WISCONSIN BANKERS ASSOCIATION

Testimony before the
Assembly Committee on Financial Institutions

In Opposition to AB 532

10:00 am, December 6, 2001
by Rose Oswald Poels
Wisconsin Bankers Association

Consumer wins
71% court
80% arbitration

Representative Jeskewitz and members of the Committee, my name is Rose Oswald Poels. I am the vice president of the legal department for the Wisconsin Bankers Association (WBA). WBA represents nearly 400 commercial banks, savings banks and savings & loan institutions of all sizes throughout the state. All WBA members would be affected by this legislation and, consequently, WBA opposes AB 532.

Federal law permitting arbitration preempts state law to the contrary.

For over seventy-five years, there has been a strong federal policy in favor of arbitration. That policy was first embodied in the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, because it was clear, even in 1924, that litigation was consuming too much of the time, effort and money of businesses and individuals alike. Section 2 of the Act states that a written provision in any contract involving commerce "to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." According to the United States Supreme Court, "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 270 (1995).

The Federal Arbitration Act (Act) establishes a "national policy favoring arbitration," and denies the states "power . . . to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). The Supreme Court and other federal courts routinely have held that state attempts to abridge contracting parties' freedom to choose arbitration are preempted by the Act. Doctor's Assocs. V. Casarotto, 517 U.S. 681 (1996); Perry v. Thomas, 482 U.S. 483 (1987); Southland, 465 U.S. 1; Saturn Distrib. Corp. v. Willliams, 905 F.2d 719 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990). Consequently, AB 532 is clearly preempted by federal law.

Notwithstanding preemption, WBA believes there are also other benefits to arbitration.

Setting aside the fact that federal law preempts this legislation, WBA believes that competition should drive the market with regard to arbitration provisions in

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contracts. The following paragraphs highlight the various benefits of arbitration for both consumers and financial institutions.

1. Arbitration clauses are beneficial for consumers and lenders.

Disputed claims will be resolved quicker and at less cost to the parties. Arbitration claims may be resolved in a matter of months. Reliance on the judicial system may require patience for over a year before a claim is finally adjudicated. The amendments to open-end credit contracts that I reviewed all include binding arbitration provisions, which means the consumer is assured of a timely, final decision on a claim and is not forever caught up in appeals. Arbitration also allows individuals to pursue their claims without having to pay a lawyer to take them through the complexities of our court system.

Moreover, arbitration still satisfies the individuals whose claims are resolved. A study in 1999 of securities arbitration indicated that well over 90% of the participants in arbitration believed their case was handled fairly. See Gary Tidwell, et al., Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations (August 5, 1999) (presented to the National Meeting, Academy of Legal Studies in Business).

A financial institution that has agreed to arbitration has forfeited its right to litigate the consumer's claim. Instead, the financial institution must accept arbitration and abide by the arbitrator's decision. This is a valuable right given consumers – the ability to take financial institutions to arbitration and to have their dispute resolved quickly and inexpensively.

2. Amendments to contracts providing for arbitration still preserve the consumer's freedom of choice.

Not all credit card companies or other lenders offering open-end credit plans include arbitration provisions as part of their contracts with consumers. Those financial institutions and credit card companies amending current contracts to provide for arbitration are required to first give the consumer notice of such a change. Therefore, if a consumer does not want to be required to submit to binding arbitration to resolve a claim, the consumer can simply choose to do business with a different financial institution.

Going through arbitration rather than the judicial system does not harm resolution of a consumer's complaint. The U.S. Supreme Court and federal appellate courts have stated repeatedly that the difference in forum is insufficient to invalidate arbitration provisions in credit agreements.

3. Certain disputes would not be heard without arbitration.

Some claims brought by consumers are large enough to justify the costs of litigation. However, the vast majority of claims are not large enough for litigation, even though they involve disputes that are important to consumers. If the consumer is not able to resolve the dispute informally through discussions with senior officials of a financial institution, then for such individual cases, only arbitration offers a quick, cost-effective way of having the dispute resolved by a neutral third party.

4. Arbitration clauses and proceedings are common in the financial services industry.

Numerous courts have upheld arbitration clauses in credit and financing transactions. In Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), the Third Circuit upheld the enforceability of arbitration involving a truth-in-lending claim. The United States Supreme Court and courts in other jurisdictions have upheld arbitration provisions in credit cards. Marsh v. First USA Bank, 103 F.Supp.2d 909 (N.D. Texas 2000), residential services, Allied Bruce Terminix v. Dobson, 513 U.S. 265 (1995) and mortgage and consumer loans, Gammaro v. Thorp Discount, 15 F.3d 93 (8th Cir. 1993). The United State Supreme Court also has consistently upheld arbitration clauses in a consumer setting, finding that arbitration clauses were valid and enforceable. See, e.g., Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000).

Dispute resolution is one of the many areas in which different financial service providers offer different products and compete for business. A ban on arbitration agreements would limit the choices available to consumers.

5. The Federal Arbitration Act prevents any abuses from occurring.

The Federal Arbitration Act provides remedies available to either party if there are abuses of arbitration. If an individual arbitrator proves biased or improperly excludes evidence, the Federal Arbitration Act provides for judicial review. 9 U.S.C. §10. Similarly, the Act permits courts to review and reallocate fees that are excessive. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997). These cases are rare because arbitration forums have detailed rules that eliminate the potential for bias or excessive fees long before a court must become involved.

6. Wisconsin courts support arbitration as a matter of good public policy.

Wisconsin statutes contain a similar law authorizing and validating arbitration provisions under Wisconsin law. Wis. Stats. §788 *et seq.* As you may know, no

section of the Wisconsin Consumer Act requires that parties litigate their claims in court rather than resolve them through arbitration.

Wisconsin courts have also repeatedly stated that it is the state's policy to encourage arbitration as an alternative to litigation. See, *e.g.*, Manu-Tronics, Inc. v. Effective Management Systems, Inc., 163 Wis.2d 304, 311 (Wis. App. 1991) and Diversified Management Services, Inc. v. Slotten, 119 Wis.2d 441 (Wis. App. 1984). Most notably, the Wisconsin Supreme Court in 1963 stated that:

> Every contract that is subject to Wisconsin law and which contains an arbitration agreement, and which does not clearly negate the application of the provisions of the Wisconsin Arbitration Act, incorporates the provisions of that act and those provisions shall apply.

City of Madison v. Frank Lloyd Wright Foundation, 20 Wis.2d 361, 383-384 (1963). There is nothing in the Wisconsin Consumer Act that would negate the use of an arbitration provision and therefore arbitration provisions should be permitted in contracts as a matter of state public policy.

Conclusion

The issue is all a matter of choice and competition. A consumer's ability to choose among a wide variety of financial services providers is not harmed by a creditor amending its contract to include an arbitration provision. Federal law specifically allows creditors to contract for arbitration as an alternative to litigation and the Supreme Court has repeatedly emphasized that section 2 of the Federal Arbitration Act prohibits states from singling out arbitration for unfavorable treatment. I again appreciate the opportunity to submit comments and encourage you to vote in opposition to AB 532.

WBA appreciates this opportunity to provide the Committee with information regarding the benefits from the use of arbitration to resolve consumer disputes. I may be reached directly at 441-1205 if you have further questions or would like a copy of the court cases cited in my testimony. Thank you for your consideration of my comments.

AB532

Limits of open ended consumer credit to binding arbitration

deregulation of credit cards

if a dispute arises

maybe resolved by binding arbitration

Waive right to trial

prohibits due process

Fair access to court system

Use of the card is agreement

affects any card issued to a resident of WI -

Consumer Act -
Banks : Creditors -
Can make an agreement that you'll arbitrate disagreements
No pre agreement to arbitrate - must wait until there's a dispute