 (1998), which, against the over-whelming weight of authority, rejected the right of banks and credit card issuers to modify account terms pursuant to change in terms clauses in their customers' accounts and refused to uphold an arbitration agreement added in this manner.

Banks and credit card issuers routinely amend deposit and revolving credit account terms through change in terms clauses to insert new price terms, changing interest rates, cash advance charges, new services, and numerous other terms. The legal effect of these changes is, of course, never questioned. This is significant because procedures that are used to amend contracts generally may be used to amend contracts to include arbitration provisions. Indeed, courts have routinely approved the addition of arbitration provisions to contracts pursuant to change-in-terms procedures. See, e.g., Clayton v. Woodmen of the World Life Ins. Society, 981 F. Supp. 1447 (M.D. Ala. 1997); Stiles v. Home Cable Concepts, Inc., 994 F.Supp 1410 (M.D. Ala. 1998) Ex parte Rager 712 So.2d 333 (Ala. 1998); Fineman v. CitiCorp USA, Inc., 485 N.E. 2d 591 (1st Dist. 1985); Garber v. Harris Trust & Savings Bank, 432 N.E. 2d 1309 (1st Dist. 1982); Beck v. First National Bank of Minneapolis, 270 N.W. 2d 281 (Minn. 1978).

To the extent Badie rejected the addition of the arbitration provision merely because it was an arbitration provision, it obviously runs afoul of Casarotto. In short, Badie is bad from a policy standpoint in that it hampers financial institutions' ability to effectively and practically change their account agreements, and Badie is bad from a legal standpoint in that it flatly contradicts Casarotto. When faced with an arbitration challenge arising out of a change-in-terms procedure, the Alabama Supreme Court, in SouthTrust Bank v. Williams, 2000 WL 1007064 (Ala.), was right to reject Badie, and was right to hold that Casarotto precluded it "from subjecting arbitration provisions to special scrutiny." Williams, 2000 WL at *6.

The sanctity of a contract should not be sacrificed in the name of consumers' rights. In any event, far from being hostile to consumers, arbitration is a time-honored, reliable and impartial mechanism to resolve disputes outside of protracted and expensive civil litigation. The United States Supreme Court has observed that arbitration often works to the benefit of consumers, who are less likely to be able to finance the expenses of formal litigation:

We agree that Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind. See S. Rep. No. 536, 68th Con., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big businesses and little businesses alike ... corporate interests [and] ... individuals"). Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. See, e.g., H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealing among the parties; it is often more flexible in regards to scheduling of times and places of hearings and discovery devices ....)

Allied-Bruce Terminix Cos., supra (citations omitted).

Mr. Methvin, however, asserts that no one can argue with a straight face that arbitration is fair to consumers, despite Supreme Court pronouncements to the contrary, and he illustrates this purported unfairness by pointing out that a credit card bank has invoked arbitration 19,705 times and prevailed 19,618 times. What Mr. Methvin does not say is that virtually all of these cases were collection cases filed by the bank against customers more than six months behind on their credit cards bills. Unquestionably, the result in collections court would have been the same.

The mantra that arbitration is "anti-consumer" has been rejected by both Congress and the U.S. Supreme Court. In the final analysis, though, whether arbitration becomes more or less frequently used, and the form it will take, ultimately will be decided either by Congress or by private enterprise responding to the pressures of the marketplace. As to the latter, despite an expensive and highly visible campaign to demonize arbitration, the public remains non-plussed. Merchants have not reported unusual numbers of complaints from consumers concerning executing arbitration agreements and certainly, the much ballyhooed "referendum on arbitration," the elections for

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Alabama's Supreme Court, was not a stirring victory for the anti-arbitration forces.

Arbitration and the Marketplace

In their zeal to stamp out arbitration, opponents of arbitration have perhaps lost sight of consumers' freedom to choose and contract as they see fit. If a consumer wishes not to arbitrate, he is free to do business with a company that does not require it. Consumers do have choices when it comes to arbitration. For instance, there are hundreds of insurance companies licensed to write policies in *61 Alabama, but only a handful require arbitration. On the other hand, many consumers might prefer arbitration over an expensive and lengthy lawsuit. In fact, the December 1, 1999 issue of The Jere Beasley Consumer Report recognizes that free market principles are at play in the arbitration context, by including the following example:

A well-known Montgomery car dealer is sending out large postcards to all of its former customers. In bold print on the addressee side of the card, the following statement in large print is found: "NO ARBITRATION AGREEMENT REQUIRED ON NEW INFINITY MODELS." On the back side of the card, the very same message is again stated in bold print. I suspect the reason for this strange turn of events is the fact that many Montgomery citizens are driving to Columbus, Georgia, and buying their motor vehicles there without having to sign arbitration agreements.

If left unfettered by arbitration opponents' dictates, the free market will always change and adapt to meet genuine consumer desires. If enough people demand something, some entrepreneur will always provide it--this elementary principle of the marketplace has as much application to arbitration as it does to electronics. In short, the competition of the marketplace--not road signs along the highway--will decide when and how arbitration will be used.

By way of example, the American Arbitration Association promulgated its "Consumer Due Process Protocol," wherein it defines what a fair arbitration process involving a consumer must include. The AAA adopted this protocol specifically to protect the rights of consumers who enter into the types of form contracts that Mr. Methvin criticizes. Also, The National Arbitration Forum has enacted detailed policies and procedures to ensure that the arbitration process is fair. The influence of these private groups in addressing any perceived abuses of arbitration is likely to have more effect on arbitration, working through the marketplace, than any legal changes called for by self-interested arbitration opponents. And, these protocols underscore the fact that, in the marketplace, the consumer will never be ignored.

Arbitration's Prevalence In Alabama

Mr. Methvin criticizes the Alabama Supreme Court for handing down a large number of arbitration-related decisions. Mr. Methvin, however, fails to ask why this is so. Why is arbitration so prevalent in Alabama and not Georgia, Tennessee or Florida? Part of the answer at least results from a perception that businesses simply were not getting a fair shake in Alabama courts. So long as parties believe their disputes will be resolved fairly and efficiently in court, there will be no real clamor for or against arbitration. When, however, "court" comes to connote an uneven playing field that gives rise to completely unpredictable and oftentimes irrational results, parties will necessarily pursue alternatives to court. Arbitration is one such alternative. See Stephen J. Ware, Default Rules From Mandatory Rules: Privatizing Law Through Arbitration, 83 Minn. L. Rev. 703 (1999).

If businesses in other states are not using arbitration as frequently as those in Alabama, and if a person can buy a new vehicle in Florida, Georgia or Mississippi without signing an arbitration agreement, it may well be that parties in other states do not fear going to court and resolving their disputes there. In Alabama, unfortunately, a different perception still exists. It was not so long ago that punitive damage verdicts became so outrageous that the U.S. Supreme Court had to step in, class certifications, even ex parte class certifications, were almost routine, and, with the abolition of the "reasonable reliance" standard, every consumer contract case became a multimillion dollar fraud claim. This scenario earned Alabama an infamous national reputation. It is hoped that this is not the scenario to which opponents of arbitration wish to return.

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Arbitration, in all likelihood, will remain prevalent in Alabama until all parties have confidence that the bench and bar are committed to fundamental notions of fairness. And so, in the end, it is ironic that those groups most responsible for the expensive and explosive campaign to demonize arbitration in reality are acting in a manner most likely to cause its perpetuation.

Conclusion

Arbitration is hardly the "anti-consumer" evil that Mr. Methvin makes it out to be, nor does arbitration steal anyone's right to trial by jury, as suggested by the opponents of arbitration in the recent judicial elections. Arbitration is simply a contractual method of resolving disputes outside of protracted and expensive civil litigation--mandated by Congress and favored by the Supreme Court. Any perceived evils in this system should be legislatively addressed, and state court judges--particularly members of the Alabama Supreme Court-- should no longer be assailed for following the law and holding parties to the terms of their contracts.

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