April 8, 2024

The Honorable Dick Durbin, Chairman
The Honorable Lindsey Graham, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: For the Hearing: Small Print, Big Impact: Examining the Effects of Forced Arbitration, Tuesday, April 9, 2024

Dear Chairman Durbin, Ranking Member Graham, and Members of the Committee:

The National Association of Consumer Advocates, a national nonprofit organization engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means, strongly supports an end to the use of forced arbitration clauses in the terms and conditions for products and services, and employment. For too long, take-it-or-leave-it contracts have denied consumers and workers of a meaningful and informed choice about whether they want to resolve disputes with corporations through arbitration after the dispute arises.

Forced arbitration clauses, hidden in fine-print corporate contracts, block consumers, workers, and small businesses from seeking justice in open court and gives corporations the power to force legitimate complaints into secretive and biased arbitration proceedings. Corporations write the arbitration rules, including choosing the arbitration firm and location. The process encourages and facilitates arbitrator bias in favor of the more powerful party. Meanwhile, arbitrators' decisions are rarely appealable, even when arbitrators make clear and egregious errors.

Particularly heinous are forced arbitration clauses that prevent individuals from joining their claims together to seek accountability for wrongful corporate actions that cause widespread or systemic harm. Class and collection actions are a critical tool in the justice system for American consumers, workers, and small businesses to seek remedies when ripped off or exploited by sophisticated bad actors. They resolve widespread and systemic harm related to violations of state and federal consumer protection, civil rights, investor rights, workplace rights and fairness, fair competition laws, and other protections. For decades, consumers' and workers' ability to band together has effectively halted illegal corporate conduct, deterred risky behavior, and compensated injured victims.

The unconscionable costs of pursuing serious claims on an individual basis means the systemic wrongdoing goes unchecked, without little or no accountability. As a result, harmed consumers and workers are left without any remedies at all. Meanwhile, the illicit business practices can cause even more damage to people, the marketplace, and the economy. This results in inequities across the marketplace.

For example, in *Munoz v. Wells Fargo Bank*, when New Mexico consumers discovered that their state-issued debit cards were drained by fraudulent transactions, they asserted that the card issuer Wells Fargo and the program manager Conduent failed to properly investigate the fraud and recredit their accounts. They sought to act on behalf of themselves and others in a class action against the entities.[1] The court determined that the action against Conduent was allowed to proceed in a class action, but the claims against Wells Fargo would not be able to move forward in court due to a forced arbitration clause in the terms and conditions. According to that ruling, claims against Wells Fargo would have to go forward in private arbitration on an individual basis.[2]

In addition to class action bans, terms and conditions with forced arbitration often include other unfair provisions, such as terms that limit consumer relief, restrict their legal claims and remedies, or allow corporations to unilaterally amend the nonnegotiable terms at any time, which further obstruct consumers' access to justice.[3] Meanwhile, study after study have confirmed that consumers are not aware of arbitration clauses, do not understand the meaning and consequences of them, and therefore are unable to meaningfully consent to these take-it-or-leave-it terms.[4]

The widespread use of forced arbitration clauses in the fine print grew with the expanded interpretation of the Federal Arbitration Act. The FAA was enacted in 1925 to ensure that certain corporations with equal bargaining power could use arbitration to resolve complex legal matters. The law was not originally envisioned to allow corporations to force arbitration and remove consumers' and workers' ability to choose how to get their complaints heard.

Congress has a key role to play to give consumers a meaningful choice over arbitration, to make it truly voluntary. Consumers and workers need legislation, such as the Forced Arbitration Injustice Repeal Act, to stop forced arbitration from deciding the outcome of consumer, civil rights, employment, or antitrust disputes. The FAIR Act would restore consumers' and workers' rights to choose to go before a judge and jury when they are harmed. It would not bar arbitration, but it would give individuals the right to meaningfully consent to any form of dispute resolution after disputes arise.

We urge this Committee to lead the effort to end the use of forced arbitration and restore some fairness to the fine print.

Sincerely,

Christine Hines
Senior Policy Director
National Association of Consumer Advocates

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[1] *Munoz v. Wells Fargo Bank, N.A.*, 2024 U.S. Dist. LEXIS 44713 (D.N.M. Mar. 12, 2024).
[2] Id.
[3] Hines, *Fine Print Traps, Terms in Corporate Form Contracts That Cause The Most Harm to Consumer Rights and Protections*, March 2024, https://www.consumeradvocates.org/wp-content/uploads/2024/03/NACA_fineprinttraps_mostharm032024.pdf.
[4] See, Roseanna Sommers, *What do consumers understand about predispute arbitration agreements? an empirical investigation*, PLOS ONE, Feb. 23, 2024, https://doi.org/10.1371/journal.pone.0296179.