



May 16, 2018

The Honorable David N. Cicilline  
Chair  
Subcommittee on Antitrust, Commercial  
and Administrative Law  
U.S. House Committee on the Judiciary  
2138 Rayburn Building  
Washington, DC 20515

The Honorable F. James Sensenbrenner  
Ranking Member  
Subcommittee on Antitrust, Commercial  
and Administrative Law  
U.S. House Committee on the Judiciary  
2142 Rayburn House Office Building  
Washington, DC 20515

**RE: FAN Letter Supporting Hearing on How Forced Arbitration Erodes Legal Rights**

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

The undersigned members of the Fair Arbitration Now coalition strongly support today's hearing exploring how forced arbitration erodes our legal system and curtails everyday people's access to justice.

**I. Forced Arbitration Disadvantages Workers, Consumers, and Small Businesses**

Forced arbitration clauses are usually hidden in the fine print of "take-it-or-leave-it" agreements. These clauses deprive people of their right to seek justice in court before an impartial judge or jury. They are ubiquitous in contracts governing bank accounts, student loans, cell phones, employment, small business merchant accounts, and even nursing home admissions. Corporations that place forced arbitration clauses in their standard contracts with consumers, non-union employees, and small businesses shield themselves from accountability for illegal practices and other wrongdoing. The contracts typically designate:

- The arbitration provider, who often rely on the company for repeat business and therefore may be biased in the company's favor;
- The arbitration rules, which provide none of the legal safeguards that protect individuals who use the courts, including their ability to obtain key evidence necessary to prove one's case;
- The state in which the arbitration is to occur, which is always at the company's convenience, not the harmed individual who may have to travel far to get there, and

- The payment terms, which might include exorbitant filing fees, as well as continuous fees for procedures such as motions and written findings, and “loser pays” rules that are prohibitive for many individuals.

The proceedings are secret and final with few rights to appeal. Studies have shown that those forced into arbitration are less likely to win, receive smaller awards, and are otherwise severely disadvantaged. According to the Economic Policy Institute, “Consumers obtain relief regarding their claims in only 9 percent of disputes. On the other hand, when companies make claims or counterclaims, arbitrators grant them relief 93 percent of the time—meaning they order the consumer to pay.”<sup>1</sup>

## **II. Forced Arbitration Clauses Are Everywhere and are Not Voluntary**

Since arbitration clauses are usually contained in non-negotiable contracts, the consumer, worker, or small business is presented with a legal fiction that they actually have a “choice” when signing away their rights when in fact refusing to sign means forgoing the goods, services, or employment. As a result, according to the Economic Policy Institute, 60.1 million workers, more than half of non-union, private-sector employees, have signed away their right to go to court if harmed by their employer.<sup>2</sup> In consumer contracts, a majority of credit cards, prepaid cards, storefront payday loans, cell phone companies, and private student loan contracts, along with a large segment of banks, include arbitration clauses in non-negotiable contracts. Many small businesses are also forced to agree to arbitrate disputes with larger companies, even when those companies steal money, price-fix, and otherwise violate antitrust laws that harm the small business.

## **III. Forced Arbitration Clauses Allow Corporations to Evade Accountability for Illegal Misconduct**

Forced arbitration clauses allow banks and lenders to cheat customers with no accountability. They allow companies to hide systemic harassment and discrimination, including sexual harassment. They also prevent small businesses from enforcing their rights against companies engaged in illegal antitrust conspiracies, allowing criminals to keep ill-gotten gains and leaving small businesses with little or nothing.

In sum, forcing consumers, workers, and small businesses into arbitration has played a significant role in hiding systemic wrongdoing and allowing corporate wrongdoers to evade accountability for bad acts.

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<sup>1</sup> Heidi Shierholz, *Correcting the Record*, Economic Policy Institute (Aug. 1, 2017), <https://www.epi.org/files/pdf/132669.pdf>.

<sup>2</sup> Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf>.

#### IV. Congress Must Act

Congress must rein in the overly expansive interpretation that courts have given to the Federal Arbitration Act. Forced arbitration weakens federal and state laws that are intended to protect consumers and employees by removing individuals' ability to enforce those laws in court. In 2011, the U.S. Supreme Court dealt a devastating blow to consumers and employees, ruling that companies could ban individuals from joining together to enforce their rights.<sup>3</sup> In 2018, the Court held that workers may be forced, as a condition of employment, to waive their right to act collectively to enforce their legal rights.<sup>4</sup> And just last month in *Lamps Plus Inc. v. Varela*, the Court dealt another blow to protecting access to the courts for those who have been harmed.<sup>5</sup>

Until Congress acts to correct the legal fiction—that workers, consumers, and small businesses have consented to the deprivation of their rights—these clauses will continue to endanger individuals and small businesses.

In February, Rep. Hank Thompson and Sen. Richard Blumenthal introduced the Forced Arbitration Injustice Repeal (FAIR) Act (H.R. 1423/S.R. 610). This important legislation would prevent corporations from forcing workers, consumers, and small businesses to resolve disputes in private, company-controlled arbitration systems, even when that company has engaged in illegal misconduct. The bill would specifically cover cases involving consumer, civil rights, employment, or antitrust violations, and it would ensure that federal and state laws enacted to protect legal rights in those cases are properly enforced.

The FAIR Act does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily post-dispute. It would allow workers, consumers, and small businesses to choose arbitration in the aftermath of being harmed if they truly perceived arbitration to have benefits over proceeding in court. Nor would it affect collective bargaining agreements that require arbitration between unions and employers. Rather, the FAIR Act's sole aim is to end the practice of forcing consumers, workers, and small businesses into secretive, one-sided arbitration proceedings that bind people long before they are harmed.

We strongly support the FAIR Act, which would restore access to our civil justice system and preserve important civil rights, employment, and consumer protections, and according to [a national survey](#), 84 percent of the public supports federal legislation that ends the practice of forcing consumers and workers into arbitration. Republicans support the legislation more than

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<sup>3</sup> AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

<sup>4</sup> Epic Systems Corp. v. Lewis, 584 U.S. \_\_\_\_ (2018).

<sup>5</sup> 587 U.S. \_\_ (2019)(holding that “an ambiguous agreement” does not provide the “necessary ‘contractual basis’” for concluding that the parties agreed to submit to class arbitration). *Lamps Plus* at 6.

Democrats (87% to 83%).<sup>6</sup> We urge you to quickly pass the FAIR Act through the subcommittee so that all of your colleagues in the House of Representatives have an opportunity to be on record supporting everyday people's access to justice. With questions, please contact Remington A. Gregg at [rgregg@citizen.org](mailto:rgregg@citizen.org) and Christine Hines at [Christine@consumeradvocates.org](mailto:Christine@consumeradvocates.org).

Sincerely,

Fair Arbitration Now (Organizations that support ending the predatory practice of forced arbitration in consumer and non-bargaining employment contracts:  
<http://www.fairarbitrationnow.org/coalition/>).

Cc: Members of the Committee

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<sup>6</sup> Guy Molyneux & Geoff Garin, *Nat'l Survey on Required Arbitration*, HART RESEARCH ASSOC. (Feb. 28, 2019), <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.