

## REVIEW & OUTLOOK

### Party at Ralph's

**W**e're old enough to remember when Naderite groups like Public Citizen were embarrassed by their ties to trial lawyers. No more. This week in Washington, the famous "consumer" group, which has long resisted efforts to identify the sources of its funding, is rolling out the red carpet for America's plaintiff attorneys. Attendees of the Consumer Rights Litigation Conference are cordially invited to Saturday night's cocktail reception at Public Citizen headquarters, which a conference brochure describes as "an elegant old Dupont Circle Victorian mansion . . . generously loaned to us for this special event."

No word yet on what the famously ascetic Ralph Nader thinks about standing up for the little guy by sipping cabernet at a Dupont Circle manse, but what's clear is that the trial lawyers will have plenty to celebrate. That's because they'll be visiting Congressional offices tomorrow and Friday to check on the progress of pro-lawsuit legislation, and they will not be disappointed. Bills gathering momentum in both houses are anything but subtle in their support for more class-action lawsuits. Tillinghast Towers Perrin estimates that litigation costs the U.S. more than \$260 billion a year, and that figure is heading due north.

The Democratic strategy is to attach an anti-arbitration provision to nearly every new law in order to limit non-lawsuit dispute settlement. Thus a House lending bill this week bans pre-dispute arbitration agreements related to mortgages, another House bill bans them in cases involving whistleblowers, and the Senate farm bill bans them even in meatpacking contracts.

The mother of them all is a bill that lunges to fulfill the trial bar's long-cherished dream: prohibiting all Americans from voluntarily agreeing at the start of any business relationship to settle disputes without litigation. Arbitration, which avoids the cost and time of going to court, has proven to be a popular form of alternative dispute resolution. Even lawyers concede its virtues. In 2003, an American Bar Association survey found that 78% of lawyers "believe that arbitration is generally timelier than litigation, and 56% feel it is more cost effective."

The lawyers may concede the principle, but they still want the money. And speaking of money, the trial bar has plenty to share with friendly lawmakers. Representative Hank Johnson (D., Ga.), who coincidentally collected more money from lawyers than from any other industry group in the 2006

Congress tries to bar arbitration;  
lawyers raise a glass.

election cycle, has introduced the Arbitration Fairness Act. The bill would outlaw pre-dispute arbitration agreements in the future for all private contracts involving consumers, employment and franchising. And it would *retroactively* rewrite hundreds of millions of existing private contracts, all voluntarily accepted by consenting adults.

You could then count the minutes until class-actions are detonated against Wall Street brokerages, with their 100 million customer agreements featuring pre-dispute arbitration clauses, or against America's cell phone carriers, with more than 60 million customers who have agreed to forgo litigation. Party at Ralph's, indeed.

The idea that Americans could do business and even settle arguments without litigation is evidently beyond the pale to Mr. Johnson. The Congressman also displays a peculiar understanding of American markets when he notes in the findings section of his bill that when companies offer contracts to potential customers, "people increasingly have no choice but to accept them."

What you will not see in the findings of this bill, where politicians typically describe the problem they intend to solve, is any evidence that arbitration harms consumers or anyone else. His remarkably fact-free narrative does claim that arbitration is often heavily stacked in favor of companies, but a 2004 study in *Law and Contemporary Problems*, a publication of Duke Law School, found exactly the opposite. Under existing law, judges can throw out arbitration agreements tilted too far in favor of one party, so most arbitration clauses tend to give the consumer a reasonably fair shake.

University of Kansas law professor Stephen J. Ware says that even in cases where arbitration contract terms are more favorable to sellers, the result is generally lower prices for consumers, because the cost of lawyering has been stripped out. "Recognition of this has been standard in the law-and-economics literature for at least a quarter of a century," he notes.

Balanced against this academic research comes a "study" from—you guessed it—Public Citizen, claiming that its sleuths have found an arbitration firm operating in California that has been unfair to consumers in a particular type of debt dispute. The lawyers will be drinking to that discovery all week in Washington. We trust the White House is paying attention, and will put a damper on the revels by promising to veto this litigation bonanza if it should ever hit the President's desk.