215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

May 16, 2018

The Honorable David N. Cicilline
Chair
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House Committee on the Judiciary
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 Judiciary2138
2142 Rayburn House Office Building
Washington, DC 20515

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

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Thank you for scheduling today's hearing to explore how forced arbitration erodes legal rights. Protecting workers, consumers, and small businesses from the practice of being forced into a secretive, privatized system of justice is an incredibly important issue that Congress must address.

Forced arbitration clauses and bans on class actions (forced arbitration clauses) use fine-print "take-it-or-leave it" agreements to abolish an individuals fundamental rights and remedies. Forced arbitration clauses have become ubiquitous in such varied settings as agreements governing bank accounts, student loans, cell phones, employment, and even nursing home admissions. These clauses deprive people of their day in court when they are harmed by violations of the law, no matter how widespread or egregious the misconduct may be. The contracts that contain forced arbitration clauses are written by corporate entities, so it is unsurprising that its terms are generally corporate friendly. Arbitration provisions generally:

- Limit the type of damages that a person can receive, such as punitive or compensatory damages;
- Prohibit individuals from banding together in a class or collective action, which may be the only realistic avenue for bringing small claims;
- Limit discovery and other attempts to obtain evidence;

- A Public Citizen report details that "54 percent of arbitration clauses discussed discovery or evidentiary standards, in most instances to 'alert consumers that discovery may be limited and evidentiary standards may be relaxed by comparison to litigation'";[1]

- Include arbitration fees that are "are dramatically higher than court costs"[2] and may include a "loser pays" provision, which creates a significant disincentive for an individual to bring a claim out of fear that they will be on the hook for all fees if they do not prevail.

Justice Hugo Black summed up the unfairness of arbitration well:

> "For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited."[3]

If a worker, consumer, or small business brings a claim in arbitration and loses—and the odds are very likely that they will—an arbitrator's decision is given "limited judicial review."[4] Rather, "[u]nder the [Federal Arbitration Act], courts may vacate an arbitrator's decision 'only in very unusual circumstances.'"[5] These circumstances include:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

---

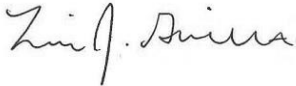
[1] Taylor Lincoln & David Arkush, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* 38 (2008), *available at* https://www.citizen.org/sites/default/files/arbitrationdebatetrapfinal.pdf.
[2] *Id.* at 39.
[3] *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1965) (Black, J., dissenting).
[4] *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013).
[5] *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[6]

Forcing everyday people into arbitration would deprive them not only of basic procedural rights that they are normally guaranteed in neutral, open court, but would all but prevent them from exercising their rights to appeal if they believe the arbitrator erred.

Public Citizen has been fighting for more than 45 years to protect the access to justice for all people. We stand ready to help you in any way as you explore this issue in greater detail.

Sincerely,



Lisa Gilbert
Vice President for Legislative Affairs
Public Citizen
Congress Watch Division

Remington A. Gregg
Counsel for Civil Justice and Consumer Rights
Public Citizen
Congress Watch Division

---

[6] 9 U.S.C. § 10 (2012).