

The Tide is Turning Against Forced Arbitration

A Summary of Recent Agency Action on Forced Arbitration

Starting in the early 2000's, corporations began quietly stripping consumers, workers, patients, students, service members and investors of their rights by using mandatory, pre-dispute arbitration agreements, a phenomenon designed to allow corporations to evade the reach of state and federal laws and escape all accountability. Today, these "Forced Arbitration" clauses are everywhere, buried in the fine print of an enormous range of employment, consumer, nursing home, investment and healthcare contracts for products and services including but not limited to: credit cards, child care, cell phones, auto loans, home construction, student loans, rent-to-own products, payday loans, insurance policies, nursing home admission forms and student enrollment agreements. These clauses force all legal claims into arbitration – a rigged system where corporations get to pick the arbitration provider, there is almost no opportunity for appeal, the process is completely secret, and the right to seek justice is denied. However, in the face of mounting data showing how forced arbitration lets corporations off the hook for breaking the law, federal agencies are now taking the necessary steps to curb the use of forced arbitration clauses.

The Consumer Financial Protection Bureau (CFPB)

- As a result of authority granted under section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, in March 2015, the CFPB released a report to Congress on the use of forced arbitration. The study confirmed what consumer advocates have long known: millions of individuals are denied relief through forced arbitration. In May, the CFPB proposed to restore the rights of financial services consumers by banning class action waivers and placing additional limitations on the use of individual forced arbitration in order to protect to consumers.

The Department of Education (Ed)

- In 2016, Ed issued a proposed rule as a part of the borrower's defense negotiated rulemaking. Ed proposed banning for-profit institutions' particularly abusive use of forced arbitration clauses against students who participate in the Direct Loan program in borrower defense-related claims. The proposed rule also contained a ban on class action waivers and several other protections against forced arbitration abuse.

The Department of Defense (DoD)

- In 2015, the DoD finalized rules to strengthen and broaden the scope of the Military Lending Act (MLA). The rule expanded the definition of "consumer credit" under the MLA and, by doing so, it broadened the ban on forced arbitration to a larger scope of financial contracts, including credit cards and other consumer financial services and products. In recognition of the harm forced arbitration causes to our service members, the DoD went so far as to make it a misdemeanor crime for any creditor to force a service member to arbitrate under the MLA's new broadened scope.

The Department of Labor (DOL)

- Fair Pay and Safe Workplaces Executive Order: On July 31 2014, President Obama issued a landmark Executive Order (E.O.) aimed at ensuring safe workplaces and fair pay for American workers by delineating new requirements on government contractors. As part of the E.O., the DOL was granted to authority to prohibit companies with federal contracts of \$1 million or more from mandating that their employees enter into forced arbitration clauses for any disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment.
- Fiduciary Rule: Further, on April 4 of 2016, DOL released the final version of the fiduciary rule. Specifically, the rule provides that if financial advisers and firms wish to continue to receive a variety of common forms of compensation that would otherwise be prohibited for a fiduciary, they must enter into a contract with investors. In that contract, financial advisors are prohibited from including provisions which limit their liability in any way or which requires the investor to waive their right to participate in a class action in court.

Federal Communications Commission (FCC)

- In 2015, the FCC declined to adopt arbitration as an alternative dispute mechanism in their net neutrality rules citing that forced arbitration is likely to benefit the party with more resources and more understanding of the dispute process.
- In 2016, the FCC is considering taking the same steps as a part of its proposed privacy rules.