Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Hearing of the Senate Judiciary Committee

Short-change for Consumers and Short-shrift for Congress?
The Supreme Court's Treatment of Laws that Protect
Americans' Health, Safety, Jobs and Retirement

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Mr. Chairman, thank you for calling this hearing. This Committee has a unique and important role to play in educating the public about the effect of Supreme Court decisions. The Court has made numerous decisions interpreting federal banking, health care, and consumer protection statutes that have far reaching implications for the health and personal finances of millions of Americans. Decisions on controversial social issues typically get the headlines, and there is no denying that they are important. But the impact on ordinary people of the decisions that our witnesses will discuss today is often much greater.

Some of today's testimony is truly tragic. Particularly in the area of ERISA preemption, the Court's decisions have a very real effect on Americans' health and well-being. That's because, when the Court decides that state tort claims are preempted, it isn't just deciding that certain people will not get the compensation they deserve through lawsuits. Rather, it is creating incentives for insurance companies and HMOs to deny coverage and prevent people from getting the treatment or the medication that they need to survive. As hard as it is to hear these stories, I'm glad this hearing is focusing attention on the real victims of these decisions by the Supreme Court.

I wanted to highlight one area that is briefly mentioned by one of the witness, but not explored in much detail in the testimony - mandatory arbitration. One very good example of a very old federal statute that has been interpreted in a way that causes great harm to consumers is the Federal Arbitration Act. That statute was passed in 1925 to give legal approval to a process that had been developed to allow businesses to adjudicate their disputes with each other outside of the regular legal system. Arbitration was in its infancy and participants in it needed the certainty that they could enforce the decisions of arbitrators in court. The FAA decreed that contracts to arbitrate could be enforced in court like any other contract.

In decisions beginning in the 1980s, the Supreme Court began to very broadly interpret the FAA, turning it into a tool for corporations to abuse their greater bargaining power in their dealings with consumers and employees. The Southland case in 1984 held that the FAA preempted state laws that prohibited arbitration provisions in certain contracts. The Circuit City case in 2001 narrowly interpreted the exemption from the FAA for employment contracts. As Justice Stevens noted in his dissent in Circuit City:

"[N]either the history of the drafting of the [Federal Arbitration Act] by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment."

The result of these and other decisions has been to encourage and approve the use of mandatory arbitration in a whole range of contracts that average citizens and consumers are pretty much forced to accept if they want a credit card, a cell phone, health coverage from an HMO, care for an aging parent in a nursing home, or to invest in the stock market. Through its decisions, the Supreme Court has essentially looked the other way as a parallel legal

system has developed - a system that lacks due process protections and that, in too many cases, is not fair to both sides of a dispute. Most important, that system has not been voluntarily chosen by both parties.

While the subject of today's hearing is the Supreme Court, I think we would be remiss if we didn't note Congress's role in these issues. The federal statutes that the Court has misinterpreted were passed by Congress. They can be amended by Congress. I hope that one result of this hearing will be to refocus attention on legislation that is desperately needed to reverse some of the Supreme Court's most damaging decisions, including those on equal pay, medical device preemption, ERISA, and mandatory arbitration. In the end, while we can complain about the Court's unwillingness to properly interpret congressional enactments, if we don't act to correct the mistakes the Court has made, we have only ourselves to blame.

Thank you Mr. Chairman.