January 30, 2020

Dear Senator:

We write to call your attention to an article published today in Consumer Reports, providing new documentation about the increasingly widespread use of forced arbitration to shield corporate accountability for the safety and soundness of the consumer products they sell, and to urge your support for S. 610, the Forced Arbitration Injustice Repeal (FAIR) Act.

https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/

Our article publishes our findings from a review of consumer products in the most popular product categories Consumer Reports rates – and in two additional categories where safety is a paramount concern, bike helmets and child car seats. We examined 117 brand/category combinations, and the results were striking: 60 percent included arbitration clauses.

Our article further documents the increasing use of forced arbitration in the marketplace, which is undermining the rule of law as it applies to corporate conduct, and is making us less safe. It is preempting the ability of our legal system to hold corporations accountable. This is a spreading injustice in the marketplace, in which corporations are forcing consumers, workers, and small family businesses to relinquish fundamental legal protections as a pre-condition for obtaining a product or service, or a job. It is time to correct this harm by enacting the FAIR Act.

Forced arbitration is being slipped into the fine print of standard-form contracts and terms of service that are presented to consumers as a take-it-or-leave-it pre-condition for obtaining such basic products and services as a credit card, bank loan, student loan, apartment lease, mobile phone, video subscription, or nursing home admission – and, as our article demonstrates, a wide range of everyday consumer products.

Congress never intended this. The Federal Arbitration Act was enacted in 1925 to give *businesses* – with relatively equal bargaining power – options for resolving their *business* disputes. But ill-conceived Supreme Court rulings[1] have warped that statute into a weapon that is being used against people who have *no* bargaining power. There is no meaningful sense in which these people have "agreed" to give up bedrock legal protections. Their only "choice" is to decline the product or service – or job – altogether. Many times, that is just not a practical option. And it is never fair.

When forced on consumers – and on workers and small businesses – in this way, the arbitration process, designed by corporations and their lawyers, inherently tends to be one-sided, tilted to favor the corporation that has arranged for it. The process is a "black hole," where the law does not apply, there is no right of appeal, and too often, the outcome is required to be kept secret. The arbitrator, chosen by the corporation, has a skewed incentive to heed the interests of the

[1] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); DirectTV Inc. v. Imburgia, 136 S. Ct. 463 (2015); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

corporation, in hope and expectation of repeat business. The corporation can also choose where the arbitration will take place, what the rules will be, and how the costs will be borne.

There are none of the fundamental safeguards that are the hallmarks of a fair, impartial, and accessible court proceeding to protect people and hold accountable a corporation that has committed widespread abuse, or has marketed an unsafe product or service.

Justice Ginsburg has stated that the Court's forced arbitration rulings "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and turning the coin, they have insulated powerful economic interests from liability for violations of consumer protection laws."[2]

In an interview with the New York Times, former Federal District Judge William G. Young, appointed in 1985 by President Reagan, was even blunter: "Ominously," he said, "business has a good chance of opting out of the legal system altogether and misbehaving without reproach."[3]

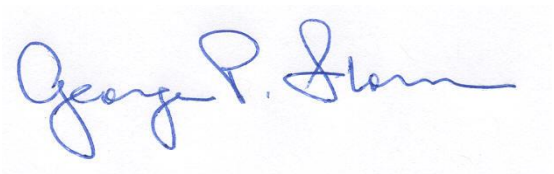
Contrary to the claims of forced arbitration defenders, the FAIR Act would in no way "ban" arbitration when it is really agreed to. It would stop *forced* arbitration from *being imposed* as a pre-condition for obtaining a product, or for obtaining or continuing service or employment, and closing off access to the courts for consumer law claims, employment law claims, civil rights claims, and antitrust claims by small businesses. Once a dispute actually arises, and the stakes are clear, consumers (or workers or small businesses) could freely choose arbitration, if they determine it to be actually fair, and to actually be a better option for them than the courts.

In the absence of effective legal protection, our article advises consumers to look for arbitration clauses, and when they are choosing between comparable products, to choose one that does not force them into arbitration. But that is often not a practical option. And it is not a satisfactory solution.

Forced arbitration is fundamentally unfair, and abusive, and unsafe – and it needs to stop.

We hope you will help correct this spreading injustice by supporting the FAIR Act. If you or your staff have any questions about the FAIR Act or about Consumer Reports' latest analysis, please contact us.

Sincerely,



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[2] DirectTV Inc. v. Imburgia, 136 S. Ct. at 477 (Ginsburg, J., dissenting).
[3] Jessica Silver-Greenberg and Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, NY Times, Oct. 31, 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.