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H.B. 6608 -- Uniform Arbitration Act

Judiciary Committee public hearing -- March 25, 2011
Testimony of Raphael L. Podolsky

Recommended Committee action
*** ADDITION OF CONSUMER PROTECTIONS NOT IN BILL**
*** RETENTION OF ALL CONSUMER PROTECTIONS ALREADY IN BILL**

This bill proposes to adopt the Revised Uniform Arbitration Act (RUAA). The act should not be adopted unless it is coupled with enhanced protections that assure that consumer remedies will not unreasonably be restricted. In addition, the General Assembly should not permit any weakening of the protections presently included in the RUAA nor should it allow any of them to be deleted.

* **Mandatory arbitration clauses in consumer contracts -- a convenience or a restriction on remedies?** Arbitration clauses are presented as a form of "alternative dispute resolution" that provide a simpler way to resolve disputes. If voluntarily agreed to by commercial parties, that may be true. In the consumer context, however, mandatory arbitration clauses are widely recognized as a restriction on the consumer's ability to get relief. Such clauses are usually part of the boilerplate in form consumer contracts to which consumers agree unknowingly and, in any event, without any actual choice. They compel arbitration and bar the consumer from going to court -- sometimes even to small claims court. They often require the consumer to pay half the cost of arbitration, which can be a very large amount. They usually preclude class actions or class relief, thereby preventing the resolution of one consumer complaint from resulting in systemic changes in industry practices. They may include inconvenient venue provisions. Taken together, arbitration clauses tend to make it harder for consumers to vindicate their rights as consumers. The RUAA does not prohibit these practices.

* **The federal problem**: It is common for states, including Connecticut, to protect consumers by prohibiting commercial parties from inserting unfair clauses into consumer contracts. The ability of states to protect consumers from mandatory arbitration clauses is limited, however, by the Federal Arbitration Act, which prevents states from adopting laws against arbitration. For example, a state could not simply ban mandatory arbitration clauses in consumer contracts. Any legislation that impacts arbitration clauses must be general legislation that affects other means of dispute resolution as well and that preserves a level playing field for arbitration.

* **The state solution, Part I -- prevent the use of "rights enforcement disabling clauses" in ALL consumer contracts**: This creative approach has been adopted

by the state of New Mexico, which adopted it in 2001. The attached draft, which is based on the concept of that statute but written so as not to be limited to arbitration clauses, would add a Section 33 to the bill providing that no consumer contract may contain a clause that:

* Restricts the availability, if otherwise authorized by statute or common law, of equitable relief, classwide relief, minimum or punitive damages, and attorney's fees;
* Prevents a party from presenting evidence in person;
* Fails to provide for a waiver of fees and costs to a consumer who cannot afford them or imposes greater fees on the consumer than would be charged in a judicial forum;
* Requires claims to be asserted by the consumer in an inconvenient forum; or
* Prevents the consumer from obtaining disclosure of relevant information prior to the hearing.

The section does not preclude mandatory arbitration clauses either by its terms or in practice, because all of these requirements can be satisfied through an arbitration program. Punitive damages and attorney's fees are explicitly authorized by Section 21(a) and (b) of the RUAA itself. While it is impossible to guarantee that a clause of this sort will not face a federal preemption challenge, we believe it is reasonably likely that, because of the generally applicable nature of the section, a preemption challenge would fail.

* **The state solution, Part II -- do not weaken RUAA**: It has been suggested to us that the limited consumer remedies provided by the RUAA might be weakened by amendment of the bill. We strongly oppose any weakening of the RUAA that would leave Connecticut consumers with even fewer rights in arbitration than the residents of other states would receive if the uniform act were to be adopted in their states. In particular, we have been warned that Section 21(c) of the act, which allows arbitrators to fashion other "just and appropriate" remedies, might be deleted. This, however, is the very section that the RUAA includes to try to balance its failure to assure a broader range of remedies for consumers. The Revised Uniform Arbitration Act should not be adopted if any of its own consumer protections are deleted.

Proposed addition to H.B. 6628

Sec. 33. (NEW) *(Effective October 1, 2011)* (a) For the purposes of this section:

(1) "Standard form contract" means a contract prepared by or on behalf of a business or commercial party for whom its use is routine in business or commercial transactions with consumers of goods or services, borrowers, or tenants;

(2) "Consumer" means an individual who 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;

(3) "Business or commercial party" means the party on behalf of which a standard form contract is prepared; and

(4) "Rights enforcement disabling clause" means a contract provision modifying or limiting otherwise available procedural rights necessary or useful to a consumer in the enforcement of substantive rights against the business or commercial party, including but not limited to a clause that (A) restricts the availability to the consumer of injunctive, declaratory, or other equitable relief; relief on a classwide basis; punitive, minimum, multiple, or other statutory damages; or attorney's fees if authorized by statute or common law; (B) fails to permit a party to present evidence in person; (C) fails to provide for the waiver of fees and costs relating to the proceeding for a consumer who cannot afford such fees and costs or imposes fees and costs for a consumer in an amount greater than would be imposed on the consumer in the judicial forum available in this state for the resolution of the dispute; (D) requires claims against the party who prepared the contract to be asserted in a forum that is less convenient, more costly, or more dilatory than the judicial forum available in this state for the resolution of the dispute; or (E) precludes the consumer from obtaining discovery or disclosure of information from the other party, prior to hearing, that is material to the issues to be determined at the hearing.

(b) A standard form contract shall not contain a rights enforcement disabling clause, and any such clause in such a contract shall not be enforceable. This subsection shall not affect the validity of the remaining portions of the contract, nor shall it preclude the parties from agreeing to terms otherwise prohibited in a standard form contract if such terms are agreed to after a dispute arises and as part of a settlement or an effort to settle such a dispute. If any portion of this section is determined to be preempted by federal law, such preemption shall not affect the validity of the portions of this section not preempted nor the validity of sections 1 through 32 of this act.