License to Steal:

How the U.S. Chamber Forced Arbitration on America

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AMERICAN ASSOCIATION for JUSTICE

David and Goliath, Milan Cathedral, Italy

Table of Contents

Introduction

Enter the Corporate Trojan Horse

Is This A Fair Fight?

The Empire Always Wins

The Chamber's Idea of Justice

Why Forced Arbitration?

Forced Arbitration's Critics? Corporations

Conclusion

Introduction

By opening a credit card envelope in the mail, making a call on a cell phone, or even taking a first sip of coffee, millions of American consumers are unknowingly giving up their rights and protections established by more than 200 years of constitutional law. Instead they unwittingly "agree" to the terms and conditions of a corporate-backed privatized system designed to ensure consumers can never hold corporations accountable for causing harm, no matter how abusive or horrific.

Forced arbitration is Corporate America's Trojan Horse – a campaign to eliminate access to the courts and individual rights and replace them with big businesses' own dispute mill. Though most Americans remain largely unaware of forced arbitration and its effects on their rights, more than half a billion arbitration provisions infiltrate our everyday lives. Most Americans have "consented" to a wide range of forced arbitration clauses without ever knowing it.

Forced arbitration eliminates all of the checks and balances of the civil justice system, including the right to a public forum, the right to demand information from a corporation, the right to a written record, and, most importantly, the right to trial by jury. Arbitrators are not bound by law and their decisions are not subject to any meaningful judicial review.

At every stage this Trojan Horse has been pushed by the financial and lobbying might of the U.S. Chamber of Commerce. Through its legal reform front group the Institute for Legal Reform (ILR), the U.S. Chamber has been at the forefront of a heavily-funded campaign to eliminate corporate accountability, even for massive violations of state and federal law. For decades, this has primarily revolved around high profile PR campaigns to portray the civil justice system as beset by frivolous lawsuits. But where a billion-dollar tort reform campaign has not succeeded in closing the courthouse door, its more stealthy compatriot – forced arbitration – has gone a long way to shielding corporations from accountability and replacing the courthouse altogether.

Enter the Corporate Trojan Horse

Consumer forced arbitration clauses have surged in the last two decades as corporations have pounced on the opportunities they present. To Big Business, the boilerplate clauses are the ultimate out. Accountability for all misconduct and violations of law has been eliminated by a paragraph of fine print that is rarely ever read. Without realizing it, the majority of Americans have consented to forced arbitration multiple times.[1]

These clauses are buried in the fine print of credit card and cell phone contracts, in the packaging of every imaginable retail product, and in mountainous pages of nursing home care and employment contracts. Often, consumers are unaware that they have agreed to a forced arbitration clause. Corporations conduct extensive market research to design these notices in a way that makes them easy to ignore, with headers such as "there's nothing you need to do."[3] Researchers have shown that it is next to impossible to see these forced arbitration clauses before applying for a credit card or purchasing a product, which means just by "receiving" the product or service, one is "agreeing" to sign away all legal rights and protections. Nor do consumers gain anything from "agreeing" to waive their rights. Consumers do not get better rates, faster service or enjoy any other form of passed-on savings.[4]

Have one of these?[2]

Then you've "agreed" to give up your rights

Credit cards
Checking account
Student loans
Cell phone
Cable
Internet
Computer
Employment contract
House
Health care
Starbucks card
even French fries

Even using a website can bind you to forced arbitration. Sites such as PayPal, EBay, and Instagram use broad forced arbitration clauses. Instagram's forced arbitration clause went so far as to ban users from participating in actions by state attorneys general. Under such a provision, site visitors whose credit card details were leaked would be unable to benefit from any intervention by state authorities.[5]

Trapped in Forced Arbitration's Maze

Even if consumers were aware of forced arbitration clauses, they have no choice but to be bound by them. This is because forced arbitration clauses are everywhere. At least 30 million U.S. employees have been forced to sign away their rights just so they can work.[6] The same goes for nursing home residents and others. If you or a family member must enter a long-term care facility, you have little choice about agreeing to a forced arbitration clause at admission.

Even those who refuse to sign forced arbitration clauses are sometimes held to their conditions. Fonza Luke, a nurse for more than 25 years at Princeton Medical Center in Birmingham, Alabama, refused to sign an arbitration agreement but continued to work for the hospital for three more years. When she was fired – for missing a day of work to attend a continuing education class – she found her employment discrimination complaint barred. The hospital successfully argued that just by continuing to show up for work, she “agreed” to the forced arbitration clause (Luke went on to lose the arbitration too).[7]

Forced arbitration has proliferated because corporations realize it grants them a get-out-of-jail-free card. Most people do not pay much attention to the idea of a forced arbitration clause. It is the next to last thing a consumer considers when deciding whether to sign a contract, and half of all consumers never notice the provisions in the first place. Even when it comes to complaints or disputes, the vast majority of consumers (88 percent) still think the clause is not important.[8] Nor do Americans realize that forced arbitration clauses cover all types of harm – fraud, abuse, discrimination – and typically cannot be challenged in court. Unfortunately, most individuals will not realize just how severe these clauses are until they are unable to hold anyone accountable after they have suffered harm due to someone else’s misconduct.

Is This A Fair Fight?

Most Americans don't realize they've signed-away their legal rights until it is too late. Buried in the fine print of many contracts are dangerous forced arbitration clauses that eliminate access to justice. Do you use a credit card? Then you have probably “agreed” to forced arbitration. What happens if you catch the bank stealing your money with phony interest fees? See if you can hold them accountable.

START

If you take the time to read the fine print that comes with your credit card, you'd likely find something like this:

“In the event that you have a complaint against us, you will be forced into arbitration before our favorite arbitrator according to the rules that we decide and can arbitrarily change along the way at a location of our choice (which will most definitely be inconvenient for you), resulting in a decision that will undoubtedly favor us and will be binding and final and leave you with absolutely no remedy.”

I knew it was in there, but I had no choice and had to sign.

Wait, I did not agree to that! This is America. I'm taking the bank to court.

The clause says the bank can hold the forced arbitration anywhere they want. Hope you like Delaware.

Tough luck. The court refuses to hear your case and sends you back into the bank's forced arbitration system.

I don't like Delaware, but I will make the trip just to hold the bank accountable.

The plane ticket alone would cost more than I'm trying to recover.

Did you keep copies of every document that you need to prove your case?

I did!

I did not

Did you really think they were going to make this easy for you? The bank is not obligated to provide you with any documents.

Your case is going before an arbitrator hand-picked by the bank.

Your case is going before an arbitrator hand-picked by the bank. The bank is bringing their arbitration experts and you don't even have documents to prove your claim.

95 percent of credit card disputes are ruled in favor of the corporation in forced arbitration. You could win, but the odds are stacked against you.

The Empire Always Wins

Forced arbitration clauses are bad news for consumers, patients and workers. Arbitration can be an effective solution in business-to-business cases, when corporations with vast legal resources and knowledge *voluntarily* agree to settle with arbitration. But in the David versus Goliath context of an individual taking on a corporation, forcing people into arbitration is little more than stealing their right to justice. The otherwise benign-sounding idea of arbitration is actually a severely biased process in which you can almost never win, and from which you can never escape. As Senator Elizabeth Warren once said, forced arbitration is "Darth Vader's Death Star--the Empire always wins."[9]

The Federal Arbitration Act

> ***9 U.S.C. § 2 - Validity, irrevocability, and enforcement of agreements to arbitrate***
>
> *A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

In recent years, Corporate America has persuaded the courts that this one sentence – Section 2 of the Federal Arbitration Act (FAA) – is perhaps the single most important sentence of all U.S. statutory language. Recent opinions handed down by the U.S. Supreme Court have used this sentence as a basis to not only wipe out all state law governing arbitration, but to trump federal law, including the Sherman Antitrust Act, the Civil Rights Act, and the Americans with Disabilities Act.[10]

Congress passed the FAA in 1925. The Congressional record from the debate over the legislation indicates that its proponents always intended it to apply to negotiations between businesses with equal bargaining power. They did not, however, intend for arbitration agreements to apply outside of this narrow scope, and they were particularly adamant that arbitration agreements did not belong in employment contracts. Then Secretary of Commerce Herbert Hoover raised objections "to the inclusion of workers' contracts in the law's scheme."[11] The transcripts also indicate that the primary proponents of the legislation intended for it to apply to contracts negotiated between businesses and not forced clauses where one party is responsible for writing the terms of the contract and the other has no choice but to "take it or leave it." They also made it clear that arbitration was best suited for disputes over simple facts and terms and was not an appropriate process for resolving complex problems. The legislation was simply intended to create a procedure that would allow federal courts to enforce arbitration agreements in business contracts the same way they enforced other contract terms.[12]

For decades after the passage of the FAA, the law was rarely cited in consumer or employment cases and had little impact beyond its original intent. But by the 1990s, it was clear that the U.S. Supreme Court was interpreting the FAA in a way that Congress had not originally intended. In his dissent to *Gilmer v. Interstate/Johnson Lane Corp.*, Justice John Paul Stevens raised his concerns about the Court's overreach regarding the FAA, writing, "In recent years…the Court 'has effectively rewritten the statute' and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration."[13] Justice Sandra Day O'Connor expressed her concern in her concurrence in *Allied-Bruce Terminix Cos. v. Dobson*, writing, "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[14]

The U.S. Supreme Court's support for forced arbitration has severely limited the states' ability to police the fairness of arbitration, particularly since the Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, which held that the FAA trumps state laws. States that have tried to protect individuals from abusive forced arbitration clauses have been consistently overruled. For example, in 2012 the West Virginia Supreme Court ruled that as a matter of public policy it was unacceptable for disputes about personal injury or death to be covered by forced arbitration agreements. The case, *Marmet Health Care, Inc. v. Brown,* involved medical malpractice lawsuits filed by the families of three nursing home residents who died after alleged negligence. The U.S. Supreme Court summarily reversed the decision, stating, "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[15]

What exactly is forced arbitration?

Forced arbitration declares that a consumer, employee, or small business cannot take his or her complaint against a corporation to court but must instead submit to a private forced arbitration forum. From that point on, the corporation is in charge.

The corporation chooses the location, which can immediately present a road block to the consumer. PayPal, for instance, requires consumers to arbitrate in California, no matter where they live or what resources they have to travel.[16] Disabled New Yorker Bernadita Duran learned about the horrors of forced arbitration the hard way when she challenged a debt settlement firm that took $4,000 of her money without ever paying off any of her debts. After filing her complaint, she was told she had to travel Arizona for the forced arbitration proceedings (Duran was given the opportunity to challenge the location – once she got there).[17]

The corporation also picks the arbitrator. Sometimes the corporation allows the consumer to pick one of a panel of arbitrators, but only from a list the corporation provides.[18] For example, most forced arbitration clauses are largely one-sided, giving certain privileges to the corporation and none to the consumer. In some forced arbitration agreements corporations have rights – such as the right to dismiss the case early on, to change its position midway through proceedings, record the hearing for their own uses, and take the matter to court if it so chooses – that the consumer expressly does not have. In some cases the corporation can even modify the rules – or cancel the "agreement" entirely – whenever it wants and without even telling the consumer.[19] In this game, the corporation owns the referees and can move the goalposts.

Arbitration's Repeat Player Problem

The biggest problem with forced arbitration has always been its inherently biased structure. Consciously or unconsciously, arbitrators favor the corporations that come before them because arbitrators are businesses too, and they depend on corporations for repeat business. It is only the corporation that comes before the arbitrator over and over, not the individual consumer or worker. This bias is reinforced by the corporations themselves, who are frequently found to be selecting only arbitrators who historically favor them, and freezing out any that dare to go against them. The result is a considerable "repeat player" problem.

A 2007 *Christian Science Monitor* analysis of data from the National Arbitration Forum (NAF) found that creditors and debt-buyers won more than 96 percent of the cases they brought against consumers. The top 10 most frequently used arbitrators, who decided the vast majority of all cases, decided in favor of consumers only 1.6 percent of the time, while arbitrators who decided three or fewer cases decided for the consumer 38 percent of the time. A 2008 lawsuit by the city of San Francisco similarly found that out of more than 18,000 consumer arbitrations, only 30 had been won by consumers.[20]

> *Consumers "ask you to explain what Arbitration is then basically hand you the money."*

Finally in 2009, the NAF was banned from arbitrating consumer credit disputes after a lawsuit filed by the Minnesota Attorney General revealed that the organization was affiliated with a New York private equity fund that also owned the major debt collection enterprise that was filing cases with the forum.[21] The lawsuit highlighted NAF's tactics, which included paying commissions to executives to insert forced arbitration clauses in contracts and then use the NAF to decide them. NAF told its corporate clients, "the customer does not know what to expect from Arbitration and is more willing to pay," that consumers "ask you to explain what Arbitration is then basically hand you the money," and that "[y]ou [the creditor] have all the leverage [in arbitration] and the customer really has little choice but to take care of this account."[22]

Sometimes the bias is even more direct. Arbitration groups, such as the American Arbitration Association (AAA) own millions of dollars in the shares of companies that are also clients. Corporations have also paid millions directly in "memberships" and arbitration contracts. The bank First USA paid NAF several million dollars in fees to arbitrate more than 50,000 collection cases. The bank won 99.6 percent of the cases.[23]

Even arbitrators themselves question the system. After AAA filed a brief at the U.S. Supreme Court in support of Circuit City in *Circuit City v. Adams*, its own arbitrators rebelled, calling the action "unseemly" and saying it destroyed their neutrality.[24]

The Cost of Forced Arbitration

With such severe restrictions and little chance of succeeding in forced arbitration, consumers are left on their own and forced to pay costs themselves. Arbitration fees vary widely, but can be high enough to deter pursuing a claim in the first place. Fired FedEx drivers were allegedly forced to pay $6,000 just to get a hearing.[25] PayPal's provisions refer consumers to AAA, but forgoes AAA's consumer rules and instead imposes the rules for commercial arbitration. Among other consequences this means that the fees for arbitration for small claims exceed $2,500.[26]

Strobel lost $281,729, but the arbitrator only awarded her $5,000, then charged her $10,350 in arbitration fees.

Even when consumers win, they sometimes lose. Eighty-six-year-old Mabel Strobel "won" her forced arbitration hearing against Morgan Stanley after the investment firm persuaded her to sell her property and use the money to buy volatile stocks with heavy sales charges. Strobel lost $281,729, but the arbitrator only awarded her $5,000, then charged her $10,350 in arbitration fees.[27] Many other ordinary investors have suffered similar injustices. According to the Financial Industry Regulatory Authority (FINRA), 11 percent of all arbitration awards in 2011 against unscrupulous brokers have never been paid, amounting to over $50 million.[28]

An End to Checks and Balances

Forced arbitration dispenses with all of the checks and balances of the civil justice system, including the right to trial by jury, the right to a public forum, the right to a written record, the right to discovery – a legal process which forces corporations to turn over information – a system of binding legal precedents, the opportunity for group actions, an adjudicator with legal expertise and meaningful judicial review.

Such conventions might not seem important to a consumer when applying for a credit card, but when the credit card company brazenly takes $4,000 in "fees," their absence can be keenly felt. Without such checks and balances, the deck is stacked heavily against consumers.

Corporations have far greater resources than consumers and far greater experience with the forced arbitration system. Despite the appearance of neutrality, research has shown again and again that the process is biased towards the corporate repeat players.[29] There is a widely held belief that the one thing corporations are universally afraid of is a jury. It should come as no surprise that a corporation accused of misconduct would much prefer to plead its case to an arbitrator who has ruled repeatedly in its favor in the past than a randomly selected jury.

Diverting cases from the civil justice system to forced arbitration is creating other problems that have not yet been fully felt. Namely, forced arbitration stunts the growth of case law. Bypassing the civil justice system prevents precedent-setting decisions from ever being written and inhibits future cases. Historically, civil rights, women's rights, and environmental issues have all advanced because the foundations behind these movements were built by establishing case law brick by brick. If these cases cannot be brought in court, their causes simply cannot advance.

Hiding Fraud and Misconduct

Forced arbitration's faults are not consigned to the unfortunate consumers who find themselves forced into it. The public at large suffers from the dangers, fraud and negligence that forced arbitration hides. Whereas the civil justice system shines a bright light on matters of public health and safety, forced arbitration hearings are private, allowing corporations to pull the veil over systematic misconduct. Very few forced arbitration decisions are published or otherwise publicly accessible. Information regarding prior misconduct simply never reaches the light of day – a fact that corporate

Forced Arbitration and Banks[30]

71 percent of checking accounts at the 10 largest U.S. banks include a clause requiring arbitration in case of disputes, according to a Pew report.

56 percent of the largest 50 financial institutions force consumers into arbitration.

95 percent of credit card disputes are ruled in favor of the corporation.

Filing fees run upwards of $750 and consumers must pay their share of arbitrators' fees, which are routinely $400 an hour or more.

60 percent of these "agreements" do not require the arbitrator to have a law degree.

75 percent of accounts with forced arbitration clauses also prohibit class actions, even in an arbitration setting.

One third of checking accounts unilaterally limit the bank's exposure to damages, and 13 percent shorten the statute of limitations.

The "agreements" between the bank and consumers are included in disclosures that are twice as long as *Romeo and Juliet*.

general counsels publicly acknowledge as a key advantage.[31]

One important element of the civil justice system is its role in uncovering information that shows misconduct, negligence and wrongdoing. Through discovery, plaintiffs' attorneys have frequently compelled corporations to disclose documents that revealed known dangers in products and services they have chosen to sell to unsuspecting customers. For instance, discovery revealed that General Motors knew the Chevy Malibu's gas tank design was defective, but decided it was cheaper to risk its customers burning to death than to fix the problem.[32] Discovery uncovered evidence that ILR board member Honeywell International knew that Zylon – the material used in bulletproof vests and sold to law enforcement agencies around the country – rapidly degraded in hot and humid environments, allowing bullets to injure or kill police officers.[33] And discovery exposed that ILR board member Johnson & Johnson knew its Ortho Evra birth control patch drastically increased a woman's risk of blood clots and stroke – a fact that Johnson & Johnson was unlikely to admit on its own.[34]

For all these examples of known misconduct and coverups, there are countless more that will never be known because forced arbitration contracts will prevent victims from bringing their cases to open court. For example, in 2012, more than 500 Wall Street brokers who had been found to have mishandled investors' money had their complaint records erased by arbitrators at FINRA, meaning future investors would have no knowledge of their prior misconduct. The records were cleared either without input from the investors, or in some cases after the investor had been offered money to agree to the record-scrubbing.[35] A 2013 study by the Public Investors Arbitration Bar Association (PIABA) similarly found that stockbrokers had their records wiped clean in 97 percent of arbitration cases resolved by settlement or stipulated award.[36] When states, such as California, have passed legislation demanding arbitration organizations release certain case information – including the companies and individual arbitrators involved – to try and stop "repeat player" problems, the arbitration companies have stonewalled the requests.[37]

However, while forced arbitration is not transparent, it is also not confidential, meaning a corporation can choose to reveal a consumer's personal information during a forced arbitration hearing. Corporations have even been known to issue press releases publicizing personal information in the middle of a dispute.[38]

Under these circumstances forced arbitration does not sound so fair. Despite business surveys claiming Americans like the idea of arbitration, the truth is that when presented with all the facts Americans overwhelmingly disapprove of forced arbitration (81 percent).[39]

There is Srength in Numbers, So the U.S. Chamber is Trying to End That, Too

In 2012, the National Chamber Litigation Center joined the lawsuit *Kilgore v. KeyBank* to try to compel arbitration in a case involving students of a California helicopter flight school. KeyBank helped the school recruit students by offering $50,000 loans, which went directly to the school upon enrollment. The flight school, however, closed without warning soon after, leaving the students with massive student loans and no education to show for it. KeyBank refused to refund any portion of the loans and demanded repayment.[40]

The California flight school turned out to be just one of many suspicious loan-school arrangements in which KeyBank was involved. Similar trade schools in other states were funded exclusively through KeyBank loans. Students could not use other loans, and when the schools suddenly closed, they were told they had to either pay in full or take on more loans in return for waiving legal rights.[41]

KeyBank's widespread alleged fraud seemed appropriate for class action status, but the Chamber persuaded the U.S. Court of Appeals for the Ninth Circuit that KeyBank's loan contracts compelled the students to give up their rights and take their chances in individual arbitration hearings.

The U.S. Chamber's Idea of Justice

That forced arbitration has become so prevalent is at least in part due to the efforts of the U.S. Chamber of Commerce. Over the last decade, the U.S. Chamber has spent over $1 billion on a high profile multi-front campaign to block individuals' access to the courthouse, including intensive lobbying, multi-media blitzes, large conferences and even cinema advertising. The campaign for forced arbitration has been stealthier. The business behemoth is pickpocketing Americans' rights without the consumers even knowing it.

Rather than on the big screen and on expensive multimedia sites, this particular campaign has been waged in Congressional offices, at regulatory agencies, in the halls of academia, and perhaps most importantly, in the very courts forced arbitration seeks to replace.

The U.S. Chamber & Academia*

The U.S. Chamber's efforts began in earnest in 2007, after a damning Public Citizen report, which found that credit card forced arbitration was wildly biased against consumers.[42] The U.S. Chamber searched the academic world for a response. They found a willing partner in Peter B. Rutledge, a former associate at a tobacco industry law firm, and at the time a professor at Catholic University's Columbus School of Law. Rutledge was an arbitrator for the American Arbitration Association and would later become counsel to the National Chamber Litigation Center (NCLC), the litigation arm of the U.S. Chamber.[43] Ironically, Rutledge had previously expressed concerns about forced arbitration, saying arbitrators were prone to favor particular industries, and that confidentiality provisions were a guise to cloak the independence and reputation of arbitrators.[44] After being compensated by the Chamber, Rutledge decided that empirical support for the idea that arbitration was biased was "mixed at best," and that if it did exist, it was the result of "benign causes." Dubious practices might exist, Rutledge admitted, but complaints about them were "exaggerated."[45]

University of Kansas law professor Christopher Drahozal highlighted problems with arbitration in his research, including arbitrary rules, and caps or even outright prohibitions on damages hidden within forced arbitration agreements.[46] Nevertheless, Drahozal would eventually become one of

Christopher Drahozal & Institute for Legal Reform executive Lisa Rickard at the 2009 ILR "Research Award" ceremony

* *Corrections have been made to this section to more accurately reflect the work of Professor Christopher Drahozal.*

the most prolific writers on forced arbitration, publishing at least 12 articles since 2007 pushing back against criticisms of arbitration.[47] In 2009, ILR awarded the Searle Civil Justice Institute its "Research Award" for a consumer arbitration research initiative led by Drahozal and a corresponding report, recognizing Drahozal as being "instrumental in the creation of the report."[48]

Lobbying – the 800-Pound Gorilla

As far back as the 1990s, the U.S. Chamber was described as Washington's 800-pound gorilla. Since then, the U.S. Chamber's revenues have more than quadrupled, money that is has subsequently plowed into Congress. Since 1998, the U.S. Chamber has spent over $1 billion lobbying Congress – more than three times the lobbying expenditures of second-place General Electric (a U.S. Chamber member).[49] The U.S. Chamber is now Washington's 3,000-pound gorilla, and it loves forced arbitration.

With the U.S. Chamber leading the way, Corporate America is pushing forced arbitration across the board. Between 2011 and 2013, 103 lobbyists registered to lobby against various iterations of the Arbitration Fairness Act, including representatives of the U.S. Chamber, the American Tort Reform Association (ATRA), the American Insurance Association (AIA), American Express, and AT&T.[50]

But the U.S. Chamber has not restricted its attempts at influence to politicians. More recently, the business lobby has attempted to bring regulatory agencies around to its way of thinking. The Chamber has even pulled in its Center for Capital Market Competitiveness (CCMC), the lobbying division it created in 2007 to push for greater regulatory "freedom" for financial entities. When financial deregulation became a less convincing clarion call in the wake of 2009's Great Recession, the CCMC joined the arbitration campaign, and began lobbying the Consumer Financial Protection Bureau (CFPB).[51]

The U.S. Chamber and the Courts

Despite the immense wealth brought to bear in the U.S. Chamber's lobbying, nowhere has the campaign been more influential than in the courts. The U.S. Chamber's litigation arm, the National Chamber Litigation Center (NCLC) has joined lawsuits to enforce forced arbitration more than 50 times in the last 10 years, including 20 since 2012.[52]

The top target of this attention has been the U.S. Supreme Court. Corporate America has long understood the importance of landing favorable verdicts at the highest level. The vast majority of groups urging the court to take a case are pro-business and anti-regulation.[53] Yet no interest group in America has the U.S. Supreme Court's ear like the Chamber.

The Justices receive approximately 8,000 petitions each year but agree to hear only around 75. When the U.S. Chamber is involved, the petition is far more likely to be accepted. About a third of the U.S. Chamber's preferred cases are taken up, a rate far higher than any other frequently petitioning group, earning it a reputation as "the country's preeminent petition-pusher."[54] Moreover, since Justice Roberts' confirmation in 2005, the U.S. Chamber has won 69 percent of cases in which it has gotten involved, up from its 56 percent win rate in the decade prior.[55]

The U.S. Chamber has an unrivaled relationship with the Roberts-led Supreme Court. The U.S. Chamber's top regulatory lawyer, Rachel Brand, helped Chief Justice Roberts through his Senate confirmation hearings an assistant attorney general with the Bush administration. The U.S. Chamber's involvement in a case, according to experts, sends a signal to the Roberts-led court of what business wants.[56]

When it comes to forced arbitration, the U.S. Chamber's influence is especially clear. The U.S. Chamber has persuaded the Court to take 13 arbitration cases over the last several years, and only been denied cert three times. Of those that have been heard, the U.S. Chamber has won 10, for a success rate of 83 percent (one case is on appeal to the U.S. Supreme Court, which has not decided whether it will hear the case).[57]

In 2011, the U.S. Supreme Court gave the Corporate America its biggest win of all in *AT&T Mobility v. Concepcion*. Liza and Vincent Concepcion had sued AT&T over phones they had purchased, which came with with undisclosed fees. The fees were small enough that pursuing an individual case was not practical, but when taking into account the other AT&T customers in the same position, the case represented millions of dollars in alleged fraud. When joined together as a class, the customers had a strong chance of holding AT&T accountable for its actions. The U.S. Supreme Court sided with AT&T and the U.S. Chamber and decided that one clause in AT&T's 42-page customer agreement was enough to stop any such group action. Customers could only seek recourse through individual arbitration hearings. AT&T is a board member of the U.S. Chamber.

This, and other cases pushed by the U.S. Chamber have resulted in a slew of business-favoring decisions at the U.S. Court of Appeals and U.S. Supreme Court. Neither are individual states immune. The U.S. Supreme Court's sweeping decisions in favor of the Federal Arbitration Act trump all state attempts to retain individual rights.[58]

Why Forced Arbitration?

In the words of U.S. Chamber's CEO, Tom Donohue, "we have to raise $5 million a week to run this place."[59] That means, despite its frequent claims to be the voice of small-business, the U.S. Chamber relies heavily on big contributions from big corporations. To land such funding, the U.S. Chamber has to offer something concrete in return. And that is where forced arbitration comes in.

What Do the Companies Get Out of it?

Consider how the members of the U.S. Chamber and its affiliate organizations directly benefit from forced arbitration:

- Insurance giant Nationwide successfully appealed to an arbitration panel to impose a 76 percent rate increase on homeowners in Florida, even after the state insurance commissioner had denied it.[60]
- Goldman Sachs, one of the U.S. Chamber's largest donors, has used forced arbitration to try to avoid accountability for alleged systematic discrimination against female executives.[61]
- Ernst & Young avoided accountability for unpaid overtime after successfully forcing the plaintiff Stephanie Sutherland, and other employees in the same situation, into individual arbitration rather than as a class action. Sutherland showed in court that it would cost far too much to bring the case individually, but the U.S. Court of Appeals for the Second Circuit ruled that she could not waive the forced arbitration requirement, thus allowing the corporation to escape paying overtime.[62]
- FedEx demanded its drivers agree to forced arbitration in order to join the company. The provisions were provided to the drivers after they had purchased their own trucks and undergone training, ensuring that they had no real option to decline. Many of these drivers were then terminated. Upon protesting the terminations, they were told they would have to spend more than $6,000 in arbitration fees before any hearing could be held (a U.S. District Court Judge eventually ruled that the agreements were so one-sided they were unconscionable, and that the drivers could take their cases to court).[63]
- American Express employed forced arbitration agreements with small businesses that banned arbitration on a class basis. When those merchants alleged American Express was using its monopoly status to charge inflated fees, and violating antitrust law, they were unable to bring a collective action, even after proving that the cost of pursuing individual claims vastly exceeded any potential recovery, making it

impossible for the small businesses to file claims. With a group action prohibited, American Express were off the hook for violating federal anti-trust laws.[64]

- In 2009, JP Morgan Chase agreed to remove forced arbitration provisions from its credit cards to settle a class action law suit, saying the decision was, "the right thing for our customers and our business, and it reflects our commitment to clearer and simpler communication with our customers." The company pledged to stop using forced arbitration for at least three and a half years. However, a 2012 study by the Pew Charitable Trusts found JP Morgan Chase demanded forced arbitration for anyone opening a checking account.[65]

- Prudential is one of many financial firms that have been accused of using forced arbitration as a bludgeon against investors that have the temerity to take it to court. Despite insisting investors use forced arbitration when they have a complaint, Prudential and others routinely file frivolous appeals in court when they lose, to the point that judges have begun threatening the corporations' attorneys with sanctions. According to investor attorney Thomas Ajamie, "firms are trying to wear down investors," in a "war of attrition." Ajamie represented a New York couple who found their life savings whittled down from $23 million to less than $1 million under Prudential's management. Prudential required the couple to arbitrate, but when a three-person arbitration panel from the New York Stock Exchange (NYSE) – all three of whom were considered Wall Street-friendly – awarded them $12 million, the company immediately moved to appeal the award, calling it "irrational."[66]

The Making of Goliaths

Many of these corporations are highly skilled at administering forced arbitration systems. Corporations like ExxonMobil routinely engage in billion-dollar arbitration cases against other corporations and even countries.[67] Corporations have begun installing dedicated arbitration teams within their legal departments, advised by the likes of PricewaterhouseCoopers – another ILR board member that has made millions telling corporations how to succeed in arbitration.[68] Many ILR company executives – including executives from AIG, ACE Group Holdings, Liberty Mutual, and Odyssey Re – double as arbitrators themselves, or are on the board of arbitration groups.[69]

For these giant corporations, forced arbitration has accomplished what decades of money poured into campaigns to change the tort laws did not achieve: provide an end-run around the civil justice system and an escape from legal accountability. Companies are even beginning to include forced arbitration clauses in shareholder contracts to repress corporate activism and protect themselves from shareholder claims.[70] On January 10, 2012, the day the U.S. Supreme Court handed down its opinion in *CompuCredit v. Greenwood*, U.S. Chamber board member the Carlyle Group amended its Initial Public Offering (IPO) filing with the SEC that would force arbitration onto shareholders. The provision would have meant any investor buying stock in the company would automatically have agreed to forced arbitration in Delaware, regardless of the conduct of the Carlyle Group. It also negated any requirements for an independent board, and other checks and balances designed for public companies. After considerable public pressure, Carlyle backed down.

Forced Arbitration's Critics? Corporations

The surge in forced arbitration, and its acceptance by the courts, has without question been a billion-dollar windfall for Corporate America. Ironically, Corporate America is also one of forced arbitration's biggest critics. That is, at least, when the deck is not stacked in their favor.

Despite corporations' apparent love of forced arbitration when it comes to dealing with consumers, they are far less likely to allow themselves to be forced into arbitration when it comes to dealing with other corporations. One study of the contracts of major U.S. corporations, including – among others – AT&T, American Express, and Bank of America, found arbitration clauses in 93 percent of employment contracts, 77 percent of consumer contracts, but only 6 percent of non-consumer contracts.[71]

Many corporate executives and representatives have publicly declared their disdain for forced arbitration. The Sports & Fitness Industry Association (SFIA), which in its past incarnation as the Sporting Goods Manufacturers Association (SGMA) was one of the biggest advocates for tort reform, now argues litigation is faster, cheaper and fairer than arbitration.[72] Motorola's former head of litigation, Kathy Bryan, told *Inside Counsel* magazine, "there is tremendous dissatisfaction with domestic arbitration. It's too expensive, too process oriented, not responsive enough and the quality of arbitrators is all over the map."[73]

In 2002, the National Automobile Dealers Association (NADA) persuaded lawmakers to exempt them from the FAA and make forced arbitration agreements between dealers and vehicle manufacturers invalid. Senator Orrin Hatch (R-Utah), who introduced "The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001," claimed the exemption was necessary because of the unequal bargaining power between manufacturers and dealers. Dealers, of course, continued to insert forced arbitration clauses in contracts with consumers.[74]

"Forced arbitration is the real poison"
– U.S. Chamber of Commerce

In 2009, the U.S. Chamber led the business community in spending millions of dollars to oppose forced arbitration provisions aimed at settling labor disputes in the Employee Free Choice Act. Hypocritically, they argued such provisions would mean an arbitrator who knew nothing about a company would be able to dictate workplace rules and salary structures.[75] It was then that the U.S. Chamber's general counsel, Steven Law, allowed the truth to come out: "forced arbitration," he said, "is the real poison."[76]

Conclusion

Arbitration's defenders claim it is more efficient and less costly than the civil justice system. If this were true, arbitration would not have to be forced on mostly unwitting consumers. The truth is the U.S. Chamber's forced arbitration campaign has been nothing less than a rights grab of unprecedented sweep. Millions of Americans have had their constitutional protections stripped away by boilerplate fine print slipped into every imaginable contract.

With their accountability eliminated, corporations have found themselves free to cheat and abuse customers and employees, encouraged by the fact that such abuses have gone unchecked. And without a public record of theses abuses, Americans will have no way of knowing just how much danger these products and services pose. When no one is accountable, no one is safe.

While courts across the land have attempted to stand up to the unfairness of forced arbitration, such attempts at preserving protections have been stymied by the U.S. Supreme Court. The Court's consistent message has been that individuals, groups, and states will not be allowed to circumvent the FAA no matter how virtuous their cause.

This means that any respite from the abuses of forced arbitration lies with Congress and federal agencies. Without Congressional action, corporations will use forced arbitration for what it is – a licence to steal.

Appendix

Significant Arbitration Cases

Rent-A-Center, West, Inc. v. Jackson – 2010

The Decision: The U.S. Supreme Court held that if a corporation's forced arbitration clause includes language delegating fairness decisions (i.e., whether or not the clause is enforceable) to the arbitrator, the decision whether or not a case must be arbitrated in the first place, must be heard…by an arbitrator.

The Effect: This decision effectively requires individuals challenging the validity of forced arbitration clauses to be subject to forced arbitration over that very clause. Worse, individuals challenging these clauses (usually on fairness or conscionability grounds under state law) can actually be forced to travel cross-country and spend exorbitant amounts of money just to arbitrate in a location selected by the terms of the contract, and heard by an arbitrator with an obvious interest in upholding the arbitration clause.

AT&T Mobility LLC v. Concepcion - 2011

The Decision: The U.S. Supreme Court held that the FAA allows corporations to ban class actions and force consumers into a corporate-designed system of forced arbitration. The Court held that even when an existing state law protects individuals from abusive forced arbitration clauses, the FAA broadly overrides these state laws. The Court noted that even when a corporation's contract violates a state law prohibiting class-action bans, the contract provision may be upheld as long as the provision is part of a forced arbitration clause.

The Effect: The Supreme Court's holding in *AT&T Mobility v. Concepcion* has had far-reaching consequences for millions of consumers who are forced to sign away their rights to get a loan, a credit card, a cell phone, and other everyday consumer products and services. Under *Concepcion*, corporations can insert forced arbitration clauses in the fine print that block consumers from banding together to pursue their claims in collective or class actions.

CompuCredit Corp. v. Greenwood – 2012

The Decision: The U.S. Supreme Court held that where a federal law does not explicitly state whether claims under the law may or may not proceed in forced arbitration, the

FAA requires enforcement of the arbitration clause.

The Effect: Lower courts have relied upon this decision to uphold unconscionable forced arbitration clauses in the face of landmark state and federal laws, including federal antitrust law, civil rights actions, and military protections such as the Servicemembers Civil Relief Act (SCRA).

For example, a federal court recently relied on *CompuCredit* to prevent a servicemember from exercising his rights under SCRA because SCRA does not explicitly prohibit the use of forced arbitration clauses or class action waivers. The case involved a predatory auto dealer who engaged in blatant predatory practices and SCRA violations against numerous servicemembers and their families. Because of *CompuCredit*, these servicemembers and their families were denied the opportunity to vindicate their SCRA rights in court and were instead forced into an expensive, individual private arbitration.

American Express Co. v. Italian Colors Restaurant – 2013

The Decision: The U.S. Supreme Court upheld American Express' take-it-or-leave-it merchant contracts requiring individual forced arbitration to resolve disputes and specifically ban class actions in any forum (arbitration or court). Small business owners including Italian Colors restaurant sued American Express alleging a violation of federal antitrust laws. In the opinion, Justice Scalia admitted that while the maximum recovery for a single small business might be only a small fraction of the costs necessary to actually prove the antitrust claim, antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.

The Effect: The *American Express* decision held that the FAA protects a corporation's right to insulate themselves for violating the law by making it too expensive for small businesses or individuals to file a claim. The Court eviscerated the "effective vindication rule" and granted immunity to corporations by allowing the insertion of class bans in abusive forced arbitration clauses. This opens the door to absurd scenarios where corporations possess the legal ability to set exorbitant filing fees, one-day statute of limitations, and even appoint its own CEO as the designated arbitrator.

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