

**Senate Judiciary Committee Hearing**  
**“The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?”**

**Questions for the Record Submitted by Senator Al Franken for Vildan Teske**

**Question 1:** I’ve heard some employment advocates point to the Lilly Ledbetter case as another good illustration of why the Arbitration Fairness Act is necessary. Can you discuss that?

**ANSWER**

The Lilly Ledbetter case is a good example of why consumers, workers, and servicemembers need access to our country’s open public justice system rather than being forced into secretive arbitration proceedings. Because her case was litigated in our public court system, we now have the Lilly Ledbetter Fair Pay Act of 2009.

Ms. Ledbetter filed a Title VII case against her employer, Goodyear, for pay discrimination based on gender. The legal issues in her case went up to the U.S. Supreme Court. The Supreme Court decided against her, holding that her case was filed too late, even though Ms. Ledbetter continued to receive discriminatory pay. The Supreme Court ruled that workers cannot challenge ongoing pay discrimination if the employer’s original discriminatory pay decision occurred more than 180 days earlier, even when the employee continues to receive paychecks that have been discriminatorily reduced. This decision severely limited the ability of victims of pay discrimination to sue and recover damages under Title VII of the Civil Rights Act of 1964. It also undermined the Congressional goal of eliminating pay discrimination in the workplace. Recognizing the unfairness of having the 180 days begin at the time the discriminatory pay decision was made by the employer (which could be many years before the employee learns that she is being discriminated against and that others are being paid more for the same work, as was in Ms. Ledbetter’s case), Congress took action. It passed the Lilly

Ledbetter Fair Pay Act which made clear that the statute of limitations clock is reset with each paycheck that is the result of discriminatory pay decision.

Had Ms. Ledbetter's employment contract contained a forced arbitration clause, the outcome would have been very different. Her case would have been forced into private arbitration and the public would not have known about the discrimination and the legal issues involved in her case. Nor would Congress have become aware of the unfairness of applying the statute of limitations in the way it was in her case. Employers that chose to discriminate in pay could have continued to do so because the employee's ability to challenge the practice would be foreclosed by an unfair application of the statute of limitations. We might have had many Lilly Ledbetters, i.e. victims of discrimination based on gender, race, age, disability, or religion, but the public, and Congress, would not have known about it. Our country would not have had the public discourse regarding this very important issue and we would not have had the resulting legislation. Simply put, forced arbitration keeps illegal practices from coming to light.

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**Question 2:** Some people have argued that limiting class actions – as *Concepcion* did – is a good thing because class actions benefit plaintiffs' lawyers and nobody else. Can you respond to that argument and talk about the value of class actions?

**ANSWER**

When individuals are forced into arbitration and their rights to bring class actions is cut off, the corporate wrongdoer benefits. Class actions are often the only way that American servicemembers, consumers, small business owners and workers can hold corporations accountable for wrongdoing. When facing powerful and well-funded corporate defendants engaged in reckless and corrupt behavior, class actions level the playing field by allowing injured Americans to bring their claims by banding together. This is especially important when

it is economically infeasible to bring a case as an individual action. Class actions give persons who are injured in the same manner by the same defendant the ability to hold the wrongdoers accountable.

Class actions are an efficient mechanism to deal with what would otherwise be a large number of small and repetitive cases with the same facts and the same law. Through class certification, courts can consolidate similar cases, conserving judicial resources.

Our court system has in place a number of tools to ensure class actions are litigated in a manner fair to both plaintiff class members and to the defendant(s). Federal Rule of Civil Procedure 23 (and its state law counterparts) governs the procedures to be followed in class actions and provides important safeguards whenever a case is litigated as a class action. Not only is there a high bar for which cases are certified as a class action, but there is also a stringent body of law requiring any class action settlement be reasonable and fair to the class members. All class settlements must be approved by the court after meticulous review of the settlement agreement's terms and, most importantly, the benefits to the class members. Furthermore, most class cases are litigated on a contingency fee system. The attorneys representing the plaintiff class members only get paid if they provide a benefit to the class members and only after the court has carefully reviewed and approved any fees.

If any class member feels a settlement is unfair, or the attorney fees being sought are unmerited, they can object to the settlement and ask the judge not to approve it. After the judge approves the settlement (and any counsel fees), any interested party can appeal that order. In other words, our public system of civil justice along with the body of class action law that has developed over the last five decades, provides the tools to ensure the class action process is fair and just.

Indeed, class actions have a proud history and have played a central role in some of the most pivotal moments in our nation's social justice trajectory. Perhaps the crowning achievement of class actions lies with *Brown v. Board of Education*, the U.S. Supreme Court's seminal case outlawing racial segregation. Class action litigation has, likewise, borne positive results in the form of safer consumer products, such as automobiles, children's toys and pharmaceuticals; safer workplaces; ending discrimination in the workplace based on race, gender, religion, disability and age. The argument that only plaintiffs' lawyers benefit from class actions defies logic given the reality that, in the last half century, the everyday lives of Americans have vastly improved thanks to class action litigation.

Class actions have also uncovered a number of consumer financial frauds that would have continued if left unchallenged - like charging illegal interest fees, adding on bogus fees and charges to accounts, and siphoning illegal, albeit relatively small, amounts of money from millions of consumers. Also, unlike in a forced private arbitration, a class action allows a plaintiff to ask for injunctive relief to stop a defendant from continuing its illegal practices or policies so that other consumers, servicemembers, workers, and small businesses will not have their rights violated in the future. In my own practice, my colleagues and I have been able to recover millions of dollars for consumers and servicemembers in class actions that exposed and stopped illegal and fraudulent practices. It is almost certain that, had we not taken on those cases, the many class members we represented would not have obtained any redress absent the class action procedure. Had those cases been forced into private, individual arbitrations, only a very small percentage of those that had been victimized by the illegal practice would have been able to receive any relief.

In conclusion, as a result of *Concepcion*, forced arbitration clauses that ban collective or class actions have an enormously negative impact on servicemembers, consumers, small business owners and workers whose claims can be small individually, but large in the aggregate and for whom it is not economically possible to file a claim on an individual basis in any forum, arbitration or court. The result is that corporations that choose to break the law are immune and are never held accountable in any forum.

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**Question 3:** You testified that mandatory, pre-dispute arbitration clauses and class actions allow corporations to get away with illegal and abusive practices perpetrated against service members. Please explain the impact that these practices have on service members' finances, readiness, rankings, and careers.

**ANSWER**

Mandatory, pre-dispute arbitration clauses and class action bans in consumer contracts give corporate wrongdoers a get out of jail free card when they break the laws that protect our country's servicemembers. Illegal conduct is much less likely to be challenged when such clauses are in servicemembers' consumer contracts. A servicemember should have the ability to bring a court action to represent not only himself, but also all the other servicemembers that were subjected to the same illegal conduct by the same defendant.

Illegal and abusive practices such as predatory and deceptive lending, wrongful foreclosures, illegal repossessions of servicemember vehicles, illegal fees and interest rates on servicemember loans, among other violations of the law, impact our servicemembers in a variety of negative ways. A servicemember that experiences financial difficulties, exacerbated further by illegal actions taken by creditors, faces the possibility of disciplinary action by his or her unit. Such disciplinary action can include letters of reprimand, non-judicial punishment, loss of

promotions, and in the extreme case, separation from the military.<sup>1</sup> One of the main concerns for my servicemember clients that have faced financial difficulty and adverse action by their creditors is the potential for losing their security clearance. Loss of security clearance may result in a demotion or the loss of the opportunity to advance in their career.

Furthermore, financial problems caused or exacerbated by a creditor's illegal actions against a servicemember jeopardize troop readiness when a servicemember is under stress and is unable to devote all of his or her energy to the defense needs of the nation.<sup>2</sup> Our military members should not have to be worrying about whether their house is going to be foreclosed, or whether their family vehicle is going to be repossessed while they are deployed.

Our servicemembers deserve to know that creditors will not be allowed to break the laws meant to protect our military, and then hide behind forced arbitration clauses and class action bans. Servicemembers must have access to our public court system and have the ability to band together in a class action when their rights are violated.

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<sup>1</sup> See e.g. Department of Defense, Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents (Aug. 9, 2006), pp. 42-43, <http://1.usa.gov/rVdafq>.

<sup>2</sup> *Id.* at p. 53.