

A close-up portrait of a woman with dark hair pulled back, wearing a purple dress shirt and a dark purple bow tie. She is looking directly at the camera with a neutral expression. The background is a soft, out-of-focus grey.

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PRIVATE COURTS, BIASED OUTCOMES:

The Adverse Impact of Forced Arbitration
on People of Color, Women, Low-Income
Americans, and Nursing Home Residents

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EXECUTIVE SUMMARY

When Roschelle Powers visited her mother Roberta Powers, a nursing home resident with diabetes and dementia in Birmingham, Alabama, she found her vomiting and disoriented, according to a 2015 investigation by *The New York Times*. Roschelle alerted the nursing home staff and told them that she had found pills in her mother's hand. A few days later, Roberta's son, Larry, visited the nursing home and found her alone and unresponsive, and he called 911. Roberta later died in the hospital. An autopsy found that she had 20 times the recommended dose of metformin, a diabetes medicine, in her body. The nursing home denied responsibility for Roberta Powers' overdose despite the pills discovered days earlier.¹



In a fair and just country, corporations are held accountable in the courts if their irresponsible behavior harms people like Roberta Powers. When the courthouse doors remain open to assist everyone, regardless of gender, age, or social or economic standing, even the wealthiest individuals and the largest and most powerful corporations can be held accountable for their malfeasance. Civil justice, working in conjunction with regulatory programs, has long been the great “equalizer” in our society.

The Powers family, however, did not have the option of filing a lawsuit against the nursing home. The corporation required the family to sign away their rights to go to court to resolve their dispute. Instead, they were forced to arbitrate any case against the nursing home as a condition of receiving care. The forced arbitration language barred them from taking their case to court, and the arbitrator decided the case in favor of the nursing home.

The Powerses are hardly alone. A tidal wave of corporate contract provisions has forced consumers and workers into arbitration. Millions are now subject to such “agreements.” Most are unaware that they have lost the right to file a case in court;² even those who are aware likely have no choice but to accept a ban on going to court because so many corporations impose forced arbitration. Roschelle and Larry Powers (and their mother) would likely have been subject to forced arbitration at another nursing home, even if they had a choice of where to place their mother. Like many families facing the difficult decision to place a loved one in a nursing home, they had no such choice.

Forced arbitration became a widespread legal practice in the wake of a series of decisions by the U.S. Supreme Court interpreting the Federal Arbitration Act,³ a 1925 law that the court has used to give corporations carte blanche to deny workers and consumers the right to sue for violations of state and federal law.⁴ Corporations prefer forced arbitration because it prevents people like the Powerses and millions of others from holding corporations publicly accountable for irresponsible and illegal actions.

After reviewing 25,000 forced arbitrations between 2010 and 2014, *The New York Times* concluded that forced arbitrations “often bear little resemblance to court.” Unlike courtroom adjudication, the “rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the corporations their clients.”⁵

Consumer and employee advocates, journalists, and academics have shown how forced arbitration makes it more difficult — and often impossible — for consumers and workers to hold corporations accountable for their illegal behavior.⁶ What has not been sufficiently recognized is the impact it has on low-income Americans, people of color, women, and abused and injured nursing home residents. Forced arbitration impacts these historically marginalized communities, and particularly the victims of systemic discrimination, in ways that go beyond its general adverse impacts.

As this report explains, forced arbitrations favor corporations over those who seek to hold them accountable because arbitrators:

- ▶ Work for companies that are selected ahead of time by corporations in millions of standard form contracts, “agreements,” and employee handbooks.
- ▶ Have financial motives to rule against individuals.
- ▶ Do not have to follow the rules of evidence.
- ▶ Are not required to explain their judgments in written opinions.
- ▶ Do not have to apply the law consistently.
- ▶ Often cannot be overruled by a higher court.
- ▶ Are prevented by corporations from hearing class actions.

Corporations and employers have further advantages over individuals in forced arbitration by virtue of their status as “repeat players,” which makes them more familiar with arbitrators and the process of arbitration.

The result is that corporations are less likely to be held accountable than they would be in the courts. Specifically, this is because:

- ▶ The ban on class actions in consumer contracts immunizes corporations from accountability when they owe a minimal amount of compensation to each of hundreds or even thousands of consumers.
- ▶ Few consumers or workers pursue arbitration forced on them.
- ▶ Consumers and workers seldom prevail in forced arbitration.

Forced arbitration impacts historically marginalized communities in ways that go beyond these adverse impacts of forced arbitration.

Low-income individuals are less able to:

- ▶ Absorb the financial impacts of unaccountable, irresponsible, or illegal corporate behavior. Even a small loss can devastate a family's financial stability.
- ▶ Pay fees required to arbitrate their claims, which results in immunity for corporations.
- ▶ Find an attorney to take their claim on a contingent fee basis regardless of the merits of their case, which makes it unlikely that people of limited means will pursue forced arbitration. Moreover, low-income people cannot aggregate their claims in a class action suit to make it more likely a contingent fee attorney will take their case.

Workers who are low-income and people of color are:

- ▶ More likely to be subjected to forced arbitration than other workers.
- ▶ More likely to be victims of wage theft.
- ▶ Less able to afford illegal losses in wages.

Women and people of color:

- ▶ Are more likely to be subjected to workplace discrimination than their white and male counterparts.
- ▶ Have fewer opportunities in forced arbitration than in a lawsuit to obtain evidence from employers to support discrimination claims.
- ▶ Face extreme difficulty proving patterns of sexual harassment because forced arbitration is secretive, barring other victims or people who could force change from seeing systematic problems.
- ▶ Are more likely to be victims of implicit bias and subconscious discrimination because almost all arbitrators are white males.

Nursing home residents:

- ▶ Are harmed in a way that other people subject to forced arbitration are not because their claims relate to physical injury, and even death, caused by substandard care, neglect, and physical and elder abuse.

Congress must end forced arbitration and restore the capacity of individuals and the courts to hold businesses accountable for illegal and irresponsible actions that disproportionately harm historically marginalized communities. Congress must also restore access to class action lawsuits, which is how historically marginalized communities can effectively hold corporations accountable for widespread discrimination and other harms. And Congress must restore the authority of federal judges to enforce laws protecting women and people of color from discrimination and workers from wage theft, to guarantee these laws provide the protections intended.

INTRODUCTION

The use of forced arbitration exploded after the U.S. Supreme Court held (5-4) in 2011 that the Federal Arbitration Act (FAA) preempted California from enforcing a law that prohibited corporations from barring class actions in court or in arbitration.⁷ In over two dozen cases interpreting the FAA since, the court has enabled corporations to impose forced arbitration on millions of workers and consumers, and thousands of corporations have done just that.⁸ As *The New York Times* notes, “From birth to death, the use of arbitration has crept into nearly every corner of Americans’ lives, encompassing moments like having a baby, going to school, getting a job, buying a car, building a house, and putting a parent in a nursing home.”⁹

Available data, which cover only a few corporations, indicate that more than 826 million forced arbitration clauses affecting consumers were in force as of 2018.¹⁰ The U.S. population, by comparison, is about 330 million.¹¹ In addition, more than 50 percent of all workers are subject to forced arbitration of employment disputes, and the percentage rises to 60 for those who work for large employers. By 2024, fully 80 percent of nonunion workers will be subject to forced arbitration.¹²

When Congress originally passed the FAA over 90 years ago, its intention was to help businesses resolve commercial disputes with one another,¹³ which the court recognized prior to 1991.¹⁴ Since then, the Supreme Court has sidelined state and federal laws and constitutions that authorize individuals to sue corporations engaged in irresponsible and illegal behavior — and handed over the power to determine how such claims are decided to the very corporations that are accused of engaging in this behavior.

It is notable that the forced arbitration rules imposed on nonunionized low-wage workers are distinct from those negotiated through labor unions. Unionized workers can bargain with relatively equal negotiating power in arms-length negotiations with employers, and unions have more power to ensure that arbitration terms are advantageous to workers. The fact that 80 percent of nonunionized workers will be forced to arbitrate highlights the significance of workers’ eroding bargaining power. Unionized workers, including those of color, are better able to resist forced arbitration; nonunionized workers cannot. Unfortunately, only 12 percent of the workforce is unionized.¹⁵

CORPORATIONS ARE FAVORED

Forced arbitration usually favors a business over the individual because it is less transparent, neutral, accurate, and fair than lawsuits. Corporations also have the advantage of repeated exposure to arbitration, whereas individuals do not.¹⁶

Individuals have less opportunity in a forced arbitration to hold a corporation accountable than in a lawsuit for the following reasons.

THE FILING OF AN ARBITRATION CLAIM IS SECRET

The filing of a lawsuit is public information, but there is no similar data bank cataloging filed arbitration claims.¹⁷ As a result, victims of illegal or harmful behavior by the same corporation often do not know that other victims are attempting to hold the corporation accountable for similar behavior. This benefits corporations by discouraging other individuals from filing arbitration claims.¹⁸ More generally, as Professor Laurie Kratky Doré notes, by “permitting the parties to shroud these matters, arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs.”¹⁹

ARBITRATION FIRMS ARE CHOSEN BY A CORPORATION AND FORCED ON INDIVIDUALS

Arbitration providers are chosen by corporations in millions of standard form contracts, “agreements,” and employee handbooks, and individuals are forced to use an arbitrator from the preselected firm.²⁰ The language in this Snapchat contract is a typical example: “You and Snapchat agree (a) that any arbitration will occur in Los Angeles County, California; (b) that arbitration will be conducted confidentially by a single arbitrator in accordance with the rules of JAMS...” (JAMS is a major arbitration corporation formerly known as Judicial Arbitration and Mediation Services, Inc.)²¹ As a result, arbitration firms have no incentive to compete on the basis of a fairer forum for workers and consumers. Instead, as related next, these firms have created an arbitration system that favors the corporations that hire them.

ARBITRATORS, UNLIKE JUDGES, HAVE FINANCIAL MOTIVES TO RULE FOR CORPORATIONS

A judge has no financial interest in a lawsuit, and the judge’s future employment does not depend on the outcome of a case. Arbitrators, unlike judges, have a financial interest in the outcome of a case because the arbitrator knows that if a decision goes against a corporation, the arbitrator may not be rehired. *The New York Times* investigative report cited above found that due to the lack of rules against conflicts of interest, corporations can arrange for friendly arbitrators to oversee forced arbitration; arbitrators “cultivate close ties with corporations to get business;” and arbitrators admitted they felt beholden to the corporations that selected them.²²

ARBITRATORS, UNLIKE JUDGES, ARE NOT REQUIRED TO WRITE AN OPINION

Judges are required to justify their decisions in a written opinion,²³ but arbitrators are not required to do the same. Even if the corporation that employs them recommends that they issue an opinion, there is no enforcement of that recommendation. Judges' opinions are published, which incentivizes judges to do a professional job, while forced arbitration decisions are not public.

ARBITRATORS, UNLIKE JUDGES, DO NOT HAVE TO BE CONSISTENT

Courts use a system of precedent that promotes equality and consistency in decision-making.²⁴ Under this system, judges are expected to reach the same outcome as in prior similar cases or explain why a different outcome is justified in the case before them. Arbitrators do not have to justify their decisions as consistent with prior cases, which prevents other workers or consumers from using a favorable award as precedent in their own cases.²⁵ The result is tantamount to the “end of law” because arbitration not only evades the requirement that the law should be consistent, but also prevents the development of the law to fit new circumstances and information.²⁶

ARBITRATORS, UNLIKE JUDGES, CANNOT BE OVERRULED BY A HIGHER COURT

Trial court judges' decisions are subject to review by appellate courts, which determine whether the judge made a mistake about the facts or the law. By comparison, even if an arbitrator's decision is judicially reviewable, a judge can only overturn it for corruption, fraud, or misconduct, according to the FAA.²⁷ There is no basis for reversal when the arbitrator has simply made a factual or legal error. In fact, an appellate court does not even have a written opinion to review, as it would if it were considering the decision of a trial court.²⁸ For these reasons, the FAA essentially eliminates meaningful judicial review. According to *The New York Times*, court records show that the courts seldom overrule an arbitrator's decision — even when there is a “substantial injustice.”²⁹

ARBITRATORS, UNLIKE JUDGES, DO NOT HAVE TO FOLLOW THE RULES OF EVIDENCE

A judge manages a lawsuit according to the rules of evidence and codes of civil procedure, which have been structured to promote fair and accurate results. An arbitrator, by comparison, “is largely free to determine how much evidence a plaintiff can present and how much the defense can withhold.”³⁰ Administrative agencies likewise are not usually required to follow the rules of evidence when they adjudicate cases, but agency decisions are fully subject to judicial review.³¹

CORPORATIONS ARE EXPERIENCED IN FORCED ARBITRATION

Corporations are also advantaged by their familiarity with arbitration as “repeat players.” Most forced arbitrations — 84 percent in one study³² and 77 percent in another³³ — involved a corporation that had experience in forced arbitration. Repeat players are more likely to win in forced arbitration than in court — twice as likely in one study³⁴ and 80 percent more likely in another study.³⁵

A corporation’s previous experience in forced arbitration benefits it in two ways. First, lawyers for the corporation can gain unique insights into what kinds of arguments are likely to prevail (or fail) in forced arbitration cases. Second, corporations develop relationships with arbitrators, whom they hire time and time again.³⁶

The New York Times investigation discovered that 41 arbitrators each handled 10 or more cases between 2010 and 2014.³⁷ As noted earlier, the lack of conflict-of-interest rules opens the door for corporations to hire “friendly” arbitrators, and for arbitrators to seek repeat business by favoring corporations in their decision-making. In other professional settings, people seek to avoid even the appearance of a conflict of interest.



THE LACK OF CORPORATE ACCOUNTABILITY

The previous comparisons are not the only differences between lawsuits and forced arbitrations that favor corporations and disfavor workers and consumers, as this report will explain. But even this truncated list indicates the extent to which individuals are constrained in holding corporations accountable for harming them in forced arbitration.

The period between 2014 and 2018 saw an average of 6,000 arbitrations per year; by comparison, more than 2 million small claims cases are filed in court every year.³⁸ Individuals rarely pursue forced arbitration, and plaintiffs seldom prevail in a forced arbitration; if they do, they are awarded less money than they would have received in a lawsuit for the same violations of law.

FEW WORKERS OR CONSUMERS ARBITRATE

The New York Times found that most people dropped their claims entirely after being prevented from filing a lawsuit. The *Times* found that, between 2010 and 2014, only 505 consumers filed an arbitration claim for disputes under \$2,500. According to the *Times*, only 65 Verizon customers filed for arbitration out of more than 125 million subscribers in those five years. Similarly, only seven Time Warner Cable customers filed for arbitration out of 15 million customers.³⁹ A 2019 study of data from two large arbitration firms likewise found that only a handful of consumers pursued forced arbitration at corporations with millions of customers.

FEW WORKERS OR CONSUMERS WIN

A Consumer Financial Protection Bureau (CFPB) study of the imposition of forced arbitration in six financial markets found that consumers who filed a forced arbitration claim won some type of relief in just 32 of the 341 cases (9 percent) that went to a decision. By comparison, corporations that started a forced arbitration proceeding against consumers won almost all of their cases. According to the CFPB, corporations prevailed in nearly all (244 out of 277) cases that went to a decision.⁴⁰ Because arbitrators do not write opinions, it is not possible to determine why consumers seldom won, but other studies show that these results are typical.

A 2011 study of 1,213 arbitrations found that workers won less often than in the courts and were awarded less money when they did prevail:⁴¹

Workers	Forced Arbitration	State Courts	Federal Courts
Win Rate	21%	36%	57%
Median Damages	\$36,500	\$176,000	\$85,500

A 2019 study discovered that only 1,909 plaintiffs won a monetary award over a five-year period, representing 6 percent of all consumer arbitrations.⁴² At one corporation, AT&T, only 17 out of 1,000 consumers won monetary damages in their forced arbitrations.⁴³

LOW-INCOME AMERICANS

When low-income consumers and workers are forced into arbitration, they are unlikely to prevail for the previous reasons. Forced arbitration, in addition, impacts low-income Americans in ways that go beyond its general adverse impacts. This is because:

LOW-INCOME AMERICANS ARE LESS ABLE TO ABSORB LOSSES

Unlike wealthier individuals, low-income Americans are less able to absorb financial losses when they are unable to obtain a remedy for harm from irresponsible or illegal corporate behavior. Loss of a job or income because of a corporation's illegal or harmful actions is often devastating for low-income individuals.⁴⁴ High-salary workers may receive a severance package upon termination, but low-wage hourly workers have no backstop against workplace discrimination, wage theft, and unlawful termination. Similarly, while higher-income individuals can absorb losses when corporations and banks engage in contract violations, low-income Americans cannot.



LOW-INCOME AMERICANS ARE LESS ABLE TO HIRE AN ATTORNEY

Unlike most low-income people, higher-income Americans can afford to hire an attorney to represent them. As noted, the loss of a job or even a small amount of income because of a corporation's illegal or harmful actions is often devastating for low-income individuals. Nevertheless, a plaintiff's attorney is unlikely to represent a low-income individual because of the limited potential damages at stake and the costs to the attorney of pursuing forced arbitration.

The class action mechanism allows individuals to band together to hold a corporation accountable for unlawful actions, which can make it worthwhile for an attorney to take cases on a contingent fee basis — even if each member of the class has suffered only limited damages.⁴⁵ As noted earlier, however, the U.S. Supreme Court has allowed a corporation to prevent consumers and workers from joining together in a class action to pursue common claims against the company, and companies routinely do so. The court has also upheld the prohibition on class actions — even where the prohibition arguably violates the National Labor Relations Act (NLRA) or another statute.⁴⁶

As a result, corporations are immunized from accountability when they owe a minimal amount of compensation to many individual consumers. Forced arbitration and the class action ban make it far easier for corporations to steal a single dollar from a million people than it would ever be to steal \$1 million from a single person. In an extensive study of forced arbitration, the CFPB found that “almost no consumers filed arbitrations about disputes under \$1,000” related to actions by banks, credit card corporations, and other lenders.⁴⁷ *The New York Times* investigation of thousands of forced arbitration decisions, cited earlier, similarly found that only 505 consumers arbitrated claims of \$2,500 or less.⁴⁸

LOW-INCOME AMERICANS ARE LESS ABLE TO PAY FOR FORCED ARBITRATION

Courts charge only a small case filing fee and, once a lawsuit is filed, a consumer or employee does not have to pay for use of the courtroom or any portion of the judge's salary. The public funds these costs because they are necessary to the pursuit of justice — not only for consumers and workers, but also for major corporations, which are prolific users of civil justice to settle their corporate-to-corporate or corporate-individual disputes.

By comparison, parties usually split the costs of forced arbitration, which can reach thousands of dollars. While more affluent Americans can afford to pay their half of these fees, the cost of arbitrating is beyond the means of almost all low-income individuals.

Filing fees for a forced arbitration can amount to \$1,500 or more,⁴⁹ and arbitrators charge as much as \$1,000 to \$2,000 per day plus expenses.⁵⁰ By comparison, federal court filing fees amounted to \$350 as of December 2020. According to a study by Public Citizen, a nonprofit consumer rights advocacy group in Washington, D.C., someone who claims damages of \$80,000 will pay thousands of dollars more to undertake arbitration than to file a lawsuit.⁵¹

COST OF FILING AN \$80,000 CLAIM

Venue	Filing Fees
Circuit Court of Cook County, Illinois	\$221
American Arbitration Association (AAA)	\$6,650
Judicial Arbitration and Mediation Services (JAMS)	\$7,950
National Arbitration Forum	\$11,625

Even worse, some forced arbitration agreements go so far as to require the losing party to pay the entire costs of the arbitration, including a corporation's attorney fees.⁵² One study found that 112 consumers who did not win their arbitration or won a reduced award had to pay 100 percent of the forced arbitration fees.⁵³ Consumers or workers who are aware of the potential of being saddled with the full costs of forced arbitration are much less likely to pursue it.

Some corporations have offered to cover all or most of the costs of forced arbitration to promote themselves as consumer-friendly — and have used this promise as a talking point when defending the practice to congressional staffers and reporters.⁵⁴ Public Citizen found, however, that a “surprising” number of corporate defendants refuse to pay the arbitration fees in those rare instances when consumers file their cases with an arbitration company picked in advance by a corporation.⁵⁵ At that point, consumers can either pay the fees that the corporation promised to pay or drop the arbitration and file instead in court, after having wasted considerable money and time.

LOW-WAGE WORKERS OF COLOR

Forced arbitration discourages most people from filing even meritorious claims, and the same is true for low-wage workers — despite the prevalence of wage theft. Forced arbitration, in addition, disproportionately impacts workers who are low-income people of color. This group is more likely to be subjected to forced arbitration, more likely to be victims of wage theft, and less able to afford the illegal loss in wages.

LOW-WAGE WORKERS OF COLOR ARE MORE LIKELY TO BE VICTIMS OF FORCED ARBITRATION

Low-wage workers, like their better-paid counterparts in “white collar” jobs, are disadvantaged by forced arbitration, but they are also more likely to be victimized by it because it is more common in low-wage industries, and women and workers of color are more likely to be the victims of wage theft.

A study of thousands of arbitrations found that forced arbitration is more common in low-wage workplaces than in workplaces in general.⁵⁶ According to one estimate, some 17 million workers earning less than \$13 per hour have been forced into arbitration of their wage claims.⁵⁷ Moreover, low-wage workers commonly experience wage-related violations, and low-wage workers experiencing wage theft are more likely to be women, people of color, and to have received less education.⁵⁸ Though women constitute less than one half of the minimum-wage eligible workforce, they were more than one half of victims of employers’ failure to pay minimum wages.⁵⁹

Black people are especially prominent in low-wage health, security, and transportation sectors. They comprise 13 percent of the U.S. workforce but hold 37 percent of nursing aide, psychiatric, and home health aide positions; 30 percent of the security guard and gaming surveillance sector; and 30 percent of taxi drivers and chauffeurs. Women are also over-represented in low-wage industries, accounting for 54 percent of workers.⁶⁰

Most low-wage workers, particularly those of color, have limited job mobility. They remain in low-wage positions because they rely on their compensation to take care of themselves and their families.⁶¹ Women of color and more generally people with low levels of education are the most likely to remain in low-wage jobs.⁶²

LOW-WAGE WORKERS FILE FEW CLAIMS

As discussed earlier, most people are discouraged from engaging in forced arbitration to hold a corporation accountable, and the same is true for low-wage workers, including low-wage workers of color. In a review of thousands of arbitration awards issued by the two largest arbitration firms, the American Association for Justice found that only 11,114 workers (0.02 percent of all those subject to forced arbitration) attempted to hold employers accountable by filing a complaint. Over a five-year period, arbitrators awarded monetary damages to only 282 workers.⁶³

Stephanie Sutherland was hired by Ernst and Young, a large national accounting firm, to perform secretarial, clerical, and data-entry work. She worked 151 hours of overtime between September 2008 and December 2009 before being terminated, but the firm did not pay the \$1,868 she claimed it legally owed her.

When she tried to sue the firm and turn her lawsuit into a class action on behalf of similarly situated workers, her lawsuit was dismissed because her employment agreement forced arbitration and banned class actions. When she discovered the cost of pursuing the arbitration that had been forced on her would exceed her damages by thousands of dollars, she dropped her claim.⁶⁴

Darden Corporation, the owner of the Olive Garden and LongHorn Steakhouse chains, was subject to only 329 claims in forced arbitration; it paid a total of only \$74,000 in the eight cases in which an arbitrator awarded compensation to workers. By contrast, the same corporation paid over \$14 million to settle lawsuits that workers successfully filed in court.⁶⁵

PAYDAY LOANS

When low-income Americans are forced into arbitration to hold a payday lender accountable for legal violations, they are unlikely to prevail for the reasons explained above. Forced arbitration, moreover, has a disproportionate impact on low-income people who use payday loans, particularly low-income people of color.

The payday loan industry benefits low-income borrowers by making credit available to them if they do not have credit cards or have low credit ratings. About 12 million people take out payday loans each year.⁶⁶ According to *The New York Times*, there are more payday loan storefronts in America than there are McDonald's restaurants.⁶⁷ The *Times* also reported that payday customers borrow nearly \$29 billion a year and pay nearly \$5 billion in fees.

While most borrowers are white, Black people are 105 percent more likely to take out payday loans than people of other races and ethnicities.⁶⁸ It is therefore not surprising that researchers have also found that payday lending stores are very commonly found in Black neighborhoods.⁶⁹

Since the customers of payday lenders are usually low-income workers who do not have access to traditional credit, their financial situation makes it possible for them to be exploited by payday lenders.⁷⁰ Short-term loans are intended as an emergency stop gap measure, but many low-income working people are unable to pay back the loans, which means that they borrow again and again. The *Times*, cited earlier, noted that one-half of all payday borrowers take out a series of at least nine loans, with the result that they pay fees that can exceed the value of the original loan.

The use of forced arbitration is universal in payday lending. Forced arbitration is found in 44 percent of checking account contracts, 53 percent of credit card contracts, 83 percent of prepaid credit card contracts, 98 percent of tuition agreements at for-profit colleges, and 99 percent of payday loan agreements.⁷¹ Like other consumers, they have little chance of winning an arbitration if a payday lender broke the law, and few even bother to try.

Tiffany Kelly, 24, a single mother with one year of college education, was in financial straits after she had been unable to obtain a bank loan and had been turned down for public assistance. Desperate, she turned to payday lender McKenzie Check Advance, located in Palm Beach County, Florida, on the advice of a coworker. After the lender gave her documents to review and initial, Kelly gave the lender a \$338 check in exchange for \$300 cash, and the lender cashed the check 10 days later. In sum, the lender charged \$38 in interest — an astonishing 11 percent rate for a 10-day loan. Kelly eventually took out 21 more payday loans and paid a total of \$860 in interest.

Kelly joined a class action that charged the corporation was lending money at usurious and exorbitant rates in violation of Florida law, but the lender was able to dismiss Kelly's lawsuit, and the rest of the class action, because it had forced its borrowers into arbitration.⁷²



SEXUAL HARASSMENT AND DISCRIMINATION

When women, people of color, older people, and other disenfranchised groups are forced into arbitration, they lose their right to sue in a federal court regarding discrimination or other violations of Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, and the Religious Freedom Restoration Act, among other protections. When people attempt to hold a corporation responsible for violations of these laws, they are unlikely to prevail in forced arbitration for the same reasons as other consumers and workers. When women are forced to arbitrate sexual harassment claims, however, they have even less opportunity to prove their case than other types of litigants forced into arbitration.

FORCED ARBITRATION MAKES IT MORE DIFFICULT TO PREVAIL IN SEXUAL HARASSMENT CASES

Title VII of the Civil Rights Act of 1964 protects workers from sexual harassment, unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.⁷³ Congress has authorized women (and others) to sue the person who engaged in sexual harassment in federal court if the Equal Employment Opportunity Commission (EEOC) does not start its own enforcement action.⁷⁴ Employers, however, routinely require women to accept forced arbitration when they are hired, which requires that sexual harassment claims be submitted to arbitration.⁷⁵

The practice of forced arbitration came into sharp view when thousands of Google workers walked off the job to protest the mishandling of sexual harassment cases in November 2018. The walkout was prompted by a *New York Times* article that revealed Google had hidden the fact that it had paid millions of dollars in severance to male executives accused of misconduct.⁷⁶

As related earlier, corporations like Google are advantaged by forced arbitration because they can prevent other potential victims of harmful corporate behavior from knowing that others have been similarly impacted. The organizers of the walkout called on Google to, among other things, put “an end to forced arbitration in cases of harassment and discrimination for all current and future workers.”⁷⁷ Google responded by making arbitration optional for individual cases of sexual harassment for full-time workers.⁷⁸

As compared to the relatively well-paid and highly educated women working for Google, women of color in low-wage jobs are more likely to be the victims of sexual harassment and less likely to avoid forced arbitration. Nearly 7,000 complaints were filed with the EEOC alleging sexual harassment in 2016, 82 percent of which were filed by women.⁷⁹ Black women filed the largest number of complaints (15 per 100,000 workers), and Latinas the second highest (5 per 100,000 workers). Both exceeded the number of complaints from white, non-Hispanic women (about 5 per 100,000 workers).⁸⁰ The number of complaints filed by Black women exceeded the number filed by white, non-Hispanic women in every industry.⁸¹

Women in low-wage jobs are particularly vulnerable to sexual harassment because they cannot afford to risk losing their paycheck if they are retaliated against for pressing their claims.⁸² Thirteen million women hold low-wage jobs — two-thirds of all low-wage workers.⁸³

FORCED ARBITRATION SEVERELY LIMITS DISCOVERY

In both lawsuits and forced arbitrations alleging workplace sexual harassment, a litigant has the burden of proving the harassment occurred. In the courts, however, women have a significantly greater opportunity to discover evidence that supports their claim. In forced arbitration, they have almost no opportunity to find evidence that will factually confirm their allegations of illegal mistreatment.

A litigant in a federal lawsuit can demand documents (discovery), obtain answers to written questions (interrogatories), speak to witnesses (depositions), and subpoena corporate officials if necessary to produce needed information. Moreover, litigants are afforded reasonable time to use these tools to build their case. If an employer refuses to turn over relevant evidence, a judge will force the employer to do so.

In forced arbitration, this opportunity is extremely limited.⁸⁴ Litigants usually have only a few weeks to gather evidence, and some forced arbitration agreements eliminate discovery altogether.⁸⁵ Moreover, litigants cannot legally force an employer to turn over information.

After Deborah Pierce, a physician in Philadelphia, filed a complaint with the Equal Employment Opportunity Commission that her employer had discriminated against her by refusing her a partnership in its medical practice corporation, the EEOC determined there was probable cause that the corporation had discriminated against her.

Pierce filed her complaint after learning that her employer had denied another female physician a partnership as well, but she had no choice but to arbitrate her discrimination complaint. According to *The New York Times*, the corporation withheld crucial evidence, including audiotapes that it had destroyed, and when it finally turned over hundreds of records, the arbitrator gave Pierce's lawyer only one weekend to review the evidence. At the arbitration, a doctor reversed testimony that he had given to support Pierce's case, claiming her male colleagues had "clarified" her memory.

The arbitrator fined the employer \$1,000 for withholding and destroying evidence, but the arbitrator then billed Pierce \$2,000 for his time in handling this issue. When the arbitrator then ruled against Pierce, his decision contained several paragraphs written by the lawyers for the medical practice.

The arbitrator also billed Pierce \$58,000 for compensation and expenses.⁸⁶ Pierce had to take out a second mortgage to cover her legal expenses and pay the arbitrator. "I'm not a lawyer ... but this can't be right," Pierce observed.

FORCED ARBITRATION MAKES IT NEARLY IMPOSSIBLE TO PROVE PATTERNS OF DISCRIMINATION

The ban on class actions and limited discovery hinders women and others from proving an illegal pattern and practice of discrimination because it is difficult to obtain evidence proving an employer engaged in systematic discrimination.⁸⁷ People of color are banned altogether from claiming a pattern or practice of racial discrimination because this claim under Title VII of the Civil Rights Act can only be pursued in a class action, not by an individual plaintiff.⁸⁸

Marjorie Madfis had worked at IBM for 17 years when she and six other members (all women) of her nine-person digital marketing team were laid off. At the time she was fired, Madfis was 57, and the others were in their 40s and 50s. IBM retained two young male members of the team. A detailed investigation by ProPublica found that firing Madfis and the other women was part of an extensive effort by the employer to replace older workers with younger, less-experienced, and lower-paid workers. In an interview, Madfis pointed out that IBM “got rid of a group of highly skilled, highly effective, highly respected women, including me, for a reason nobody knows.” She concluded, “The only explanation is our age.”⁸⁹

The Age Discrimination Act of 1967, however, makes it illegal to “discharge any individual ... because of such individual’s age.”⁹⁰ In 2014, the corporation began to require workers to arbitrate age discrimination complaints and banned class actions in court or in forced arbitration. Moreover, contrary to a later law, IBM did not provide to the workers information that would have allowed them to suspect, if not determine, that the corporation was engaged in firing many older workers.

THE ARBITRATION FIELD IS DOMINATED BY WHITE MEN

Finally, forced arbitration affects victims of sexual harassment and discrimination because of the lack of diversity among arbitrators. Data collected from the two largest arbitration firms indicates that, among arbitrators, women and people of color are significantly underrepresented relative to the U.S. population and to the population of U.S. lawyers and judges.⁹¹ Underrepresentation is especially significant for women of color.⁹² As the following data indicate, the pool of arbitrators is overwhelmingly white and male:

Organization	Number	Gender	Black	Hispanic/Latino	Asian American
American Association of Arbitrators ⁹³	2,800	Men (78%) Women (22%)	3.9%	3.7%	1.5%
JAMS ⁹⁴	338	Men (68%) Women (32%)	5.0%	3.0%	2.5%
International Institute for Conflict Prevention & Resolution (CPR) ⁹⁵		Men (83%) Women (17%)	17% people of color		

Scholars and laypeople alike understand the benefits diversity brings to workplaces, and the arbitral forum is no exception.⁹⁶ As attorney Caley Turner explains in an essay published by the International Institute for Conflict Prevention and Revolution, “Consider, for example, a young Latino woman being forced to arbitrate an employment discrimination case against her boss, a white male, in front of a panel of three white male arbitrators.” In this situation, the “imbalance of power caused by such a scenario, whether real or simply perceived, may affect the arbitrators’ decision, and will definitely affect the woman’s perception of that decision.”⁹⁷ Nevertheless, the selection of arbitrators of color and women is generally proportional to their very low representation in arbitration organizations.⁹⁸

More statistical data is needed to understand how the homogeneity of arbitrators affects decision-making, but as Professor Susan Cole points out, “Many commentators believe that the lack of diversity among arbitrators undermines the integrity of the alternative dispute resolution (‘ADR’) process.”⁹⁹ A review of hundreds of forced arbitration cases by the American Association of Justice revealed that women and men arbitrators reach different results in the arbitration of sexual harassment cases:¹⁰⁰

Top 10 Arbitrators	Win Rate	Median Award
Men	2.1%	\$53,473
Women	3.4%	\$100,000

The concern about bias in discrimination cases is amplified by the lack of procedural fairness in forced arbitration discussed earlier in this report. There is no effective judicial review of arbitrators for bias, and no public accountability of the bias in the forced arbitration process.¹⁰¹ In addition, women and people of color lack the protections available in the federal courts to ensure fairness and diversity in the selection of juries, which are responsible for finding facts and determining whether sexual harassment occurred. These include requiring a plan of random jury selection from a cross-section of the population and requiring judges to prevent discrimination based on race, gender, or ethnicity.¹⁰²

NURSING HOME RESIDENTS

Nursing home residents, like others subject to forced arbitration, are hard put to hold a nursing home corporation accountable because it is far more difficult to do so in forced arbitration than in a lawsuit. Nursing home residents (or their families) are harmed in ways that other people subject to forced arbitration are not. Their claims relate to physical injury and even death caused by substandard care, neglect, and elder abuse.

Between 1 and 2 million people over 65 have been injured, exploited, or otherwise mistreated by someone on whom they depended for care or protection.¹⁰³ Older people in nursing homes and other institutional care facilities are at significantly higher risk for abuse and neglect than older people who live in their own homes.¹⁰⁴ In 2019, nursing home ombudsmen received nearly 200,000 complaints from nursing home residents or their families, 140,000 of which were verified by ombudsmen that year.¹⁰⁵ According to the National Research Council, these figures likely underestimate the number of older people at risk of abuse or neglect in a nursing home.¹⁰⁶

The coroner in Montrose County, Colorado, ruled the death of Charlotte Fischer, 90, a resident of the Colorow Care Center in Olathe, Colorado, a homicide. Available information indicated that she died after a nurse's assistant in the care center threw Fischer against a wall and fractured her hip. In a criminal proceeding, the county charged the assistant with third-degree assault on an at-risk person. Fischer's son and daughter also sued the nursing home in a civil action.

The Colorado Supreme Court held that Fischer's son and daughter were required to pursue their claim of nursing home negligence in forced arbitration. The corporation had inserted a forced arbitration requirement into the paperwork that Fischer's daughter, who had power of attorney to make decisions for her mother, had to sign so the nursing home would accept her mother as a resident.

The Fischers asked the Colorado Supreme Court to invalidate the required forced arbitration because the nursing home had failed to call this requirement to their attention in any way. But the court turned down their argument because the Federal Arbitration Act preempted or overruled state law concerning arbitration.¹⁰⁷ Shockingly, this opinion was in accord with U.S. Supreme Court decisions on the same subject.¹⁰⁸

In 2016, the Obama administration banned the use of forced arbitration by nursing homes that receive federal funding, but the Trump administration substantially overturned the ban. Under current federal law, where applicable, nursing homes are required to give patients a 30-day period to rescind forced arbitration requirements, but most people are unaware that they are the subject of forced arbitration or understand its implications.¹⁰⁹

The importance of protecting nursing home residents is growing. The U.S. Census Bureau predicts that by the year 2060, one in four Americans will be 65 or older.¹¹⁰ As the number of residents grows, the potential for neglect and negligence increases.

CONCLUSION

Forced arbitration makes it more difficult and often impossible for consumers and workers to hold corporations accountable for irresponsible and illegal actions. Low-income workers and consumers, the victims of systematic discrimination, and abused and injured nursing home residents are especially disadvantaged.

Congress must end forced arbitration and restore the capacity of individuals and the courts to hold businesses accountable for illegal and irresponsible actions that harm people and disproportionately harm low-income people, women and people of color, and nursing home residents. Congress must also restore access to class actions, a critically important mechanism empowering people of color and others in historically marginalized communities to effectively hold corporations accountable for discrimination and other harms. And Congress must restore the authority of federal judges to enforce its laws protecting women and people of color from discrimination, and workers from wage theft, to ensure that these laws provide the protections Congress intended.



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