

April 2, 2019

The Honorable Lindsey Graham, Chairman
The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: For the hearing, *Arbitration in America*

Dear Chairman Graham and Ranking Member Feinstein:

Our organizations greatly appreciate you holding a hearing, entitled “Arbitration in America.” Arbitration was once viewed as a reasonable method to resolve disputes between parties of equal bargaining power. Today, predispute binding arbitration clauses (“forced arbitration”) inserted into fine-print consumer and worker contracts, have become a pervasive and harmful practice that forces individuals to go to private arbitration instead of public court to seek remedies when they are harmed. We are grateful for the spotlight on an unjust and arbitrary system that takes away important choices for ordinary people and that often imposes severe economic costs on them.

Forced arbitration is used to block the courthouse door for American consumers and workers, and wipes away their access to justice when they are wronged. They can be forced to seek remedies in arbitration, for example, when they have been ripped off by bad loans, illegal charges on bills, or deceptive investments, or physically abused in nursing homes, or sexually harassed by superiors at their jobs.

Forced arbitration deprives them of due process protections that are assured in a public court system. Instead, bad actors choose the arbitration firms and the arbitration process. The proceedings are private and typically confidential. Appeals are rarely available. That means wrongdoers can evade public attention and scrutiny of their misconduct until the harm becomes too widespread to ignore.

In 1925, Congress passed the Federal Arbitration Act to facilitate business-to-business arbitration, where two sophisticated entities of equal bargaining power negotiated contract terms. The FAA was not meant as a way for big businesses to avoid liability for financial, physical or other harm inflicted on their customers or workers, but it has become so since the U.S. Supreme Court steadily expanded the law to allow forced arbitration in nonnegotiable, take-it-or-leave-it contracts.

Congress has acted many times to restrict the FAA and protect individuals in numerous sectors, such as auto dealers in their transactions with auto manufacturers; home owners with residential mortgages and related lines of credit; livestock and poultry growers who deal with big agribusiness; employees of government defense contractors with Title VII and sexual assault tort claims; and military members and their dependents with certain high-cost loans (payday, etc.).¹ But these individuals are only protected in the specific circumstances covered by the laws. Servicemembers, seniors, farmers, and hardworking families remain exposed to bad actors in all other sectors of the economy, and often end up losing their right to redress because of forced arbitration.

Congress can take the next logical step to restore individuals’ right to access remedies when they are mistreated. Minor cosmetic changes such as disclosures, limited opt-out clauses, and other meaningless gestures will fail to fix the basic problems of forced arbitration (no choice and no access to remedies), and

¹ Pub. L. 107-273, 15 U.S. Code § 1226; 15 U.S. Code § 1639c. (e); 7 U.S.C. § 197c; 48 CFR 252.222-7006; 10 U.S.C. 987(e)(3) and (f)(4) and 79 Fed. Reg. 58602.

will in fact exacerbate them for the majority. Make arbitration fair by eliminating forced arbitration clauses in consumer and worker contracts, as proposed in S. 610, the Forced Arbitration Injustice Repeal Act (“FAIR Act”). This move will fully restore Americans’ ability to *choose* how to seek justice, whether in court, arbitration, or some other truly voluntary, agreed-upon method.

Thank you again for examining this important issue. We look forward to supporting the meaningful solution. Please feel free to contact us with additional questions or concerns.

Sincerely,

Alliance for Justice
American Association of University Women (AAUW)
American Museum of Tort Law
Center for Justice & Democracy
Center for Responsible Lending
Citizen Works
Committee to Support the Antitrust Laws
Consumer Action
Consumer Advocacy & Protection Society (CAPS)
Consumer Reports
Demos
Earthjustice
Empire Justice Center
Florida Alliance for Consumer Protection
NACA Georgia
Impact Fund
Legal Aid at Work
Legal Aid Center of Southern Nevada
NAACP
National Association of Consumer Advocates (NACA)
National Consumer Law Center (on behalf of its low income clients)
National Consumer Voice for Quality Long-Term Care
National Employment Law Project
National Employment Lawyers Association
Northwest Consumer Law Center
NACA Pennsylvania
Pipeline Parity Project
Public Citizen
South Carolina Appleseed Legal Justice Center
Tennessee Citizen Action
Washington Employment Lawyers Association
Woodstock Institute
Workplace Fairness

cc: Members of the Senate Judiciary Committee