

## **Additional Questions for the Record**

**Subcommittee on Consumer Protection and Commerce  
Hearing on  
“Autonomous Vehicles: Promises and Challenges of Evolving Automotive Technologies.”  
February 11, 2020**

**Mr. Daniel Hinkle, Senior State Affairs Counsel  
American Association for Justice**

### **The Honorable Bobby Rush (D-IL)**

- 1. Mr. Hinkle, in your testimony, you discussed how companies like Uber use forced arbitration in their customer agreements. Can you please discuss how that has impacted consumers?**

Opening the roads to AVs pushes forced arbitration into an entirely new sector and stifles accountability for one of the most dangerous activities in the world—driving. This is because AV companies, or the platforms they utilize to operate, are much more likely to be able to catch Americans in their forced arbitration web because AV companies will now be the sellers, owners, renters, and operators of the vehicles.

Currently, though most car dealerships utilize forced arbitration to deny consumers’ rights, car manufacturers are not able to do so because they have no direct connection to the consumer. But if AV companies (many of which are like Tesla or Uber and currently use forced arbitration against consumers) are also selling, leasing, or renting AVs directly to consumers, as most experts have predicted, those consumers and passengers will be forced into arbitration upon purchase, lease, use, or rental of an AV. Indeed, AV companies, or the platforms they utilize to operate, are much more likely to engage consumers and passengers in a way that forces them into having to “accept” forced arbitration because the marketplace for automated vehicles is expected to be far different from the way in which most Americans purchase and use cars today.

Additionally, as the ridesharing experience has already taught, unless legislation adequately addresses forced arbitration, automated vehicle manufacturers will be able to force arbitration upon anyone in front of a screen. Companies providing a ridesharing service to passengers already use forced arbitration to stifle and keep secret claims involving serious injury, such as those for personal injury, discrimination on the basis of a disability, or sexual harassment and assault. Uber has successfully used its click-through forced arbitration clause (recently upheld by the 2<sup>nd</sup> Circuit), to force drivers and passengers alike into arbitration. The fact is, there is nothing in current law that stops Uber or companies like it from forcing victims and survivors into arbitration in the future—for any matter. If the same companies that are currently forcing assault survivors

into arbitration also become responsible for how a car is built and whether it safely follows the rules of the road, the expansion of the deprivation of passengers' rights will be exponential. Why should companies like Uber get to control when and how rape survivors—or families whose loved ones have been killed by an AV—can enforce their rights?

### **The Honorable Tony Cardenas (D-CA)**

**1. Mr. Hinkle, are you advocating for a ban on forced arbitration for suits related to autonomous vehicles?**

Yes. There are serious concerns regarding the use of forced arbitration by automated vehicle manufacturers and operators. In an automated vehicle world, forced arbitration will significantly expand to bar victims injured or killed in a collision involving an automated vehicle from accessing the United States civil justice system to hold vehicle manufacturers and operators accountable for putting unsafe vehicles on America's roads. Public safety demands automated vehicle manufacturers and operators be held accountable for the harm they cause. This public accountability should be the priority in any legislative proposal to regulate automated vehicles—forced arbitration must be prohibit for suits related to automated vehicles.

Currently, victims of harm caused by automobiles are able to hold those responsible publicly accountable because they are not subject to forced arbitration. This is because there is no direct relationship between a victim and another driver or a victim and a manufacturer such that a forced arbitration clause could apply. Every vehicle on the road today has a human operator and, if there is harm caused, victims have the right to seek accountability from that driver. Similarly, victims also have the right to seek accountability from vehicle manufacturers because, unlike dealerships and rental companies, there is no direct contractual relationship between a victim and a manufacturer. But this will all change once the human operator is replaced by an automated vehicle manufacturer *selling, renting, and operating* the vehicle. As is done now by rideshare companies like Uber and Lyft, automated vehicle companies that provide vehicles directly to consumers will be able to keep harmed consumers and passengers from enforcing their rights in court and instead funnel them into a fundamentally unfair and secretive forced arbitration system.

**2. Why is it important that a pedestrian hurt by an autonomous vehicle be permitted to bring the case to court?**

The failure to address forced arbitration will not just impact passengers, but also immediately affect pedestrians. Current Supreme Court holdings related to forced arbitration allow any company to force *anyone* who has clicked through their terms of service to force claims into arbitration, even for claims that arise *outside* the immediate relationship. This means that pedestrians, bicyclists, or any other road user could be forced out of court if that person also happens to have an Uber or Google account.

For example, Wells Fargo is *currently* forcing customers who were suing over fraudulent bank accounts into arbitration based on contract language associated with other, legitimate accounts they had previously opened. Or consider a Third Circuit Court of Appeals case in which entertainment company Live Nation tried to block a disabled Pennsylvania resident from suing over lack of wheelchair-accessible seating at a 2017 concert because he “agreed” to arbitration when he purchased a ticket to another concert in 2012.

Forced arbitration clauses, which are presented on a “take-it-or-leave-it” basis, strip consumers and passengers of their rights by insulating companies from accountability by funneling all claims into a secretive and rigged process of the company’s design.

The one-sided and secretive nature of forced arbitration is established at the onset of proceedings wherein companies, rather than harmed individuals, choose the private company which will administer the forced arbitration proceeding, the payment terms, and the rules under which the forced arbitration will take place. Forced arbitration proceedings provide none of the enforceable legal safeguards which serve to protect and empower individuals when they file a claim in court; this includes the ability to speak out publicly about what happened, the right join with others to bring a claim through a class action, the ability to obtain key evidence necessary to prove one’s case, and the ability for any meaningful appeal of a forced arbitration provider’s ruling. Additionally, forced arbitration rules often designate the time and location of the arbitration proceedings, which is most often at the company’s convenience.

In addition to the outright total deprivation of rights, such proceedings will always be inherently unfair and biased in favor of the company because forced arbitration providers always and only rely on the company in order to get repeat business (i.e.: it is only Uber that decides which forced arbitration provider shall be designated in its millions of passenger/customer “agreements”). This bias is demonstrated by the Economic Policy Institute’s finding that consumers obtain relief regarding their claims in only 9 percent of disputes whereas companies are granted relief 93 percent of the time when they make claims or counterclaims.<sup>1</sup> Given how rigged this system is against consumers and passengers, most people give up pursuing their rights altogether, effectively allowing their claims to be silenced and the company to be immunized from all public accountability.

---

<sup>1</sup> Shierholz, Heidi. (2017, August 1). *Correcting the record: Consumers fare better under class actions than arbitration*. Retrieved from <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/>.