U.S. Senate Judiciary Committee

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Testimony in Response to Supplemental Questions

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QUESTIONS FROM SENATOR BLUMENTHAL

1. *The fight over forced arbitration clauses is often portrayed as a fight between plaintiffs and defendants. Your testimony suggests that this is too simple. Private litigants, in effect, serve as private attorneys general, protecting the rest of us from wrongdoing.*

    a. ***Why should Americans who will never file a lawsuit nonetheless care about forced arbitration agreements?***

ANSWER:

Even if a given person is not likely to file a lawsuit if a corporation breaks a law and harms them, they still have an enormous stake in corporations following the laws. Every American benefits when corporations are discouraged from engaging in deceptive practices, for example, that undermine the operations of the market and honest actors. Every American benefits from the antitrust laws being powerful and effective.

As I argued in my testimony, forced arbitration undermines private enforcement of the laws in America that protect consumers, workers, investors, small businesses, medical patients, and others. While many people are reluctant to personally get involved in lawsuits, they still benefit enormously when the laws are effective.

2. *Supporters of forced arbitration will sometimes admit that many of the practices that are common in American arbitration today simply cannot be defended. But they claim that the solution is simply to fix forced arbitration.*

    a. ***Could policymakers simply fix forced arbitration by changing the arbitration process while leaving Americans subject to forced arbitration agreements?***

ANSWER:

Arbitration clauses are drafted by the stronger party to contracts, generally in standardized form contracts, and with very few exceptions, in ways that only a tiny number of people will read. Trying to fix the problems with forced arbitration by tinkering around the edges through regulation of the arbitration process will not change the fundamental dynamic that currently has one party to a dispute drafting one-sided and unfair systems. To fix the process, legislators would have to anticipate all the different ways an arbitration clause could be slanted against the weaker party, who didn't draft it, and ban them. But for every trick and trap that the Congress would forbid, clever corporate lawyers could generate ten more that weren't foreseen.

Also, it's important to remember that the U.S. Supreme Court has held that a great many challenges to arbitration clauses must be decided by arbitrators rather than courts if the corporation puts into the arbitration clause fine print that says that the arbitrator will decide this issue. As a result, even if this Congress were to pass a law regulating arbitration, and banning various abuses of arbitration clauses (such as provisions that strip people of their rights under substantive statutory provisions, or provisions that ban workers or consumers from bringing class actions), this might be undermined by the Federal Arbitration Act. Under current law, those provisions might not mean much, because arbitrators (not courts) would be the decision makers with the power to enforce them, and arbitrators have a strong incentive to find the provisions enforceable.

3. *You have testified that large corporations have a great deal of influence over the structure and practice of arbitration. In general, if the customer has no power and the seller has lots of power, basic economics would suggest that the customer is going to get the raw end of the deal.*

    a. ***Based on your research, do the corporations that force their customers into arbitration design arbitration programs with those customers' best interests in mind?***

ANSWER:

Corporate lawyers tend to believe that laws that limit the corporation – consumer protection, worker protection – are impediments to be avoided. In my experience, corporations that adopt arbitration clauses are doing this in order to give them immunity from laws. The idea that they are forcing people into arbitration for the customers' best interests is a product of an energetic public relations campaign, rather than reality.

4. *In his testimony, Mr. Kaplinsky makes the case that arbitration is "faster, less expensive and far more beneficial to consumers." But if Mr. Kaplinsky were correct, it seems like consumers would leap at arbitration. Corporations could just wait until a dispute arises and then give consumers a free and clear choice between arbitration on the one hand and a judge and jury on the other.*

a. If corporations gave consumers this kind of free and clear choice after a dispute has arisen, would you be okay with that?

ANSWER:

Our concerns are entirely with pre-dispute arbitration. If consumers, workers or others were to affirmatively choose to arbitrate cases after a dispute arises, I do not object to such a situation. Obviously, courts would need to police such disputes the way they police all contracts (so, a nursing home shouldn't be able to come up to someone grieving after the death of a loved one and ask them to sign a number of fine print documents that they don't understand). One important addition I would suggest, however: if there are disputes about the validity of a post-dispute arbitration clause, those should be resolved by a court, rather than an arbitrator. The current body of law under the Federal Arbitration Act that often has arbitrators determining their own jurisdiction is problematic, as arbitrators have a strong financial incentive to find that the claims may be forced into arbitration.

5. In his testimony, Mr. Kaplinsky says that "courts rigorously protect consumers from unfair arbitration agreements."

a. If a consumer signs an arbitration agreement buried in a contract that she did not have a reasonable chance to read, would a court invalidate that agreement?
b. If she would never have signed the agreement had she been aware of the arbitration clause, would the courts invalidate that agreement?
c. If her only alternative to signing the agreement was losing her job, her phone, or some other necessity of modern life, would the courts invalidate that agreement?
d. In your view, do courts "rigorously protect consumers from unfair arbitration agreements"?
e. Can you give some examples of unfair arbitration agreements that were not invalidated by the courts?

ANSWERS:

a. There are some cases where courts have refused to enforce arbitration clauses that were hidden from consumers in certain ways, such as, the arbitration clause was contained in some part of a website but the consumer wasn't told that clicking on some button constituted agreement to the terms and conditions. But at the same time, it is very common for courts to enforce arbitration clauses against workers and consumers in all sorts of cases where they did not actually know about the clauses (such as they were buried in fine print in lengthy documents in language that was hard to understand).

b. It is fairly rare to see a worker or consumer successfully defeat an arbitration clause where part of their argument was that if they had known about the clause, they

would have refused to sign it. If the clause was buried somewhere in the fine print, most courts will say something along the lines of "the law does not excuse a party from being bound by a contract term merely because they did not read it." Now, if there are circumstances from which one can argue that the consumer or worker reasonably didn't know about the arbitration clause (which does happen, in particular cases, but is fairly rare), this argument might work, but in the vast majority of cases, it will not succeed.

c. Courts routinely enforce arbitration clauses where a worker would lose her or his job if they did not sign it; this happens routinely, and is the governing rule of law for millions of Americans. Courts enforce arbitration clauses for nearly all consumer goods. The law of duress in most states is only available in quite extreme circumstances, and there are numerous cases of workers forced into arbitration clauses that were imposed after they had been at corporations for years.

d. The law protecting workers and consumers from abusive forced arbitration clauses has deteriorated substantially in the wake of several U.S. Supreme Court decisions of the last 10 years. In the *Rent-A-Center v. Jackson* decision, in 2010, the Court (by a 5-4 vote) held that arbitrators (rather than judges) would generally be entrusted with deciding whether arbitration clauses are unconscionable. This was a substantial change in the law in most jurisdictions. In the years prior to *Rent-A-Center*, there were more than 100 decisions that had struck down arbitration clauses as unconscionable when the clauses contained various unfair terms (meaning, more unfair than just forcing workers or consumers into arbitration in general). In the wake of *Rent-A-Center*, the vast majority of unconscionability challenges have been forced out of court, and turned over to arbitrators. In the vast majority of cases, arbitrators have enforced the clauses, or made minor tweaks to the clauses but still forced the workers or consumers to arbitrate. Accordingly, in the years since 2010, courts have become dramatically less effective in enforcing rules limiting abusive and unfair arbitration clauses.

Similarly, prior to April 2011, the law in the vast majority of the states was that if an arbitration clause that banned class actions was going to undermine or gut the effectiveness of worker or consumer protection laws, then a court would not enforce that clause (or at least the class action ban), on the grounds that it was unconscionable. In the *Concepcion v. AT&T Mobility* case, however, the Supreme Court (again by a 5-4 vote) held that the Federal Arbitration Act preempts and overrides all of those state laws. In the wake of *Concepcion*, courts have been far more reluctant to strike down even the most egregiously unfair forced arbitration clauses, and the effectiveness of courts as a check upon abusive contract provisions has largely disappeared.

e. There are a large number of cases where courts have held that parties "agreed" to arbitration in settings where it was clear that people had not knowingly, intentionally done so. Here are just a few examples: *Jabbari v. Wells Fargo & Co.*, No. 15-CV-02159-VC, 2015 WL 13699809 (N.D. Cal. Sept. 23, 2015) (consumer required to arbitrate claims with Wells Fargo, where consumer alleged that they had never agreed to open an account with bank, where court found that consumer had entered into an authorized (as opposed to the fraudulent) account with the bank at some point – the arbitration clause supposedly required arbitration of claims involving other, unauthorized and fraudulent accounts); *Dantz v. Apple Ohio LLC.*, 277 F. Supp. 2d 794 (N.D. Ohio 2003) (waitress sexually harassed for years by manager; corporation tries to get her to

sign arbitration agreement; she refuses to sign it; court says she's bound to arbitrate anyway because she continued working there); *Dye v. Tamko Building Products, Inc.,* 908 F.3d 675 (11th Cir. 2018) (homeowner must arbitrate claims about defective shingles, where wrapping on shingles dropped off on property had a paper arbitration clause that roofers might have read when they opened the package to install the shingles, and the roofers were deemed authorized to bind the homeowner to the forced arbitration clause in the wrapping if they went ahead and installed the shingles). There are an enormous number of similar cases one could cite.

QUESTIONS FROM SENATOR BOOKER

1. *A recent study published by the Economic Policy Institute examined the proliferation of forced arbitration clauses in employee contracts across industries.[footnote omitted] The study found that the industries with the highest rates of forced arbitration clauses—education and health—have a workforce with more female employees and employees of color than other industries. The study estimated that women and African American employees in particular are the most likely groups to be subject to forced arbitration.*

   The #MeToo movement has revealed the extent of sex-based harassment in the workplace, and a recent study by the National Women's Law Center confirmed that black women disproportionately experience sexual harassment at work.[footnote omitted]

   a. ***Can you provide any relevant data regarding arbitration of sexual harassment and racial discrimination claims?***

ANSWER:

Our organization litigates a substantial number of challenges to forced arbitration clauses where there are flaws – drafting errors, over-reaching, workers or consumers did not agree to the clause – but I regret that we do not do empirical research of the sort that you're addressing in this question.

To the best of my knowledge, by far the best work in the field of empirical data has been done by Professor Alexander Colvin at Cornell Law School, and a number of different collaborators, over a period of years. In a series of published articles, available through SSRN, that he regularly updates, I believe, Professor Colvin has looked at every employment case handled by the American Arbitration Association, and then compared them with a comparable sample size of employment cases handled in courts. His data covers both sexual harassment and radical discrimination cases, and also cases involving such things as wage and hour violations. The Colvin studies have found that corporations win a higher percentage of employment cases in arbitration than they would have won in court. They also find that, on average,

awards in favor of workers in arbitration are dramatically smaller than awards would be in court.

b. At the hearing, Professor Gilles spoke about how forced arbitration siloes sexual harassment claims, keeping charges against a perpetrator secret from employees and removing the incentive for employers to address systemic sexual harassment. Can you provide further detail about how forced arbitration perpetuates workplace sexual harassment?

ANSWER:

First, for the reasons I addressed in my testimony at the hearing on April 2nd, and have discussed above, forced arbitration undermines the enforcement of the law in the workplace in a host of ways. Nearly all forced arbitration clauses ban class actions; the arbitrators are systematically biased in favor of corporations and against workers (which has been widely reported in the literature, which we have encountered in our practice and in the experience of hundreds our members). Forced arbitration clauses typically ban workers from bringing class actions, which in some cases are the only meaningful way that workers can achieve justice. Forced arbitration clauses are typically non-transparent, and the secrecy undermines the enforcement of the laws against sexual harassment. And forced arbitration clauses often include other abusive provisions that strip or undermine workers' rights.

c. How would you respond to the following argument? "If we make arbitration voluntary, courts will be overwhelmed with frivolous sexual harassment claims."

ANSWER:

Forced arbitration clauses cover slightly more than half of all employees in the United States, by the best estimates I have seen. There is no data, no study or survey that indicates that workers who are with employers who don't use forced arbitration are flooding courts with frivolous claims.

Our experience is very strongly that workers who are sexually harassed in the workplace face a host of hurdles and challenges that discourage them from bringing lawsuits (or speaking out) about the harassment, and that the laws against sexual harassment are badly underenforced. The idea that there are a large number of survivors who are bringing frivolous cases is at odds with the basic reality of employment in the United States.

2. The Forced Arbitration Injustice Repeal Act, introduced by Senator Blumenthal,

would prohibit forced arbitration clauses for employment, consumer, antitrust, and civil rights disputes. It would also prohibit class-action waivers.

a. ***In your view, would a voluntary arbitration system address the problems raised by forced arbitration clauses? How so?***

b. ***In his testimony to the Committee, Mr. Bland cited a study by the Consumer Financial Protection Bureau that found that few consumers read and even fewer understand arbitration clauses. Only approximately 13 percent of consumers who were directed to read a forced arbitration clause understood it prohibited them from participating in a class action lawsuit. What does "agreeing" to forced arbitration mean when one party to the agreement does not understand its consequences?***

ANSWERS:

a. I strongly believe that the FAIR Act would solve all or nearly all of the harms that arise from forced arbitration. The legislation would dramatically improve the legal situation of tens of millions of workers and all consumers in the United States.

b. The idea of consent in this area is completely divorced from actual agreement. So long as various formalities are properly executed, courts will nearly always enforce forced arbitration clauses that were never actually seen or understood by workers and consumers, so long as the clauses were buried in some fine print document that was referenced or included in some lengthy document that was provided in some way to the worker or consumer. Consent is treated as a formality, rather than a meaningful requirement of agreement.

3. *This Committee has expressed deep concern with current antitrust law and enforcement priorities, and forced arbitration seems to perpetuate some contemporary monopolistic practices.*

a. *One major issue that economists have increasingly cited as harming consumers and workers is the lack of competition in the labor market. Labor monopsony allows firms in industries where the labor market is not competitive to unilaterally set terms of employment and reduce wages without losing workers to competing employers. Monopsony power can be generated and reinforced through mechanisms like no-poach agreements and non-compete contracts. Giving employers the power to set the rules of dispute resolution seems only to add to the asymmetric power imbalance. Please explain further how forced arbitration clauses contribute to this phenomenon.*

b. *Another antitrust issue addressed by this Committee is increased market consolidation and the inability of small businesses to compete and challenge monopolistic practices, as Mr. Carlson's experience*

demonstrates. How would prohibiting class-action waivers in consumer contracts like Mr. Carlson's address this concern?

ANSWERS:

a. Many abusive monopsony practices do violate the antitrust laws, and workers should be able to enforce their rights under those laws. Enforcing one's rights under the complex antitrust laws (which typically requires producing expensive and sophisticated evidence, generally through expert testimony, often can only be done through the use of a class action. Given that nearly all arbitration clauses used by corporations against workers include terms that ban class actions, arbitration clauses make it impossible for workers to vindicate their rights under the antitrust laws in most cases.

b. Banning the inclusion of class action bans in forced arbitration clauses would have allowed Mr. Carlson's case against American Express to go forward. In that case, American Express ended up settling the cases of extremely large corporations who were able to pursue it on an individual basis, but smaller businesses were left out in the cold. Limiting the use of class action bans in forced arbitration clauses would have made an enormous difference.

4. *In 2015, California enacted a law requiring private arbitration companies that administer consumer arbitrations to make public certain information about each arbitration it conducts. In your view, what data should be collected about forced arbitration to ensure the practice is transparent to lawmakers and the public?*

5. *At the hearing, several witnesses disagreed about how arbitrators are selected and whether defendant employers can fairly be characterized as selecting arbitrators. Please explain the process for selecting an arbitrator in an individual case and determining the rules by which an arbitration is governed. What changes would you suggest to this process?*

ANSWER:

The rules vary somewhat from case to case, depending upon the language of the arbitration clause, but most clauses name some third party company, such as the American Arbitration Association, to administer the arbitration. The AAA has a variety of sets of rules for different types of cases. In some cases, the AAA simply names a single person as the arbitrator, without any input from the parties. In other cases, the AAA will give the parties a small list of possible arbitrators, and then the parties can strike one or a small number of people from the list, and the AAA will pick a name from the names that are not struck.

Questions for the Record from Senator John Kennedy

April 4, 2019

1. *I will be introducing the Stop Blaming Victims Act to address the problem of Nondisclosure agreements being used to protect government employees who sexually harass others. It would limit the ability of government employees to hide behind non-disclosure agreements. NDA's are dangerous because they are often mandatory elements of a settlement that prevent victims from speaking out later on when they see similar abuses repeated. How are mandatory NDA's used in forced arbitration? Are they also used to silence wronged parties who might seek to expose wrongdoing at a powerful company?*

ANSWER:

It is very common for NDAs to be included in forced arbitration clauses. And while I do not agree that this is a correct reading of the law, corporations often argue and some judges agree that an NDA is more likely to be enforced if it is included in a forced arbitration clause, on the grounds that the Federal Arbitration Agreement gives it greater weight. It is certainly the case that in many cases, courts allow the arbitrator (as opposed to a court) to evaluate the legality of an NDA that is included in an arbitration clause.

NDAs that are included in arbitration clauses are often used to silence whistleblowers. While we would argue on behalf of any whistleblower client that statutory and other legal protections should override an NDA in a forced arbitration clause, those arguments would not be certain winners. A whistleblower who is covered by an arbitration clause with an NDA runs a substantial risk of financial liability (and potentially ruinous liability) if she or he speaks out about illegal conduct.

2. *Courts consistently rule that claims under the Uniformed Services Employment and Reemployment Rights Act, which protects the employment rights of members of the armed forces, are subject to arbitration under the Federal Arbitration Act. We should be ensuring that our military men and women are adequately protected. How is it fair that an employer can fire an employee who leaves for combat and often times their only recourse is arbitration? What in your opinion needs to be done to correct this?*

ANSWER:

It is deeply unfair that an employer may not fire an employee who leaves for combat, despite USERRA, and for the employee's only recourse to be to go into arbitration.

In my opinion, the Congress should ban the use of forced arbitration clauses for all employees.

3. *In the past couple of years, more and more companies have eliminated forced arbitration. Over the last year, Uber, Lyft, Facebook, and Google and many others have scrapped their arbitration policy. Why do you think we are seeing this uptick in companies ending their forced arbitration policy?*

ANSWER:

In our experience, far more corporations have added forced arbitration provisions than the handful of corporations that have ended their policies. I hope that this trend reverses, though, and that there is -- across the economy -- a substantial uptick in corporations that abandon forced arbitration. I do not have an insight as to why the corporations you have named have scrapped their arbitration policy, although my understanding is that several of them have only done so with respect to claims of sexual harassment and assault, and not for all employment claims. So, for example, I believe that most of those corporations would continue to enforce their arbitration policies against workers with claims under the wage and hour laws, or claims of racial discrimination.