

The Facts On Forced Arbitration

How Forced Arbitration Harms America's Workers

Forced Arbitration Disempowers Small Businesses Against Corporate Wrongdoing

The pervasive effects of forced arbitration harm employees and consumers, but America's small businesses are also vulnerable to its impact. Large corporations use forced arbitration to prevent the small companies they deal with from resolving their grievances in court. Increasingly, those with claims against corporate actors must instead resolve their disputes through private arbitration proceedings that are designed to benefit the offending corporation. Forced arbitration clauses allow corporations to choose their own arbitrators and incur lower defense costs. Those same clauses create barriers for plaintiffs, including higher threshold costs, lack of discovery, and lower damage awards. These factors often lead to dropped claims by disheartened plaintiffs seeking justice.ⁱ

While forced arbitration tends to favor business interests, the benefit does not extend to all enterprises. Because large corporations generally succeed when arbitrating disputes,ⁱⁱ the small business community has started to adopt forced arbitration in the hope that arbitration clauses will similarly protect them from the high costs of legal liability.ⁱⁱⁱ Yet, the advantage large corporations receive from forced arbitration is often at the expense of the small businesses that make up over 90% of America's companies.^{iv}

When a small business opens a line of credit or buys goods from a larger vendor, the transaction agreements likely contain a forced arbitration clause.^v Should a grievance arise, that small business owner is stripped of the right to take the offending corporation to court.^{vi} Further, small businesses cannot protest the very arbitration clause that bars its access to courtroom doors. Large corporations hold greater bargaining power, and have the means to negotiate contracts without take-it-or-leave-it clauses. As a result, deep-pocketed corporations have no problem gaining access to courts to adjudicate the same issues small businesses are unable to resolve.^{vii}

By stripping the ability of small businesses to access courts and protest unfair clauses, forced arbitration has made the justice system available only to those corporate entities whose market power can afford it. The millions of small enterprises that invest in our cities and towns, employ our neighbors, and boost local economies are left powerless to resolve corporate disputes in a court of law—harming not only small businesses, but entire communities.

The harm to small business does not end with unequal access to our courts. Because most forced arbitration clauses also effectively ban class action suits, small companies suffering from harmful corporate practices—such as hidden credit card fees, illegal debt collection, and antitrust violations—cannot join forces to vindicate their rights.^{viii} Without legal consequences to hold them accountable, unscrupulous corporations are free to continue those deceptive practices—leaving small businesses to compete with them on an uneven playing field. Because many forced arbitration clauses shield corporations from class action suits, corporations are given a license to violate environmental, financial, and consumer protection laws. Corporations using their monopoly power to fix prices are free to do so without fear that a group of small business owners might assert legal action against them. Antitrust laws, enacted to protect small businesses, are inaccessible because of the forced arbitration clauses that shelter corporate wrongdoing.^{ix}

The business community at large is silent on the harms forced arbitration perpetrates on small business in America. Corporations and business leaders treat the benefits of forced arbitration as a one-size-fits-all solution to avoid costly

Fast Facts

1 in 5

Small businesses rely on credit cards as a source of investment capital.

6%

Of arbitration proceedings in the credit card industry side with the consumer.

67%

Of voters say they would prefer to have their claims against a company decided in a public court rather than through arbitration.

59.1%

Of voters support federal legislation that would end arbitration requirements for consumers and employees.

litigation. While it may serve some business interests, small business owners would be well advised to ensure they are not at the losing end of a forced arbitration clause.

Legislators on Capitol Hill have recently taken up the topic of forced arbitration, and the debates it has engendered indicate that both sides of the aisle are troubled by the issue. In his opening remarks during a Senate Judiciary Committee Hearing, Senator Lindsey Graham (R-SC) stated: "Arbitration has a place in society. I want to be pro-business, but everything good for business sometimes maybe is not the best answer for society."^x At a U.S. House of Representatives Committee Hearing on Financial Services, Representative Alexandria Ocasio-Cortez (D-NY) also spoke on the issue: "I find this extremely concerning, that before misconduct happens you can waive your right to seek justice in court." The Congresswoman noted, with dismay, that large corporations are able to shield themselves from accountability for corporate misconduct simply by inserting an arbitration clause in employee and consumer contracts.^{xi}



Support from select Congress members is a step in the right direction, but ending forced arbitration demands broad bipartisan support—something we already have amongst the voting public. In a February 2019 poll, 84% of voters indicated support for federal legislation that would end arbitration requirements for consumers and employees, with Republican voters supporting the measure in greater numbers than Democrats.^{xii} By a two-to-one ratio, voters also indicated they would prefer having their claim heard by a judge or jury in a court rather than through arbitration.^{xiii}

It is time for Congress to follow the will of the people by ending forced arbitration today.

Endnotes

- i David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee And Consumer Rights Claims In An Age Of Compelled Arbitration*, 36 Wis. L. Rev. 33 (1997) (explaining the advantages corporations have against consumers when setting disputes through arbitration); see also Elizabeth Colman, *Forced Arbitration: A Race to the Bottom*, The Employee Rights Advocacy Institute for Law & Policy (2018), http://employeerightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report_Forced-Arbitration_A-Race-To-The-Bottom.pdf (noting that the barriers to adjudication through forced arbitration often lead to claim suppression).
- ii Hamaji et al., *Unchecked Corporate Power: Forced Arbitration, The Enforcement Crisis, And How Workers Are Fighting Back*, Economic Policy Institute (2019), <https://www.epi.org/files/uploads/Unchecked-Corporate-Power.pdf>.
- iii Jean Murray, *What are the Benefits and Drawbacks of Arbitration?*, The Balance Small Business (2019), <https://www.thebalancesmb.com/what-are-the-benefits-and-drawbacks-of-arbitration-398535>.
- iv Georgia McIntyre, *What is the SBA's Definition of Small Business (And Why?)*, Fundera, Inc. (2018), <https://www.fundera.com/blog/sba-definition-of-small-business>.
- v Imre Stephen Szalai: *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233 (finding that 81 of the Fortune 100 companies use forced arbitration clauses in consumer transactions, with 78 companies including class action waivers in their clauses).
- vi Fair Arbitration Now, *The CFPB Arbitration Rule Benefits Small Businesses*, <https://fairarbitrationnow.org/wp-content/uploads/Fact-Sheet-Small-Businesses.pdf> (last visited July 22, 2019).
- vii *Id.*
- viii Fair Arbitration Now, *supra*, note 6.
- x Hearing on Arbitration in America Before the S. Comm. on the Judiciary, 116th Cong. (2019) (statement of Sen. Lindsey Graham, Chairman of the S. Judiciary Comm.).
- xi Putting Investors First: Reviewing Proposals to Hold Executives Accountable: Hearing Before the H. Comm. on Financial Services, 116th Cong. (2019) (statement of Rep. Alexandria Ocasio-Cortez)
- xii Guy Molyneux & Geoff Garin, *National Survey on Required Arbitration*, Hart Research Associates (2019), <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf> (finding that 87% of Republicans support federal legislation to end arbitration requirements, while 83% of Democrats support the same measure).
- xiii *Id.*