

**Opening Statement  
Of  
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**Domestic Policy Subcommittee  
Oversight and Government Reform Committee**

**Wednesday, July 22, 2009  
2154 Rayburn HOB  
2:00 p.m.**

Chairman Kucinich, Ranking Member Jordan, and members of the Committee, thank you for the opportunity to discuss the vital role that consumer arbitration can and should play in the U.S. justice system.

Arbitration is a simple, fair, and cost-effective way for consumers and businesses to resolve disputes outside of the traditional litigation system. American consumers benefit from arbitration in myriad ways that I will briefly outline for you in my remarks.

First, however, I want to relate to the Committee the National Arbitration Forum's recent announcement that it is no longer accepting consumer arbitration cases. In spite of this announcement, my belief remains strong that arbitration provides the superior access to justice to consumers and that arbitration is an excellent method of resolving consumer disputes.

Unfortunately, the FORUM lacks the necessary resources to defend against increasing challenges to arbitration leveled from all fronts, including from state Attorneys General and the class action trial bar.

Mounting legal costs, a challenging economic climate, and increased legislative uncertainty surrounding the future of arbitration have prompted the FORUM to announce that it will no longer accept consumer arbitration cases.

*I want to emphasize that FORUM's exit from the consumer arbitration arena represents a significant loss for consumers. Without access to arbitration, consumers with smaller value claims will not be able to secure legal representation, and will be left to navigate the litigation system by themselves.*

Arbitration provides consumers with several significant advantages compared with court litigation. These advantages include:

Consumer arbitration is simple. Consumers can submit and respond to arbitration claims in their own words, in plain English, and are not bound by the formalities of legal proceedings that could prevent them from telling their stories and proving their cases.

Consumer arbitration is accessible. Arbitration provides every consumer with access to justice, especially low- and middle-income consumers who often cannot afford lawyers or prolonged trials. Many lawyers will not even accept representation for smaller-value claims, such as those often settled in arbitration. Arbitration gives these consumers a full and fair opportunity to resolve disputes, and allows consumers to hold businesses accountable for mistakes.

Consumer arbitration is flexible. Consumers can elect to appear for a hearing in person, via telephone, or simply by submitting documents, which saves consumers the expense of missing work or travelling to a hearing. Alternatively, all parties have the right to retain an attorney to represent them in arbitration, though every consumer receives the same protections regardless of whether there is an attorney present.

Consumer arbitration is affordable. Filing fees at the National Arbitration Forum started at just \$19 for claims up to \$1,500, and fees did not climb above \$40 until the size of the consumer claim exceeded \$13,000. Low income consumers could have filing fees waived in arbitration and bring a claim against a business without paying anything. When fees prevented consumers from asserting a claim with the National Arbitration Forum, fees were shifted to the business party.

Consumer arbitration is fair. Consumers receive the same or better protections in arbitration as in court. National Arbitration Forum neutrals are independent legal experts who were bound by comprehensive rules, including the FORUM Arbitration Bill of Rights, Code of Conduct for Arbitrators, Statement of Principles, and Code of Procedure.

FORUM arbitrators were required to consider the merits of each case, apply the same laws that would apply in court, and empowered to issue all of the same remedies that can be awarded in court. In addition, courts enter default judgments against consumer parties that do not participate in litigation, whereas arbitrators independently consider the evidence for every claim and rule on the merits, regardless of the participation of the consumer.

Consumer arbitration decisions are confirmed by courts. To be legally enforceable, an arbitration decision must be confirmed by a court. Although courts do demonstrate respect for arbitral decisions, courts have shown that they are more than willing to overturn arbitration awards where the arbitrators exceeded his/her powers, demonstrated bias, or failed to provide due process to a party.

The National Arbitration Forum consumer protections, simple procedures, low fees, quick resolutions, and efficient administration meant that consumers could resolve disputes and obtain the same outcome they would have received in court.

Perhaps just as important as the FORUM's consumer protections was our continued commitment to *increasing* consumer protections in arbitration. Over the last twenty years, for example, consumer and judicial feedback have directly led to improvements in our arbitration process, such as: lower consumer filing fees, improved service rules, tightened restrictions on hearing

jurisdictions and arbitrator qualifications, a consumer liaison, a new educational website designed to help consumers navigate the arbitration process, and on and on.

Opponents of consumer arbitration often make scurrilous and baseless claims about the arbitration process, using anecdotes and misleading statistics to give the appearance of impropriety where there is none.

Arbitration opponents, including the trial bar and the advocacy group Public Citizen, cite apples-to-oranges comparisons of arbitration and litigation, and use ominous jargon like “repeat player effect” to try to demonstrate that consumers face a stacked deck in arbitration.

Data and outcomes research for similar cases confirm that win rates for consumers and businesses are the same in arbitration as in court.

- For example, consumers bringing arbitration claims against businesses prevailed 65.5 percent of the time in arbitration, and 61.5 percent of the time in court, according to the Bureau of Justice Statistics, U.S. Department of Justice. In other words, consumers prevailed an additional 4 percent of the time in arbitration versus the courts.
- Businesses bringing claims against consumers prevailed 77.7 percent of the time in arbitration, and 76.8 percent of the time in court, according to the same study – virtually identical results.
- In a study of consumer debt collection matters in particular, lenders prevailed against consumers in 93.8 percent of cases, compared to 96 percent of cases in court. That means that consumers in arbitration actually prevailed in 2.2 percent more cases than consumers in court, and at a lesser expense to the consumers.

Repeat users in arbitration obtain no better results than repeat users in court.

Claims made by arbitration opponents about the inherent bias of the arbitration system are simply not true. National Arbitration Forum consumer arbitration cases were decided by experienced, independent legal professionals. FORUM neutrals were former judges or experienced attorneys who are impartial, bound to a code of professional ethics, and decide cases outside of any influence from the FORUM or the other parties. Experienced FORUM neutrals would simply never jeopardize their considerable professional reputations or standing in the community by deciding an arbitration case on any basis other than the merits of that particular case.

Congress enacted the Federal Arbitration Act in 1925 to establish arbitration as an antidote to the “costliness and delays of litigation.” For more than 80 years, arbitration has provided access to justice for millions of American consumers, and Congress and the U.S. Supreme Court have repeatedly endorsed consumer arbitration as an effective and fair alternative dispute resolution process.

Now, legislation currently before Congress, the Arbitration Fairness Act of 2009 (H.R. 1020), threatens to eliminate arbitration as an effective means of alternative dispute resolution, deny many consumers access to justice altogether, and clog state courts with thousands of additional cases at a time when state court systems face historic backlogs and budget crises.

The Arbitration Fairness Act will cause considerable harm to American consumers, the very group it is intended to protect. Middle- and low-income Americans will lose access to justice because they cannot afford lawyers, prolonged trials, or because attorneys often will not accept representation for smaller-value claims.

Consumers will no longer be able to force businesses to arbitrate claims, but will instead have to engage in complex, expensive and unpredictable litigation. For additional context, consider what the reality of dispute resolution through litigation – a reality that Newsweek recently referred to as “Litigation Hell” – means for consumers:

For even the most minor case, a consumer will have to hire an attorney, who bills at upwards of \$100 per hour. The attorney will accumulate billable client hours for discovery, procedural motions, and jury selection – all of which are being further delayed by overcrowded court dockets and understaffed courts. In the end, a contingent fee attorney would need to receive a verdict for thousands of dollars to recover his/her billable fees. Claims of that size are not the reality for most consumers who use arbitration to resolve disputes. Litigation is great for lawyers, but not for consumers, as the costs of litigation would be prohibitive for all but the richest litigants.

Businesses can afford long and costly litigation, so consumers will again be disadvantaged, and the costs of litigation will simply pass to consumers in the form of increased prices for products and services, or decreased wages for employees.

Eliminating arbitration will also flood federal and state courts with consumer credit cases – which have roughly tripled in some jurisdictions since 2000 – at a time when budget cuts are forcing personnel reductions. States will be forced to hire additional judges and staff; build and furnish new courthouses; and implement more administration to manage the process – the cost of which will fall to American consumers in their role as taxpayer.

In fact, the only party that will benefit from the Arbitration Fairness Act is trial lawyers, because the legislation will increase legal fees, and force disputes that would otherwise be efficiently resolved in arbitration into lucrative and expensive class action lawsuits.

The answer to isolated abuses of the arbitration process by industry bad actors is not to eliminate arbitration.

The answer is to ensure that consumer due process protections are preserved in arbitration.

The answer is to codify industry best practices, including those that were employed by the National Arbitration Forum.

The answer is to continue to allow affordable access to arbitration, not only for corporations and the rich, but for all Americans.

The answer is to protect arbitration as the best option for consumers and businesses to resolve disputes outside of the court system.

Thank you.