

Statement of  
**The Honorable Al Franken**

United States Senator  
United States Senate  
October 13, 2011

Senate Judiciary Committee  
Hearing "Arbitration: Is It Fair When Forced? "  
Statement for the Record  
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Thank you everyone for being here today. Thank you to my colleagues for their interest in this issue, and thank you to Chairman Leahy for giving me the opportunity to chair this hearing. And a special thanks to today's witnesses for sharing their time and expertise with the committee. Before I introduce today's witnesses, I'd like to take a few moments to clarify my intent in calling today's hearing.

The topic of mandatory arbitration is much more interesting than its dry-sounding title might suggest. Today, we're likely to discuss such wide-ranging legal issues as federal preemption, statutory construction, and class actions in situations as varied as chicken farmers to cell phone users to auto dealers. To the extent possible, I'd like to keep today's hearing focused on mandatory arbitration, as opposed to other voluntary types of alternative dispute resolution, or ADR. I'm not aware of any introduced legislation to "ban arbitration." I think everyone in this room can agree that there are some circumstances in which ADR, including post-dispute arbitration, should be encouraged. So let's focus our attention today on mandatory arbitration, which raises the most concern for me.

I'd also like to use this hearing to broadly highlight all of the efforts that have been made over the years to properly limit the use of mandatory arbitration. I'm far from the first Senator to champion this issue. Senator Feingold, a former colleague on the Committee, was a true pioneer. And Senator Feingold partnered with fellow Committee members to bring relief to certain groups particularly affected by mandatory arbitration.

The Ranking Member of this Committee, Senator Grassley, led the charge in limiting the use of mandatory arbitration clauses for poultry and livestock producers in contracts with their processors. He was able to secure the passage of a provision in the 2008 Farm bill. I'd like to submit for the record a letter from Craig Watts, a Fairmont, North Carolina chicken farmer. He is one of many farmers who, under this law, has chosen to opt-out of the arbitration clause in the contract he signed with his chicken processor. He notes that in his twenty years in contract poultry:

"I know of no examples of anyone ever taking a dispute to the court of arbitration. For a farmer it is just too expensive. . . But in the 2008 Farm Bill, Congress recognized how unconscionable these mandatory arbitration clauses were. . .and it resulted in the farmer getting to choose to keep it or opt out. . . it has not led to a wave of lawsuits as many had said. . . but I do believe it is an incentive to do business above board. "

Another member of this Committee, Senator Hatch, led a similar effort to provide relief for auto

dealers. In the Senate, this bill had 66 cosponsors. Thanks to Senator Hatch's efforts, America's auto dealers are now on a level contractual playing field with the big auto manufacturers. These efforts all preceded my work on limiting forced arbitration for employees of defense contractors. They also preceded my introduction of the Arbitration Fairness Act this Congress, and the bill I recently introduced with Senator Blumenthal, the Consumer Mobile Fairness Act. These bills, like the ones that have come before it, seek to limit the use of forced arbitration clauses in contexts where one party suffers from a substantially weaker bargaining position. These particular bills focus on consumers and workers who sign form contracts with corporations.

Critics may argue that these contracts were entered into voluntarily and that we are compelled to honor forced arbitration clauses or risk abolishing entirely the freedom to contract. I think several of today's witnesses can speak to this issue better than I.

I am very honored today to introduce Minnesota's Attorney General, and my friend, Lori Swanson. In 2009, Attorney General Swanson sued the National Arbitration Forum on behalf of Minnesota consumers. At the time, the National Arbitration Forum was the country's biggest arbitrator of consumer credit disputes. In the course of her investigation, Attorney General Swanson revealed that the NAF, which presented itself to the public as a neutral arbitration company, was in fact working behind the scenes with the companies, against the best interest of consumers. In fact, the NAF boasted to the companies, quote, "customers don't know what to expect from arbitration and are more willing to pay, " and that, quote, "customers ask you to explain what arbitration is then basically hand you the money. " But I'll leave it to Attorney General Swanson to tell the rest of the story.

We're also pleased to have with us Dr. Deborah Pierce, currently the Associate Director of Emergency Medicine at Einstein at Elkins Park Hospital. She will share her experience from a previous employer and the subsequent arbitration process she endured after bringing a gender discrimination claim against that employer. Her story illustrates many of mandatory arbitration's serious problems, which have led me to question the merits of our current system.

We're joined also today by Paul Bland, a senior attorney at Public Justice. Mr. Bland has devoted nearly his entire career to representing consumer clients in countless cases around the country. He is a true wealth of knowledge on a range of issues, particularly consumer arbitration. Mr. Bland's experience litigating consumer cases after Concepcion will give us a realistic and sobering look at the prospects for consumer-enforced corporate accountability going forward. We also welcome Professor Christopher Drahozal, the John M. Rounds Professor of Law and Associate Dean for Research and Faculty Development at the University of Kansas School of Law. Professor Drahozal has written extensively on the law and economics of arbitration. We also welcome Victor Schwartz, who is a partner at the firm of Shook, Hardy & Bacon LLP, and of the US Chamber of Commerce and the US Chamber Institute for Legal Reform.

Before I turn it over to today's witnesses, I want to reiterate my sincere goal that today we can find some common ground. We may not all agree on the best ways to move forward, and on which legislative proposals are needed, but I hope we can walk away with a few areas of agreement. I'll suggest the obvious -that there is a role for federal courts in our justice system. This past August, Justice Kennedy replied to a reporter's inquiry about the Court's current docket, and he said this: "The docket seems to be changing. . . A lot of big civil cases are going to arbitration. I don't see as many of the big civil cases. " Personally, I'm troubled that our private arbitration system is, at least in part, eclipsing the United States Supreme Court, the highest court in the land. Perhaps today's hearing can help us determine whether there is a sound middle

ground -one where we use arbitration to the fullest fair extent, but allow our Supreme Court to fulfill its role as the true final arbiter.  
Thank you.