Statement of

The Honorable Russ Feingold

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Opening Statement of U.S. Senator Russ Feingold
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Hearing On "The Arbitration Fairness Act of 2007"

As Prepared for Delivery

One of the most fundamental principles of our justice system is the right to take a dispute to court. Indeed, all Americans have the constitutional right in civil and criminal cases to a trial by jury. The right to a jury trial in civil cases in Federal court is contained in the Seventh Amendment to the Constitution. Many States provide a similar right to a jury trial in civil matters filed in state court.

I have been concerned for many years that mandatory arbitration clauses are slowly eroding the legal protections that should be available to all Americans. A large and growing number of corporations now require millions of consumers and employees to sign contracts that include mandatory arbitration clauses. Most of these individuals have little or no meaningful opportunity to negotiate the terms of their contracts and so find themselves, if they even realize that the provision is in the contract, having to choose either to accept a mandatory arbitration clause or to forgo securing employment or needed goods and services. Perhaps most disturbingly, mandatory arbitration clauses are being used to prevent individuals from trying to vindicate their civil rights under statutes specifically passed by Congress to protect them.

There is a range of ways in which mandatory arbitration can be particularly hostile to individuals attempting to assert their rights. For example, the administrative fees--both to gain access to the arbitration forum and to pay for the ongoing services of the arbitrator or arbitrator--can be so high as to act as a de facto bar for many individuals who have a claim that requires resolution. In addition, arbitration generally lacks discovery proceedings and other civil due process protections. Furthermore, under a developing body of case law, there is no meaningful judicial review of arbitrators' decisions.

Unfortunately, in a variety of contexts--employment agreements, credit card agreements, HMO contracts, securities broker contracts, and other consumer and franchise agreements--mandatory arbitration is fast becoming the rule, rather than the exception. The practice of forcing employees to use arbitration has been on the rise since the Supreme Court's Circuit City decision in 2001. Unless Congress acts, the protections it has provided through law for American workers, investors, and consumers, will slowly, but surely, become irrelevant.

Just as its name suggests, the Arbitration Fairness Act is designed to return fairness to the arbitration system. Arbitration can be a fair and efficient way to settle disputes. I strongly support voluntary, alternative dispute resolution methods, and we ought to encourage their use. What this bill does is ensure that citizens once again have a true choice between arbitration and the traditional civil court system by making unenforceable any predispute agreement that requires arbitration of a consumer, employment, or franchise dispute. The bill does not apply to mandatory arbitration systems agreed to in collective bargaining, and it certainly does not prohibit arbitration if all parties agree to it after a dispute arises.

Let me quickly address two questions that have arisen about the bill. First, it is intended to cover disputes between investors and securities brokers. I believe that such disputes are covered by the definition of consumer disputes, but to clear up any uncertainty, we will make the intent even clearer when we mark up the bill in committee.

Second, as I mentioned, the bill covers consumer, employment, and franchise disputes, each of which is a defined term. In addition it covers disputes that arise under civil rights statutes or "any statute intended . . . to regulate contracts or transactions between parties of unequal bargaining power." Some opponents of the bill have seized on that language and misstated it, saying that the bill covers any contract between parties with unequal bargaining power. They then say that such a provision is overbroad and very vague. I actually agree that such a provision would be problematic, but of course, that's not what the bill says. The provision in question is essentially a savings clause, so that a cause of action under a civil rights statute or a statute that is specifically designed to address disparities of bargaining power can be brought in court, even if the dispute does not meet the definition of a consumer or employment or franchise dispute. I hope this helps to clear up any misunderstanding about the scope of the bill.

In our system of government, Congress and state legislatures pass laws and the courts are available to citizens to make sure those laws are enforced. But the rule of law means little if the only forum available to those who believe they have been wronged is an alternative, unaccountable system where the law passed by the legislature does not necessarily apply. This legislation both protects Americans from exploitation and strengthens a valuable alternative method of dispute resolution. I look forward to exploring the implications and details of this bill with our witnesses.

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