ALLIANCE FOR JUSTICE

PRESIDENT
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March 19, 2015

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Dear Director Cordray:

On behalf of our more than 100 member organizations representing a broad array of groups committed to the creation of an equitable, just, and free society, Alliance for Justice commends the Consumer Financial Protection Bureau for its strong report on the dangers of forced arbitration clauses. We call on the Bureau to promulgate rules prohibiting their use in all the consumer financial products and services under its jurisdiction.

Alliance for Justice believes that all Americans have the right to secure justice in the courts and to have their voices heard when government makes decisions that affect their lives. Unfortunately, forced arbitration is an increasing threat to access to justice.

The CFPB has a duty to protect consumers by prohibiting forced arbitration in all consumer financial products and services under its jurisdiction if doing so is "in the public interest and for the protection of consumers."[1] After this report, there can be no doubt both those conditions have been met. The CFPB should begin rulemaking immediately.

Forced Arbitration Clauses Are Pervasive, but Consumers Are Unaware of Their Impact

As the CFPB's report demonstrates, forced arbitration clauses are pervasive in contracts for consumer goods and services. Tens of millions of consumers use financial products and services with mandatory arbitration in their fine print. Nearly every payday loan and wireless phone carrier contract a consumer enters into uses forced arbitration. Not only do these clauses keep consumers out of a courtroom, but nearly all of them prohibit consumers from banding together with others to collectively protect their rights.

Yet, despite the proliferation of these clauses, consumers are generally unaware of their existence and impact. Nearly 80 percent of consumers using a credit card with a forced

[1] Dodd-Frank Wall Street Reform Act, 12 U.S.C. § 5518 (2010).

arbitration clause were unaware if their contracts contained such a clause. And fewer than seven percent of those consumers were aware they were unable to sue the credit card issuer in court.

Important rights are now being lost in the fine print of contracts that consumers never read, let alone understand. Forced arbitration clauses tend to be the most complex part of financial product contracts, the least readable, and they are written at a higher grade level than the rest of the agreements.

Forced Arbitration Clauses Prevent Consumers from Redressing Wrongdoing

The result of forced arbitration clauses and class action waivers, as the CFPB's study demonstrates, is not just to stop collective action or to move disputes into a different forum. Rather, the result is to stop consumers from holding companies accountable altogether.

In *AT&T Mobility v. Concepción*,[2] the Supreme Court upheld a forced arbitration clause that barred AT&T's customers from filing a class action suit. In doing so, the Court overrode a rule of California law that a class action waiver in a standard-form consumer contract can be unenforceable if, in practice, it amounts to an exemption from responsibility for fraud or willful misconduct.[3] In the wake of *Concepción*, more and more companies have availed themselves of that exemption from responsibility.

Alliance for Justice's recent film *Lost in the Fine Print*[4] tells the story of Alan Carlson, the owner of Italian Colors, a neighborhood restaurant in Oakland, California. Alan believed that American Express was illegally using its monopoly power to charge large fees to small businesses. Italian Colors stood to recover tens of thousands of dollars from American Express, but doing so would require hundreds of thousands of dollars in legal fees, including expert witnesses to prove the complicated antitrust claims. So Alan joined with other small businesses to defray costs, and brought a lawsuit under the Sherman Antitrust Act.

But American Express's contract with Alan contained a forced arbitration clause that prohibited class actions, class arbitrations, and even producing a common expert report with the other small business owners. The Supreme Court upheld the clause in *American Express v. Italian Colors Restaurant*.[5] While Alan and the other owners still ostensibly had the option to bring an arbitration claim on their own, "only a lunatic or a fanatic"[6] will do so when legal costs are so high and the possible recovery so low.

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[2] 131 S. Ct. 1740 (2011).
[3] ALLIANCE FOR JUSTICE, ARBITRATION ACTIVISM: HOW THE CORPORATE COURT HELPS BUSINESS EVADE OUR CIVIL JUSTICE SYSTEM 7 (2011).
[4] LOST IN THE FINE PRINT (Alliance for Justice 2014), *available at* http://LostInTheFinePrint.org.
[5] 133 S. Ct. 2304 (2013).
[6] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1761 (2011) (Breyer, J. dissenting); *see also* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J. dissenting) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.").

This is especially true for consumers. Italian Colors stood to recover tens of thousands of dollars. Individual consumers will normally stand to recover a fraction of that. In *AT&T*, the Concepcións stood to recover $30.22—a number far too low to justify individual arbitration. The CFPB's report confirmed this intuition. Each year, only 25 consumers bring claims worth less than $1,000 in arbitration regarding financial products. If the CFPB does not act to prohibit forced arbitration, it will allow financial companies to use their market power "to insist on a contract effectively depriving its victims of all legal recourse."[7]

The notion that consumers are voluntarily giving up this right is a myth. As noted earlier, nearly every forced arbitration clause now contains a class action waiver, but consumer understanding has not caught up with this development. The CFPB's study found that fewer than two percent of consumers who had waived their right to participate in a class action were aware they had done so.

Forced Arbitration Prevents Wrongdoing from Being Exposed

Even if an individual does pursue a claim through arbitration, and even if that individual prevails, forcing important consumer complaints out of the public court system and into private, often secret arbitration prevents wrongdoing from being exposed and remedied on a large scale. Unlike in court proceedings, filings in arbitration are not available to the public, and hearings take place behind closed doors.

Some examples from the employment context demonstrate the importance of public scrutiny when violations of important laws are alleged, and how forced arbitration can prevent companies' illegal practices from being exposed. For instance, the recent trial in Ellen Pao's case against Kleiner Perkins Caufield & Byers LLC[8] has revealed a troubling culture of sexism at a venture capital firm. One prominent venture capitalist is alleged to have said Ms. Pao had "a female chip on her shoulder," and Ms. Pao alleges she was told "you had to be one of the guys to be successful."[9] The case has offered a rare glimpse of an influential, highly profitable, and largely inaccessible industry—a glimpse that would have been unavailable had the case been forced into arbitration, as the defendants attempted.[10]

Unlike Ms. Pao, Nicole Mitchell was unable to take her former employer to court for alleged violations of the Uniformed Services Employment and Reemployment Rights Act. Ms. Mitchell, a former anchor on The Weather Channel, was forced into arbitration after trying to sue her employer for discriminating against her based on her status as a Hurricane Hunter in the Air Force Reserve. As *Lost in the Fine Print* describes, Ms. Mitchell's case was litigated behind

[7] *Am. Express*, 133 S. Ct. at 2320 (Kagan, J. dissenting).
[8] *See generally* David Streitfeld, *Venture Capitalists Under Spotlight in Bias Suit*, N.Y. TIMES, March 6, 2015, at A1, *available at* http://www.nytimes.com/2015/03/06/technology/in-ellen-paos-suit-vs-kleiner-perkins-world-of-venture-capital-is-under-microscope.html?_r=0.
[9] *Id.*
[10] Pao v. Kleiner Perkins Caufield & Byers LLC, No. A136090, 2013 Cal. App. Unpub. LEXIS 4524 (Cal. App. 1st Dist. June 26, 2013).

closed doors. The briefs and documents were marked as confidential, and Ms. Mitchell was never even able to meet to meet the arbitrator who ruled on her case.

Our consumer laws, like our employment discrimination laws, vindicate critically important societal goals. Their proper interpretation should be decided in the full sunlight of the courtroom—not in a private tribunal closed off to media and public attention. It is undoubtedly in the public interest to prohibit the use of forced arbitration and to return these conversations to the public square.

The CFPB Must Act Now to Prohibit Forced Arbitration

The Dodd-Frank Wall Street Reform Act authorizes the CFPB to "prohibit or impose conditions" on the use of forced arbitration if doing so "is in the public interest and for the protection of consumers."[11] The study shows that both conditions have been met.

The CFPB should promulgate a rule prohibiting forced arbitration in all contracts for consumer financial products and services in its jurisdiction, including credit cards, checking accounts, reloadable prepaid cards, payday loans, private student loans, auto purchase loans, and mobile wireless third-party billing.

The use of these clauses for all consumer financial products and services raises the same concerns for consumers and the public interest. CFPB's own enforcement actions demonstrate the harms consumers face from forced arbitration. In September, the Bureau brought an action against the for-profit Corinthian Colleges for encouraging students to take out expensive student loans with false promises of employment prospects and career services.[12] Corinthian Colleges, like most for-profit colleges, required students to agree to forced arbitration clauses as a condition of enrollment.[13] As a result, without the CFPB's enforcement action, the college would likely never have been held accountable for its predatory lending practices. We know that, to ensure that all wrongdoers are held accountable, private and public enforcement must work hand in hand. With limited public enforcement resources, forced arbitration may well prevent the next Corinthian College from being held accountable.

Forced arbitration has prevented at least one for-profit school from being held accountable. *Lost in the Fine Print* tells the story of Debbie Brenner, who wanted to become a surgical technologist. She chose to attend the for-profit Lamson College based on claims it made about its program, professors, and especially the job placement for graduates. But the college bore little resemblance to its claims. The classrooms were overcrowded, the professors underqualified, and

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[11] Dodd-Frank Wall Street Reform Act, 12 U.S.C. § 5518 (2010).

[12] *CFPB Sues For-Profit Corinthian Colleges for Predatory Lending Scheme*, CONSUMER FINANCIAL PROTECTION BUREAU (Sept. 16, 2014), http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-corinthian-colleges-for-predatory-lending-scheme/.

[13] *See* Letter from Fair Arbitration Now to Ted Mitchell, Under Sec'y, Dep't of Educ. (January 22, 2015), *available at* http://www.citizen.org/documents/fair-arbitration-now-dept-of-education-corinthian-letter-2015.pdf.

no local hospitals would hire from Lamson because of bad experiences with past graduates. Ms. Brenner attempted to bring a lawsuit against the school, but was forced into arbitration. She lost, and the arbitrator awarded Lamson $360,000 in legal fees.

Similarly, the CFPB's recent enforcement action against Sprint for cramming unauthorized charges on consumers' cell phone bills demonstrates the need for a prohibition on forced arbitration.[14] The Bureau brings enforcement actions, in part, "to put the entire industry on notice" when an illegal practice is widespread.[15] Yet, the prevalence of forced arbitration in the cell phone industry—including at Sprint[16]—severely threatens the realization of this goal. The CFPB cannot bring enforcement actions against every cell phone carrier, and individual consumers cannot act to enforce public policy when the doors to the courthouse are locked shut.

There is too much at stake in forced arbitration for the CFPB to leave these clauses unregulated. To protect consumers, these clauses must be prohibited in all contracts for consumer financial products and services.

Nothing short of a complete prohibition on forced arbitration clauses in all consumer financial products will give consumers the protection they deserve. The CFPB has already established its jurisdiction over a broad array of financial products and demonstrated the harm caused by forced arbitration. Now, the Bureau must act to end the use of forced arbitration in all products under its jurisdiction.

Sincerely,

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Nan Aron
President

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[14] *CFPB Sues Sprint for Cramming Consumers with Unauthorized Third-Party Charges*, CONSUMER FINANCIAL PROTECTION BUREAU (Dec. 17, 2014), http://www.consumerfinance.gov/newsroom/cfpb-sues-sprint-for-cramming-consumers-with-unauthorized-third-party-charges/.

[15] Steve Antonakes, *Prepared Remarks of CFPB Deputy Director Steven Antonakes at The Exchequer Club*, CONSUMER FINANCIAL PROTECTION BUREAU (Feb. 18, 2015), http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-deputy-director-steven-antonakes-at-the-exchequer-club/.

[16] *Legal / Regulatory & Consumer Resources*, SPRINT (last visited Feb. 25, 2015), http://sprint.com/legal/.