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## RECENT PROPOSED LEGISLATION

ARBITRATION — CONGRESS CONSIDERS BILL TO INVALIDATE PRE-DISPUTE ARBITRATION CLAUSES FOR CONSUMERS, EMPLOYEES, AND FRANCHISEES. — Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007).

Arbitration has been hailed since at least the 1920s as one solution to the overcrowding of courts and complexity of litigation. Yet it may be failing to live up to its promises, at least for small players with limited bargaining power. A recently proposed piece of legislation purports to address shortcomings in the arbitration process, largely by invalidating the binding effect of pre-dispute arbitration clauses for certain classes of contract parties. This act would provide some protections for consumers and employees, and limited protections for franchisees as well. However, if Congress truly wishes to protect individuals in positions of inferior bargaining power, it may need to consider changing aspects of the arbitration process itself. Additionally, Congress may need to clarify its policy with regard to franchisees for the proposed legislation to have its most potent impact.

On July 12, 2007, Senator Russ Feingold proposed the Arbitration Fairness Act of 2007 (AFA).<sup>1</sup> The bill purports to address numerous failings of current arbitration practice in the United States by amending the Federal Arbitration Act<sup>2</sup> (FAA), which, along with subsequent case law interpreting it, largely shapes current arbitration practice. The FAA, passed in 1925, was initially designed to permit arbitration agreements to be enforceable across state lines.<sup>3</sup> Advocates of the FAA emphasized both the business and legal advantages of increasing arbitration's usefulness.<sup>4</sup> In addition to these gains, Congress hoped to confront longstanding suspicion of arbitral proceedings by promoting a policy favoring arbitration.<sup>5</sup> By its terms, the FAA implies a prefer-

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<sup>1</sup> S. 1782, 110th Cong. (2007). The bill was introduced in the House of Representatives by Rep. Hank Johnson. H.R. 3010, 110th Cong. (2007).

<sup>2</sup> 9 U.S.C. §§ 1–16 (2006).

<sup>3</sup> Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101 (2006) (noting that advocates of a federal arbitration law were concerned that “[i]f a New York party agreed to arbitrate with a citizen of another state that did not have a similar law, the arbitration agreement would not be enforced in that other state’s courts”).

<sup>4</sup> *Id.* at 102 (noting the argument that arbitration “saves time, saves trouble, saves money . . . prevents unnecessary litigation, and eliminates . . . delay.” (quoting *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 7–8 (1924) (statement of Charles Bernheimer))).

<sup>5</sup> Russell D. Feingold, Policy Essay, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 285 (2002) (“Congress’s second motivation [in passing the FAA] was to address the courts’ reluctance to enforce agreements to arbitrate.”); see *Southland Corp. v. Keating*, 465

ence for extremely limited judicial review. While it permits the courts to enforce an agreement to arbitrate,<sup>6</sup> it allows review and possible reversal of an arbitral award only on narrow procedural grounds.<sup>7</sup>

For many years following the passage of the FAA, courts took a relatively modest approach in considering the scope of pre-dispute arbitration clauses. For example, in 1953 the Supreme Court refused to enforce an agreement to arbitrate, stating that the right to a judicial forum could not be waived.<sup>8</sup> Over time, however, the Supreme Court articulated two doctrines that gave pre-dispute arbitration clauses a uniquely powerful position among contracts. First, the separability doctrine effectively provides the arbitration clause with “its own legal identity.”<sup>9</sup> A second doctrine, known as the *kompetenz-kompetenz* doctrine, gives the arbitrator sweeping authority to decide on matters concerning “the validity or the scope of the agreement to arbitrate.”<sup>10</sup> In practical terms, these doctrines combined mean that even when the contract itself apparently contains problems of formation or illegality that would normally render an entire contract invalid, the arbitration clause is still binding; an arbitrator rather than a court must evaluate the validity of the contract.<sup>11</sup>

Despite the FAA’s original focus on commercial settings,<sup>12</sup> judicial decisions interpreting the FAA have expanded its scope to reach all

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U.S. 1, 34 (1984) (O’Connor, J., dissenting) (noting that prior to the FAA, “federal courts refused to enforce [state arbitration] laws in diversity cases”). The Supreme Court frequently cites federal policy favoring arbitration as a rationale behind its decisions. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1207 (2006) (“Section 2 [of the FAA] embodies the national policy favoring arbitration . . . .”); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“[T]he Court has . . . long recognized and enforced a ‘liberal federal policy favoring arbitration agreements . . . .’” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983))).

<sup>6</sup> 9 U.S.C. § 4.

<sup>7</sup> *See* 9 U.S.C. § 10(a) (allowing courts to vacate an arbitration award when “the award was procured by corruption, fraud, or undue means,” or when the arbitrators demonstrate “partiality or corruption,” commit misconduct that prejudices a party’s rights, or “exceed[] their powers”). Courts have also established various common law causes for vacatur; however, petitions based on these are rarely successful. *See, e.g.*, Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 237 (2007) (discussing how rarely courts vacate awards when petitioners claim that arbitrators evidenced a manifest disregard for the law).

<sup>8</sup> *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (discussing the Securities Act of 1933).

<sup>9</sup> THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 12 (2007).

<sup>10</sup> *Id.* at 13.

<sup>11</sup> *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1210–11 (2006) (holding that, where the plaintiff claimed that an entire contract was void as illegal, the arbitration clause in the contract required an arbitrator rather than a court to decide on the validity of the contract).

<sup>12</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O’Connor, J., dissenting) (noting that the FAA was assumed to “create[] no new legislation, grant[] no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.” (internal quotation mark omitted) (quoting 65 CONG. REC. 1931 (1924) (statement of Rep. Graham))).

types of contracts. For example, the Supreme Court is credited with elaborating doctrines on arbitration that apply “to claims arising under federal statutes; to employment disputes; to consumer disputes; and finally to consumer class actions.”<sup>13</sup> A burgeoning business of professional organizations has developed to accommodate the demand for the hundreds of thousands of arbitrations conducted annually.

The AFA is the attempt of some members of Congress to rein in expansive interpretations of the federal policy favoring arbitration.<sup>14</sup> The bill reflects concern about the fact that consumers often have little or no choice in whether to submit to arbitration, the pressures on arbitrators to make decisions favorable to large repeat players, the injustices that can result from the lack of transparency inherent to arbitration, and the fact that the federal policy in favor of arbitration has been used to justify even egregious breaches of individuals’ rights.<sup>15</sup>

The AFA offers a multifaceted solution to these enumerated problems. First, it proposes to invalidate two types of pre-dispute arbitration clauses: consumer contracts between businesses and individual consumers;<sup>16</sup> and employment contracts between individual employees and employers.<sup>17</sup> Second, it would nullify pre-dispute arbitration clauses in certain contracts between franchisors and franchisees.<sup>18</sup> Third, the bill would invalidate pre-dispute arbitration clauses that implicate statutes designed to protect civil rights or to protect parties

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<sup>13</sup> Joseph M. Matthews, *Are Florida Courts Really Parochial When It Comes to Arbitration?: A Rebuttal*, FLA. B.J., Dec. 2007, at 29, 30 (citations omitted). The reach of arbitration clauses now extends across a panoply of fields, including bankruptcy, Title VII discrimination claims, legal malpractice claims, and others. See CARBONNEAU, *supra* note 9, at 116–37. This expansion is not without its critics. See, e.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring) (“[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”).

<sup>14</sup> See Arbitration Fairness Act § 2.

<sup>15</sup> *Id.* Other, recent proposed bills would bar binding pre-dispute arbitration clauses from residential mortgage contracts and between poultry producers and packers. See Richard Simon, *Fighting for the Right To Go to Court: New Legislation in Congress Argues that Mandatory Arbitration Favors Businesses over Consumers*, L.A. TIMES, Dec. 17, 2007, at A12.

<sup>16</sup> The Arbitration Fairness Act would amend 9 U.S.C. § 2 to incorporate the following language: “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of — (1) an employment, consumer, or franchise dispute . . . .” Arbitration Fairness Act § 4.

<sup>17</sup> *Id.* While some scholars have advocated just such a wholesale ban on pre-dispute arbitration clauses, see, e.g., Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 133, 166, others have advocated more cautious steps, see, e.g., Christopher J. Kippley & Richard A. Bales, *Extending OWBPA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers*, 8 NEV. L.J. 10 (2007) (advocating for the adoption of notice requirements to ensure that consumers and employees understand what rights they may be waiving when they sign contracts that include pre-dispute arbitration clauses).

<sup>18</sup> Arbitration Fairness Act § 4.

with unequal bargaining power in the contract negotiation process.<sup>19</sup> Finally, the amendments would require that disputes over arbitration clauses in contracts be adjudicated by courts, rather than by arbitrators.<sup>20</sup>

Two of the targeted groups, consumers and employees, have often been at the center of the maelstrom surrounding arbitration; their experiences have given rise to many tales of abuses within the arbitration system.<sup>21</sup> While less frequently appearing in headlines, the relationship between franchisees and franchisors has also caused some concern. In fact, Congress has already passed a law protecting a subset of franchisees from binding pre-dispute arbitration clauses.<sup>22</sup>

In his statement regarding the proposed bill, Senator Feingold expressed concerns that high costs, a lack of due process protections, and an absence of judicial review have made arbitration an unfair forum for many unwitting consumers.<sup>23</sup> Critics of the AFA, however, argue that it would increase the amount and costs of litigation and the overcrowding of the courts, ultimately leaving many of its intended beneficiaries with no legal recourse whatsoever.<sup>24</sup>

As doctrines favoring arbitration have developed, consumers have found themselves on the losing end of an arbitration process that seems unfairly biased towards large companies. A study by a non-profit consumer advocacy organization found that ninety-four percent of arbitration decisions provided by the National Arbitration Forum in California favored the business over the individual consumer.<sup>25</sup> Con-

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *E.g.*, *Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?* Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary, 110th Cong. (2007) (written testimony of consumer Jordan Fogal), available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=983> (recounting a lengthy struggle through arbitration over defective construction). Some arbitration participants claim they were not even aware they had agreed to pre-dispute binding arbitration. See, e.g., *S. 1782, the Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the United States of the S. Judiciary Comm.*, 110th Cong. (2007) (testimony of Fonza Luke), available at [http://judiciary.senate.gov/testimony.cfm?id=3055&wit\\_id=6827](http://judiciary.senate.gov/testimony.cfm?id=3055&wit_id=6827).

<sup>22</sup> See discussion *infra* pp. 2268–69 (discussing the Motor Vehicle Contract Arbitration Fairness Act).

<sup>23</sup> *S. Judiciary Subcomm. on the Constitution: Hearing on “The Arbitration Fairness Act of 2007,”* 110th Cong. (2007) (statement of Sen. Russ Feingold), available at <http://feingold.senate.gov/~feingold/statements/07/12/20071212.htm> [hereinafter Feingold].

<sup>24</sup> *E.g.*, Letter from Members of the Coalition To Preserve Arbitration to Senators Patrick Leahy & Arlen Specter (Feb. 7, 2008), available at [http://www.sifma.org/regulatory/comment\\_letters/62757902.pdf](http://www.sifma.org/regulatory/comment_letters/62757902.pdf); see also Robert G. Seidenstein, *Mandatory Arbitration Clauses Facing Congressional Attack*, N.J. LAW., Dec. 24, 2007, at 1.

<sup>25</sup> PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 2 (2007), available at [http://www.citizen.org/documents/Final\\_wcover.pdf](http://www.citizen.org/documents/Final_wcover.pdf). A rebuttal report has recently been issued. See PETER B. RUTLEDGE, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, ARBITRATION — A GOOD DEAL FOR CONSUMERS: A RE-

sumers largely view arbitration as an unfair process.<sup>26</sup> Additionally, over time, arbitration has gained a reputation for being neither more efficient nor less expensive than judicial proceedings.<sup>27</sup> In fact, for many years commentators have warned that arbitration is becoming prohibitively expensive.<sup>28</sup> Furthermore, arbitral proceedings are confidential,<sup>29</sup> and arbitrators are not required to issue written opinions.<sup>30</sup> While secrecy may protect businesses from unpleasant public relations scandals, it also may keep wrongdoing from being publicized and therefore deterred.<sup>31</sup> Arbitrators and their decisions are shielded from judicial oversight; as noted earlier, the FAA allows for review and potential reversal only on narrow, procedural grounds. At the same time, arbitrators are subject to incentives that may cause them to favor repeat players.<sup>32</sup> An arbitrator's income hinges on her being selected as an arbitrator; should she decide against a repeat player, she may permanently lose that player's business.<sup>33</sup>

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SPONSE TO PUBLIC CITIZEN (2008), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091>. The *Christian Science Monitor* similarly found that creditors and debt buyers won ninety-six percent of the cases they brought before the National Arbitration Forum; however, the *Monitor* noted that these statistics may be comparable to results obtained in court. Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCI. MONITOR, July 16, 2007, at 13, available at <http://www.csmonitor.com/2007/0716/p13s01-wmgn.htm>.

<sup>26</sup> For example, in one recent study, 62.62% of customers who participated in arbitration over securities disputes indicated that they found the process unfair. Barbara Black & Jill Gross, *Perceptions of Fairness of Securities Arbitration: An Empirical Study* 45 (Univ. Cincinnati Coll. of Law, Public Law & Legal Theory Research Paper Series, Paper No. 08-01, 2008), available at <http://ssrn.com/abstract=1090969>.

<sup>27</sup> See, e.g., Keith A. Dotseth & Hilary Loynes, *Viability of Mandatory Arbitrations: Are Companies Still Allowed To Pick Their Own Poison?*, 74 DEF. COUNS. J. 313, 314 (2007).

<sup>28</sup> See, e.g., Budnitz, *supra* note 17 (calling for a legislative solution to burgeoning and prohibitive costs of consumer arbitration); Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 730 (2006).

<sup>29</sup> Arbitrators are required by their professional organizations to keep arbitration proceedings confidential. See, e.g., NAT'L ARBITRATION FORUM, CODE OF CONDUCT FOR ARBITRATORS 6, <http://www.adrforum.com/users/naf/resources/CodeOfConductForArbitrators1.pdf>.

<sup>30</sup> E.g., PUBLIC CITIZEN, *supra* note 25, at 2. Even if arbitrators do issue written opinions, however, these opinions are not published and would thus be difficult, if not impossible, for non-participants to obtain.

<sup>31</sup> Cf. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 948 (2006) (arguing that secret settlements "reduce the deterrent effect of litigation").

<sup>32</sup> PUBLIC CITIZEN, *supra* note 25, at 32-34.

<sup>33</sup> See Seidenstein, *supra* note 24, at 1; see also *Mandatory Binding Arbitration Agreements: Are They Fair for Consumers? Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of F. Paul Bland, Jr., Staff Attorney, Public Justice) (recounting how one arbitrator was "blackballed by a credit card company after she ruled against it in a single arbitration"), available at <http://judiciary.house.gov/media/pdfs/Blando70612.pdf>; S. 1782, *The Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the United States of S. Judiciary Comm.*, 110th Cong. (2007) (testimony of F. Paul Bland, Jr.), available at [http://www.judiciary.senate.gov/testimony.cfm?id=3055&wit\\_id=6829](http://www.judiciary.senate.gov/testimony.cfm?id=3055&wit_id=6829).

The AFA would mandate a few changes that could have widespread impact. It would permit consumers and employees to evaluate each dispute on a case-by-case basis instead of willy-nilly waiving all rights to judicial adjudication for all contract disputes. Additionally, since they could only opt for arbitration in the shadow of an actual dispute, they might be able to better weigh the practical implications of the rights they are waiving when they choose arbitration over judicial resolution.

There are, however, a few puzzling elements of the AFA as currently drafted. First, it may not fully protect consumers and employees: parties unsophisticated enough or with insufficient bargaining power to avoid binding pre-dispute arbitration clauses may logically still be vulnerable to being pushed into post-dispute arbitration by stronger players. Second, the AFA may not cover all individuals who have “little or no meaningful option”<sup>34</sup> when negotiating arbitration clauses. For example, it is unclear whether medical patients would be considered “consumers” for the purposes of the AFA.<sup>35</sup>

Congress may better meet its goals of protecting consumers, employees, and others by amending the FAA in other ways. As noted earlier, some members of Congress are concerned in part about arbitration’s lack of due process protections and judicial review. Yet incorporating all of the protections of the judicial system into arbitration seems pointless; the end result would be a parallel private court system with all the lengthy proceedings and expenses of the public one (albeit a court system in which the parties pay associated costs such as overhead and the decisionmaker’s salary). However, certain protections could be incorporated. Numerous proposals have been advanced for improving the arbitral process.<sup>36</sup> For example, Congress could amend the FAA to allow judicial review on substantive instead of rarely effective procedural grounds. Meaningful review, in turn, would likely require written opinions from arbitrators. Absent such proposals, however, it remains to be seen how effective the AFA may be in protecting individuals.

The AFA is particularly puzzling with regard to franchisees. First, it is surprising that franchisees are included at all, as Congress’s enumerated findings express concern about “consumer disputes and em-

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<sup>34</sup> Arbitration Fairness Act § 2(3).

<sup>35</sup> Cf. *Darviris v. Petros*, 812 N.E.2d 1188 (Mass. 2004) (holding that state consumer protection statute does not apply to the negligent provision of medical care). Similar concerns about the AFA have been raised with regard to securities disputes. See Feingold, *supra* note 23.

<sup>36</sup> See, e.g., Ian Ayres & Jennifer Gerarda Brown, *Privatizing Employment Protections*, 49 ARIZ. L. REV. 587 (2007) (arguing for requiring written opinions for employment arbitrations under certain circumstances); Sarah Rudolph Cole, *Revising the FAA To Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007) (advocating for limited expansion of judicial review); Kippley & Bales, *supra* note 17 (advocating for notice requirements for waivers of rights).

ployment disputes,” the lack of options available to “consumers and employees,” and the “constitutional rights of individuals.”<sup>37</sup> Franchisees are often businesses rather than individuals; and they generally are providers rather than consumers of goods or services.<sup>38</sup>

Second, while the Act explicitly states that it wishes “[n]o predispute arbitration agreement” to be “valid or enforceable” as to “employment, consumer, or *franchise* dispute[s],”<sup>39</sup> its definition of “franchise dispute” will likely lead to arbitration in many disputes between franchisees and franchisors. With regard to employees, the AFA defines an employment dispute simply as “a dispute between an employer and employee . . . .”<sup>40</sup> It employs similarly broad language with regard to consumers,<sup>41</sup> suggesting that the AFA’s restrictions would apply to any dispute between an individual consumer and a supplier of goods or services. However, the language defining a franchise dispute is much more limited. In fact, the AFA ban on predispute arbitration would seem to apply only to the specific franchise contract that grants a franchise, allows use of a franchise’s insignia, and requires a franchise fee.<sup>42</sup> Any concerns about imbalance of bargaining power should logically extend to other contracts between franchisors and franchisees, but these other contracts are not protected.

Prior experience suggests that such a limited definition likely means many disputes between franchisors and franchisees would be arbitrated in accordance with pre-dispute arbitration clauses. In 2002, Congress passed the Motor Vehicle Franchise Contract Arbitration Fairness Act (MVFC).<sup>43</sup> This Act appeared to provide blanket protection in that it allowed arbitration of contracts between motor vehicle dealers and manufacturers only if both parties agreed in writing to arbitration post-dispute.<sup>44</sup> The MVFC defines protected contracts as those that involve both selling to dealers for resale purposes and au-

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<sup>37</sup> Arbitration Fairness Act §§ 2(2)–(3), (7).

<sup>38</sup> See THE COMPACT OXFORD ENGLISH DICTIONARY 631 (2d. ed. 1989) (defining “franchise” as “[t]he authorization granted to an individual or group by a company to sell its products or services in a particular area”). Prior to the passage of 15 U.S.C.A. § 1226, “[c]ourts [had] uniformly rejected arguments by dealers that their purported lack of bargaining power vis-à-vis manufacturers warrant[ed] disregarding mandatory arbitration clauses.” Carl J. Chiappa & David Stoelting, *Tip of the Iceberg?: New Law Exempts Car Dealers from Federal Arbitration Act*, 22 FRANCHISE L.J. 219, 220 (2003) (citations omitted).

<sup>39</sup> Arbitration Fairness Act § 4 (emphases added).

<sup>40</sup> *Id.* § 3.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Pub. L. No. 107-273, § 11028, 116 Stat. 1835 (2002) (codified at 15 U.S.C. § 1226 (Supp. IV 2004)).

<sup>44</sup> 15 U.S.C. § 1226(a)(2).

thorizing repairs and servicing.<sup>45</sup> Congress expressed particular concern about the disparity of bargaining power between the parties.<sup>46</sup>

However, the handful of cases interpreting pre-dispute arbitration clauses in light of the MVFC have almost invariably resulted in arbitration between dealers and manufacturers. The Second Circuit distinguished between a stockholders' agreement and a dealer agreement that authorized sale, service, and repairs, concluding that the claims related to the stockholders' agreement were arbitrable.<sup>47</sup> In another case, a magistrate judge found that a pre-dispute arbitration clause in an Agreement and Business Plan between a dealer and a manufacturer also covered complaints linked to their Sales and Service Agreement.<sup>48</sup>

Thus, even disputes related to the type of contract specified in the MVFC may be subject to pre-dispute arbitration clauses that piggyback on other agreements between dealers and manufacturers. Courts may construe an apparent blanket ban so narrowly as to still allow a large set of arbitrations to proceed, even in relationships Congress believes need special protections. The MVFC's approach has evidently created confusion about how to balance the anti-pre-dispute arbitration approach of the MVFC with the long-standing pro-arbitration policy of the FAA.<sup>49</sup> If Congress takes a similar approach with the AFA, it may create similar confusion and therefore weaken the effectiveness of the limitations the AFA imposes on the "supposed Federal policy favoring arbitration."<sup>50</sup>

The AFA would likely protect, at least partially, consumers and employees from an arbitral process that often seems unfair. Yet to truly protect persons in positions of limited bargaining power, Congress may need to consider making changes to the arbitration system itself. Also, Congress's findings and policies appear somewhat misaligned with the language of the AFA with regard to franchisees. Despite this, the AFA could go far towards ensuring that parties truly have a choice when they seek justice through arbitration rather than through the courts.

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<sup>45</sup> *Id.* § 1226(a)(1)(B).

<sup>46</sup> See Chiappa & Stoelting, *supra* note 38, at 219.

<sup>47</sup> Arciniaga v. General Motors Corp., 460 F.3d 231 (2d Cir. 2006); see also *Pride v. Ford Motor Co.*, 341 F. Supp. 2d 617, 621 (N.D. Miss. 2004) (granting motion to compel arbitration in part because "[t]he Agreement at issue here is not a contract under which Ford sold motor vehicles . . . nor did the Agreement authorize . . . repair or service").

<sup>48</sup> *Brown Pontiac-Olds, Inc. v. General Motors Corp.*, No. 05-204-P-H, 2006 WL 318827 (D. Me. Feb. 9, 2006).

<sup>49</sup> Such confusion may be seen in one court's attempt to produce a ruling that comports with both the FAA and the MVFC. In *Volkswagen of America, Inc. v. Sud's of Peoria, Inc.*, 474 F.3d 966 (7th Cir. 2007), the court suggested that the arbitrable and inarbitrable issues were interdependent, see *id.* at 973 n.1; however, it then focused on the separability of these issues as part of the rationale for its opinion, see *id.* at 974.

<sup>50</sup> Arbitration Fairness Act § 2(7).