

Franken Urges Consumer Arbitration Fix After AmEx Ruling

By **Melissa Lipman**

Law360, New York (December 17, 2013, 7:31 PM ET) -- Sen. Al Franken, D-Minn., pushed Tuesday for legislation to make it easier for consumers and small businesses to pursue antitrust, discrimination, consumer protection and other class claims in the wake of the U.S. Supreme Court's recent decisions on arbitration waivers.

Franken and other democrats on the Senate Judiciary Committee voiced concerns at a hearing that the justices' recent 5-4 decisions in *AT&T v. Concepcion* and more recently in *American Express v. Italian Colors* were activist decisions that placed the interests of corporations over those of consumers.

Both decisions have upheld class action waivers in arbitration agreements, with the most recent case overturning the Second Circuit's ruling that the agreement was unenforceable because it would bar the plaintiffs from being able to effectively vindicate their statutory right to pursue antitrust claims against the credit card company.

On Tuesday, Franken accused the Supreme Court majority of judicial activism and urged his colleagues to support his bill, the Arbitration Fairness Act, which would ban mandatory, predispute arbitration in antitrust, civil rights, consumer and employment cases.

"The Roberts court once again went out of its way to overturn precedent in a way that benefits corporations," Franken said. "The bill does not prohibit arbitration if a consumer or worker or small-business owner wants to take his claim into arbitration ... the bill just restores the Federal Arbitration Act to its original purpose and scope."

Franken further emphasized the importance of blocking companies from essentially forcing their customers, workers and clients to abandon their class action rights.

"Just the prospect of class actions gives companies real incentives to follow the law," Franken said.

Sen. Sheldon Whitehouse, D-R.I., and Sen. Mazie Hirono, D-Hawaii, likewise worried that corporations had gone too far, with Hirono saying that "Congress can do something about that."

The lawmakers heard from a top U.S. Department of Justice antitrust official, Deputy Assistant Attorney General Leslie Overton, who explained why the government had urged the Supreme Court not to overturn the Second Circuit's decision in the AmEx case.

"Private antitrust actions are a vital supplement to the government's civil enforcement efforts ... as well as our criminal enforcement," Overton said. "The United States filed its brief because of our concern that the effect of the mandatory arbitration agreement ... would be to prevent the respondents from being able to effectively vindicate their rights under the federal antitrust laws."

Several Republican lawmakers, however, questioned whether letting more claims go to litigation was really the best solution and voiced strong opposition to Franken's proposal.

Mayer Brown LLP's Archis A. Parasharami lent some support to those concerns, saying arbitration offered consumers and employees a chance to deal with small, individualized claims that they would not be able to address in court.

"The only clear winners from of increase in class action litigation and the elimination of arbitration are the lawyers," Parasharami said.

--Editing by Elizabeth Bowen.