CIVIL JUSTICE & NATIONAL ADVOCACY

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MEMORANDUM IN SUPPORT OF THE "FORCED ARBITRATION INJUSTICE REPEAL ACT" OR "FAIR ACT," S.610/H.R.1423 –

Bill would ban forced arbitration clauses and class action waivers in consumer and civil rights cases, among others

Introduction

On February 28, 2019, a group of Senators and House members held a joint news conference announcing the introduction of a vital new piece of legislation, the "Forced Arbitration Injustice Repeal Act" Or "FAIR Act," S.610/H.R.1423.[1] This legislation would ban the use of forced arbitration clauses and class action waivers in four categories of cases: consumer, civil rights, employment and antitrust.[2] This memo focuses on the first two: consumer and civil rights cases.

The FAIR Act would amend the 1925 Federal Arbitration Act, the federal law that the U.S. Supreme Court has cited to uphold forced arbitration clauses with class actions waivers.[3] However, it should also be noted that enforcement of many other federal consumer and civil rights laws are at risk if Congress does not act. Those include the Civil Rights Acts of 1964 and 1991, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Uniformed Services Employment and Reemployment Rights Act, and the Truth in Lending Act. Private rights of action are a cornerstone of effective enforcement of these laws. Forced arbitration and class action bans undercut the carefully-designed private enforcement mechanisms of these laws.

What's Wrong with Forced Arbitration Clauses and Class Action Waivers?

Forced arbitration clauses – hidden in the fine print of consumer, employment and other contracts and written in legalese that is incomprehensible to most – prohibit harmed individuals

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[1] https://thehill.com/policy/technology/432065-lawmakers-introduce-bills-to-end-forced-arbitration

[2] See also, accompanying, "Memorandum In Support Of Banning Forced Arbitration Clauses For Servicemembers Suffering Employment and Financial Abuses; We support both the Justice for Servicemembers Act and the FAIR Act," and "Memorandum In Support Of Legislation Banning Forced Arbitration Clauses And Class Action Waivers For Workers; Recent Supreme Court decision creates urgent need for Congress to pass the Restoring Justice For Workers Act and the FAIR Act."

[3] 9 U.S.C. Ch. 1. See, *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (June 20, 2013).*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

from suing law-breaking companies in court. Instead, consumers, workers, servicemembers and others must resolve their disputes in secretive, company-controlled, rigged, private systems.

When a dispute is in forced arbitration, the company accused of wrongdoing sets the arbitration terms. It selects the arbitration company, which likely relies on that same company for repeat business and therefore is biased in the company's favor. This arbitrator may have no legal training, is not required to follow law, and need not issue a written legal opinion. Once the arbitrator has ruled, their decision is enforceable with the full weight of the law even though it might be legally incorrect. There is no right to appeal.

Yet as abusive and unfair as the arbitration process can be, what is perhaps more significant is the large numbers of cases that these clauses erase, particularly when combined with class action waivers. The *Wall Street Journal* reported recently, for example, that as more companies use forced arbitration clauses and class action waivers, "many employees are walking away from harassment, wrongful-termination and discrimination claims rather than taking them to a privately run tribunal, according to experts and new research." Often, workers simply drop the claims. [4]

Civil Rights Cases. Forced arbitration clauses and class action waivers make it impossible to enforce civil rights laws. Without the class action tool, workplace harassment and discrimination can be impossible to prove because, as the NAACP Legal Defense Fund has pointed out, proof of wrongdoing – documents and records - is "within the exclusive province of the defendant" and must be forced out through the expensive discovery process. Individuals alone typically cannot afford to pay such costs.[5] Moreover, class action waivers "effectively foreclose the use of two crucial methods for proving employment discrimination: disparate impact and pattern-or-practice theories," which require employees to present evidence as a group. Indeed, in the 1970s, "proposals to abolish class actions or to restrict their scope in Title VII [employment discrimination] cases were rejected." As a Senate Report stated at the time, "Title VII actions are by their very nature are class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII."[6]

In addition, since the forced arbitration process is secret, it allows companies to cover-up discrimination and harassment. It is one reason why employees at some major tech companies, including Google, Lyft, Uber, and Microsoft,[7] have been able to successfully pressure individual companies to ban these clauses in sexual harassment cases, and beyond.[8] Gretchen Carlson, who

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[4] https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201

[5] Brief Of *Amici Curiae* NAACP Legal Defense & Educational Fund, Inc. (August 16, 2017), http://www.scotusblog.com/wp-content/uploads/2017/08/16-285-16-300-bsac-16-307-tsac-NAACP-Legal-Defense-Education-Fund-Inc..pdf.

[6] *Id*., S. Rep. No. 92-415, at 27 (1971), *reprinted in* Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare, *Legislative History of the Equal Opportunity Act of 1972*, at 436 (1972).

[7] https://abcnews.go.com/Business/google-drops-forced-arbitration-sexual-harassment-assault-cases/story?id=59084593

[8] https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees *See*, https://sites.google.com/view/endforcedarbitration

was sexually harassed by Roger Ailes and Steve Doocy while at Fox News,[9] had to sue Ailes directly because of the forced arbitration agreement she was required to sign with her employer, the network.[10] She said, "Forced arbitration is a harasser's best friend … It keeps harassment complaints and settlements secret. It allows harassers to stay in their jobs, even as victims are pushed out or fired. It silences other victims who may have stepped forward if they'd known."[11] Legislation is the only way civil rights and harassment survivors can be fully protected.[12]

Consumer Cases. Similarly, in 2015 when federal Consumer Financial Protection Bureau (CFPB) studied the use of forced arbitration clauses and class action waivers in consumer financial contracts, the agency found that "tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses," nearly all of which contain class action waivers. Yet from 2010 through 2012, consumers only filed a tiny number of claims in arbitration: an average of only 411 cases each year for six major product markets combined – credit card, checking account/debit cards, payday loans, prepaid cards, private student loans and auto loans." By comparison, at least 350 million consumers benefitted from class action settlements during this period, with total relief well over $2 billion. [13]

As to the small number of customers that do pursue arbitration instead of just dropping their claim, they are less likely to win, receive smaller awards, and are otherwise severely disadvantaged. As the Economic Policy Institute (EPI) found, "consumers only win relief in 9 percent of disputes." Even worse, what is far more typical is that companies fight consumers in arbitration with claims or counterclaims. In those situations, arbitrators grant companies relief 93 percent of the time, and then often order the consumer to pay the financial institution. So considering "both sides of this equation," in arbitration, the average consumer is actually paying $7,725 to the company.[14]

Secrecy surrounding wrongdoing is another tremendous problem for consumers forced to arbitrate. In 2017, Wells Fargo settled with many of its customers whose credit scores were harmed after thousands of bank employees opened as many as 3.5 million fake checking and credit card accounts in customers' names to meet the company's aggressive sales goals.[15] Yet for years, the company had forced complaining customers into arbitration, keeping the wrongdoing

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[9] http://fortune.com/2016/09/06/fox-gretchen-carlson-settlement-apology/

[10] https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/

[11] https://www.gillibrand.senate.gov/news/press/release/standing-with-gretchen-carlson-senators-gillibrand-and-graham-and-representative-bustos-announce-bipartisan-legislation-to-help-prevent-sexual-harassment-in-the-workplace-void-forced-arbitration-agreements-that-prevent-sexual-harassment-survivors-from-getting-the-justice-they-deserve

[12] In addition to the FAIR Act, legislation has also be introduced to end the use of forced arbitration in sexual harassment cases. *See*, H. R. 1443, and the broader S.1082

[13] Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a), available at, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf, last accessed 3.2.2019

[14] Correcting the record, https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/

[15] *Jabbari v. Wells Fargo & Co.*, No. 15-CV-02159-VC (N.D. Cal. 2017).

hidden and allowing it to continue. Indeed, just a few months before the bank agreed to settle this case, it tried to kill it by forcing defrauded customers to arbitrate.[16]

Forced Arbitration is a Widespread and Growing Problem

According to a recent survey, the percentage of companies that include forced arbitration clauses and class action waivers in employment contracts increased from 37.2 percent in 2017 to nearly 48.9 percent in 2018.[17] An earlier study found that 56.2 percent of private-sector nonunion employees are subject to mandatory employment arbitration procedures. That is more than 60 million American workers. [18] In addition, "of employees subject to mandatory arbitration, 41.1 percent had also waived their right to be part of class action claims. Overall, this means that 23.1 percent of private-sector nonunion employees, or 24.7 million American workers, no longer have the right to bring a class action claim if their employment rights have been violated."[19]

When it comes to consumer contracts, the problem is even more shocking. Today, almost all wireless contracts contain an arbitration clause.[20] Social media platforms, like Instagram, use them. In fact, [21]

- Eighty-one companies in the Fortune 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with consumer transactions.
- Of the eighty-one companies in the Fortune 100 with consumer arbitration agreements, seventy-eight companies include class waivers in their arbitration agreements.
- At least a majority of the households in the United States (and possibly almost two-thirds) are covered by broad consumer arbitration agreements.
- More than sixty percent of United States retail e-commerce sales are covered by broad consumer arbitration agreements.
- In 2018, at least 826,537,000 consumer arbitration agreements were in force, based on estimates from just a few companies for which information was readily available. The actual number of consumer arbitration agreements is likely higher. For a point of comparison, the U.S. population is about 328,000,000.

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[16] https://money.cnn.com/2017/03/29/investing/wells-fargo-settles-fake-account-lawsuit-110-million/index.html; https://money.cnn.com/2016/11/25/investing/wells-fargo-lawsuit-forced-arbitration/?iid=EL

[17] https://classactionsurvey.com/wp-content/uploads/2019/04/2019_Class_Action_Survey.pdf. *See also,* accompanying, "Memorandum In Support Of Legislation Banning Forced Arbitration Clauses And Class Action Waivers For Workers; Recent Supreme Court decision creates urgent need for Congress to pass the Restoring Justice For Workers Act and the FAIR Act."

[18] https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/

[19] https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/

[20] Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a), available at, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf, last accessed 3.2.2019

[21] Imre Stephen Szalai, The Prevalence of Consumer Arbitration Agreements by America's Top Companies, UC Davis Law Review Online, Vol. 52 Feb. 2019, available at, https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf, last accessed 3.2.2019

What Would the FAIR Act Do?

The FAIR Act would prevent companies from forcing workers, consumers, and small businesses to resolve disputes in private arbitration. It would also prevent companies from banning class actions. The bill would specifically cover cases involving consumer, civil rights, employment, or antitrust violations.

In the consumer context, "consumer dispute" is broadly defined to cover disputes over any kind of contract dealing with real or personal property, investments, credit accounts, money, and consumer agreements relating to digital technology (e.g. mobile wireless contracts, TV service contracts, mobile applications). "Civil rights dispute" covers claims under any state or federal civil rights law, as well as the U.S. or state constitutions.

The FAIR Act would not eliminate arbitration as long as it was agreed to voluntarily, post-dispute. 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, servicemembers and small businesses into arbitration proceedings that bind people long before they are harmed.

What Do Bill Opponents Say?

Opponents of the FAIR Act may argue that arbitration is quicker, cheaper, and provides better resolutions for consumers and workers. Of course if that were true, then forced arbitration proponents should have no problem allowing individuals to choose arbitration after a dispute occurs. That is precisely what the FAIR Act would do. But it is not true.

In fact, as noted earlier, the forced arbitration process can be expensive and harmful to consumers and workers. Those forced into arbitration are less likely to win, receive smaller awards, and are otherwise severely disadvantaged. Arbitration costs can be exorbitant, including filing fees, travel costs, and "loser pays" provisions that can threaten people with economic devastation. And as the Economic Policy Institute found, "consumers typically wait 150 days for a decision in arbitration."[22] Yet when compared to a class action, which costs a victim nothing to join, arbitration is just a few months quicker. A few months quicker in exchange for owing a bank $7,725 is not a favorable result for any consumer.

FAIR Act Supporters

The major civil rights and consumer groups and organizations support the passage of the FAIR Act. The bills' supporters include Leadership Conference on Civil Rights, Lawyers Committee for Civil Rights Under Law, Demos, Impact Fund, NAACP, and National Women's Law Center. It also includes major national and state consumer organizations including Consumer Federation of America, National Association of Consumer Advocates, National Consumer Law Center, and Public Citizen.

[22] Correcting the record, https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/

APPENDIX – VICTIM STORIES

Glenda and Peter Perez (Florida)

Glenda and Peter Perez were employees of Cigna Health Insurance. In May 2017, Glenda was falsely accused of making a data error with large financial consequences for the company. Her husband Peter showed her a report revealing that white employees were making the same errors she allegedly made. She filed a racial discrimination complaint with HR but two months later, she was fired after taking an hour from work to deal with a personal emergency. She was forced to arbitrate her claim because of the clause in her employment contracts. She scheduled the arbitration. However, she then heard from the arbitrator that the meeting was cancelled, and that the arbitrator had awarded the judgment to Cigna.

Shockingly, Peter and Glenda then saw a picture of the arbitrator at a Cigna lawyer's birthday party. As a result, Glenda filed a petition to vacate the award and when Cigna was served, Cigna fired Peter. This ordeal cost the Perezes so much money that their home was forced into foreclosure. They lost everything as a result of this incident and now are hoping a GoFundMe can help them cover some of their financial losses.[23]

Ronald G. DeNicolo Jr. (Illinois)

Mr. DeNicolo brought a class action against rental car giant Hertz, which also operates Dollar and Thrifty, which uses shady debt-collector Viking Credit Services to bill customers for car damage months after they returned undamaged rental cars. The lawsuit noted, "[t]he Better Business Bureau has received numerous complaints about Viking's practice of billing for rental car damage long after the alleged damage occurred … citing data on the BBB website."

DeNicolo received a bill for over a thousand dollars from Viking "more than three months after he returned an undamaged rental car," even though "[n]o one at the rental facility alleged that the car was damaged when he returned it" and "by the time he heard from Viking, the car had likely been rented again dozens of times and driven countless miles." Hertz sought to compel arbitration because DeNicolo had "agreed to arbitration when he rented a car at an automated kiosk at the San Francisco airport and selected 'I Agree' on a screen asking if he consented to Hertz's rental terms." The court agreed with Hertz, threw out the class action, and ordered that he and other customers submit their claims in individual arbitration.[24]

For more information, please contact students May Vutrapongvatana, Natchaya.Vutrapongvatana@law.nyls.edu (civil rights disputes), Danah Jones Danah.Jones@law.nyls.edu (consumer disputes) or Adjunct Professor and Executive Director of the Center for Justice & Democracy at New York Law School, joanned@centerjd.org.

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[23] https://www.youtube.com/watch?v=xfqKlEIxiaw https://www.gofundme.com/peter-amp-glenda-perez-end-forced-arbitration

[24] *DeNicolo v. The Hertz Corp*, No. 19-210 (N.D. Ca. April 12, 2019); Dena Aubin, "Lawsuit over Hertz's collection for car damages sent to arbitration," *Reuters Legal*, April 15, 2019.