

May 7, 2013

The Honorable Patrick Leahy, Chairman
The Honorable Chuck Grassley, Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Letter in Support of the Arbitration Fairness Act of 2013, S. 878

Dear Chairman Leahy and Ranking Member Grassley:

We, the undersigned organizations, strongly support the Arbitration Fairness Act of 2013 (or “AFA”), S. 878, introduced in the Senate by Senator Al Franken (D-Minn.). This important legislation would end the growing predatory practice of forcing non-union employees and consumers to sign away their Constitutional rights to legal protections and access to federal and state courts by making pre-dispute binding mandatory arbitration (“forced arbitration”) clauses unenforceable in civil rights, employment, antitrust, and consumer disputes. Forced arbitration is proliferating in employment (from minimum wage-workers to whistleblowers to highly compensated executives), and in everyday consumer contracts for products and services such as credit cards, child care, cell phones, car loans, home construction, student loans, health insurance policies, and nursing homes.

The AFA would also restore Congressional intent, limiting the application of the Federal Arbitration Act (FAA) to disputes between commercial entities of generally similar sophistication and bargaining power. A series of recent decisions by the U.S. Supreme Court have made it significantly more difficult for consumers and employees to challenge even the most abusive forced arbitration clauses. These decisions have not only impacted federal laws and courts, but have also stripped the power of state supreme courts to rule on matters involving state law claims.

Consumer and employment contracts with arbitration clauses are often non-negotiable.

Corporations that place forced arbitration clauses in their standard contracts with consumers and non-union employees shield themselves from accountability for wrongdoing. The contracts typically specify who the arbitrator will be, under what rules the arbitration will take place, the state the arbitration will occur in, and the payment terms for the arbitration. Arbitration clauses are often contained in non-negotiable contracts and a person has no choice but to acquiesce or forgo the goods, services and/or employment altogether.

Forced arbitration erodes traditional legal safeguards as well as substantive civil and employment rights and antitrust and consumer protection laws.

None of the safeguards of our civil justice system are guaranteed for persons attempting to enforce their employment, consumer, anti-trust and civil rights in forced arbitration. There is no impartial judge or jury, but rather arbitrators who rely on major corporations for repeat business. With nearly no oversight or accountability, businesses or their chosen arbitration firms set the rules for the secret proceedings, often limiting the procedural protections and remedies otherwise available to individuals in a court of law. For example, the ability to obtain key evidence necessary to prove one's case is restricted or eliminated. In addition, the exorbitant filing fees, continuous fees for procedures such as motions and written findings, and "loser pays" rules in arbitration are prohibitive to most individuals, particularly in this weak economy when so many Americans are struggling just to make ends meet.

Forced arbitration also weakens the value of federal and state laws intended to protect consumers and employees by removing their ability to enforce those laws in court. For example, big corporations are able to grant themselves immunity for violating antitrust laws and cheating consumers by eliminating statutory rights in the fine print of their contracts.

Furthermore, a cornerstone of hard-won civil rights protections is the right of victims of workplace discrimination or harassment to have their claims heard by an impartial judge and jury. Increasingly, employers strip this right away and require workers to agree to forced arbitration as a condition of hiring or continued employment. By being forced into binding mandatory arbitration, an estimated 30 million non-union workers have lost essential protections established by our nation's employment and civil rights laws.¹

Laws at risk include provisions of the Civil Rights Acts of 1964 and 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Uniformed Services Employment and Reemployment Rights Act (USERRA), the National Labor Relations Act, the Sherman Antitrust Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Sarbanes-Oxley Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Servicemembers Civil Relief Act, the National Defense Authorization Act for Fiscal Year 2013 (amending the Military Lending Act), the Lilly Ledbetter Fair Pay Act of 2009, the Telephone Consumer Protection Act, the Fair Debt Collection Practices Act, the Credit Repair Organizations Act, the Electronic Fund Transfer Act, the False Claims Act, the Fair Credit Reporting Act, the Right to Financial Privacy Act, the Real Estate Settlement Procedures Act, the Truth in Lending Act, and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act.

Courts also have held that the Federal Arbitration Act (FAA) trumps state laws, even those intended to protect consumers, such as anti-predatory lending and unfair and deceptive practices laws. Consequently, unscrupulous businesses use forced arbitration in student loans, payday loans, credit card contracts, auto deals, rent-to-own, and other everyday transactions, thereby avoiding accountability.

On April 27, 2011, the U.S. Supreme Court dealt a devastating blow to consumers and employees, ruling that companies can ban class actions in the fine print of contracts. In *AT&T Mobility, LLC v. Concepcion*, the Court held that corporations may use arbitration clauses to ban consumers and employees from exercising their right to join together through class actions to hold powerful corporations accountable. As a result of *Concepcion*, thousands of valid legal claims by consumers and employees that expose clear abuses and corporate misconduct have been suppressed and prevented from being brought before a court of law. In addition, many class actions have been dismissed and sent to arbitration even when the judge states that the cases may be best suited to proceed as class actions.

The *Concepcion* ruling makes it all the more vital for Congress to pass the AFA to enable individuals to agree to arbitration – knowingly and voluntarily – to resolve their disputes rather than forcing them into arbitration. The AFA would eliminate the use of these binding pre-dispute clauses in consumer and employment contracts, returning the FAA to its original intent to facilitate private arbitration between sophisticated parties on equal footing.

The AFA would allow consumers and employees to choose arbitration after the dispute arises.

The AFA does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily after a dispute arises. Nor would it affect collective bargaining agreements that require arbitration between unions and employers. Its sole aim is to end the unscrupulous business practice of forcing consumers and employees into biased, costly arbitrations by binding them long before any disputes arise.

We strongly support the Arbitration Fairness Act of 2013, which would restore transparency and access to our civil justice system and preserve important civil rights, employment, anti-trust and consumer protections.

Congress has passed laws to ban forced arbitration for disputes involving auto dealers, poultry and livestock producers, and certain employees of federal contractors. The time has come for Congress to outlaw forced arbitration for America's consumers and workers.

We urge you and the other members of Congress to pass S. 878.

Sincerely,

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Association of University Women (AAUW)

American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)

Alliance for Justice

American Association for Justice

American Civil Liberties Union

Americans for Financial Reform
Center for Justice & Democracy
Center for Responsible Lending
Citizen Works
Committee to Support the Antitrust Laws
Consumer Action
Consumers for Auto Reliability and Safety
Consumer Federation of America
Consumer Watchdog
Consumers Union
DC Consumer Rights Coalition
Every Child Matters Education Fund
Empire Justice Center
Homeowners Against Deficient Dwellings
Home Owners for Better Building
Leadership Conference on Civil and Human Rights
Maryland Consumer Rights Coalition
NAACP
National Association of Consumer Advocates
National Association of Shareholder and Consumer Attorneys (NASCAT)
National Community Reinvestment Coalition
National Consumer Law Center (On behalf of its low income clients)
The National Consumer Voice for Quality Long-Term Care (formerly NCCNHR)
National Consumers League
National Council of La Raza
National Fair Housing Alliance
National Employment Law Project
National Employment Lawyers Association
National Women's Health Network
National Women's Law Center
New Jersey Citizen Action
People for the American Way
Public Citizen
Union Plus
U.S. Public Interest Research Group
West Virginia Association for Justice
West Virginia Citizen Action Group
Woodstock Institute

cc: Members of the Senate Judiciary Committee
Senate Majority Leader Harry Reid
Senate Minority Leader Mitch McConnell
Members of the House Committee on the Judiciary

House Speaker John A. Boehner
House Minority Leader Nancy Pelosi

¹ See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amongst the Sound and Fury?*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 405, 411 (2007)("[A] current estimate in the range of 15 to 25 percent of employers having adopted employment arbitration seems reasonable."). The 30 million figure is based upon a civilian labor force of 154.4 million Americans, as reported by the Bureau of Labor Statistics. Approximately 18.5 million American workers are unionized, leaving roughly 135 million non-union employees.