

MEMORANDUM

DATE: November 17, 2006

TO: Advisory Committee on Legislation

FROM: Consumer Law Section

RE: Legislative Proposal for State Bar: Arbitration Reform

Commentary on Proposal Requiring Disclosures in Arbitration Agreements

The Supreme Court has limited the ability of states to precondition an arbitration agreement's enforceability on the drafter's compliance with certain disclosure requirements. See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). This proposal avoids such preemption issues because it does not make failure to disclose grounds for finding the arbitration agreement unenforceable. Instead, any party can seek an injunction to order the party proposing the arbitration clause to comply with the disclosure requirement in the future. The disclosure law thus does not affect the enforceability of the arbitration clause, but provides a practical mechanism to insure compliance with the statute.

This proposal focuses on the disclosure of the costs of arbitration (which can be many thousands of dollars for an in-person hearing), but a similar approach could require other disclosures relating to an arbitration agreement, such as requiring the arbitration clause to be in large type or on the front page of a contract. This proposal focuses on costs because this information will allow the consumer to assess, after a dispute arises, whether the arbitration process will be affordable. The disclosure will also aid the consumer to decide whether they should agree to the arbitration requirement in the first place.

The provision requires disclosure of the cost of an arbitration if the consumer opts for an in-person hearing, presenting witnesses and other evidence. Nothing prevents the other party from also disclosing the cost of an abbreviated arbitration procedure where the consumer would opt for a procedure limited to written submissions or to a telephone conference call.

The disclosure as to who pays the costs will also require corporations propounding the arbitration requirement to specify whether costs will be shared or picked up by the corporation. Too often today, corporations only agree to pick up the costs *after* the consumer has effectively argued in court that the costs make arbitration unaffordable, and thus unenforceable. Meanwhile, other consumers are deterred from pursuing arbitration because they assume they will have to pick up half the costs, as specified in either the arbitration agreement or the rules of the arbitration service provider.

PROPOSED BILL:

Disclosure of Arbitration Costs to Consumers

A BILL TO BE ENTITLED

TRANSPARENCY IN ARBITRATION COSTS ACT

AN ACT

To amend Chapter 9 of Title 9 of the Official Code of Georgia Annotated to preserve rights of contracting parties.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. A new Section 9-9-3.1 is established as follows:

9-9-3.1

- (A) A “consumer arbitration agreement” is defined as a standardized contract where one party drafts a provision that requires disputes arising after the contract’s signing be submitted to binding arbitration, and the other party is a consumer. Such an agreement does not include a public or private sector collective bargaining agreement.
- (B) Consumer is defined for purposes of this Act as an individual who either:
- (1) uses, purchases, acquires, attempts to purchase or acquire, or is offered or furnished any real or personal property, tangible or intangible goods, services, or credit for personal, family, or household purposes; or
 - (2) is an employee of or seeks employment from the other party to the agreement.
- (C) A party drafting a consumer arbitration agreement shall clearly and conspicuously disclose in regard to any arbitration:
- (1) The filing fee;
 - (2) The average daily cost for an arbitrator and hearing room if the consumer elects to appear in person;
 - (3) Other charges that the arbitrator or arbitration service provider will assess in conjunction with an arbitration where the consumer appears in person;
 - (4) The proportion of these costs which each party bears in the event that the consumer prevails, and in the event that the consumer does not prevail.

- (D) The costs specified in section (C) need not include attorney fees, and, to the extent that, with regard to the disclosures required by section (C), a precise amount is not known, the disclosures may be based on reasonable, good faith estimates. A party providing a reasonable, good faith cost estimate shall not be liable in any manner for the fact that the actual cost of a particular arbitration varies from the estimate provided.
- (E) Failure to comply with this Act is not grounds to refuse to enforce an arbitration agreement. However, the information provided in the disclosure can be considered in a determination whether an arbitration agreement is unconscionable or otherwise is not enforceable under other law.
- (F) Where this Act is violated, any person or entity, including the State Attorney General, can request a court to enjoin the drafting party from violating the Act as to agreements it enters into in the future. The drafting party shall be liable to the person or entity bringing such an action for that person or entity's reasonable attorney fees and costs where the court issues an injunction or where, after the action is commenced, the drafting party voluntarily complies with the Act.

Section 2. All other laws should be conformed accordingly.

Section 3. Should a court decide that any provision of this Act is unconstitutional, preempted, or otherwise invalid, that provision shall be severed and such decision shall not affect the validity of the Act other than the part severed.