



October 10, 2018

Hon. Gary Gensler, Chair  
Financial Consumer Protection Commission  
3E Senate Office Building  
Annapolis, MD 21401

Re: State measures to address forced arbitration

Dear Mr. Gensler,

Thank you for the opportunity to address the Commission regarding the state of the law on mandatory pre-dispute arbitration provisions and their enforceability under the Federal Arbitration Act (“FAA”). The other witnesses on the panel have spoken about the scope of the problem in terms of how predispute arbitration provisions harm Maryland residents and weaken the state’s ability to enforce its own laws. I will focus my remarks on the evolution of caselaw at the U.S. Supreme Court and in other courts regarding the extent to which the FAA preempts state laws regarding arbitration or that may impact arbitration.

### **Background on Public Justice**

Public Justice, P.C., is a national public interest law firm that specializes in pursuing justice for the victims of corporate and government abuse through precedent-setting and socially significant civil litigation.<sup>1</sup> Public Justice prosecutes cases designed to advance consumers’ and victims’ rights, civil rights and civil liberties, occupational health and employees’ rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. To further its goal of preserving access to justice for consumers, employees, and other persons harmed by corporate misconduct, Public Justice initiated a project devoted to fighting abuses of mandatory arbitration. In connection with our project, Public Justice has litigated, investigated, researched,

---

<sup>1</sup> The Public Justice Foundation is a 501(c)(3) non-profit charitable public foundation that supports Public Justice, the law firm. For purposes of these comments, both organizations are referred to interchangeably as Public Justice.

written and advocated about mandatory arbitration issues more extensively than any other law firm or organization in the United States that represents or advocates for consumers.

Public Justice has represented consumers and workers in a large number of cases challenging abuses of mandatory arbitration clauses, in state and federal courts, for more than fifteen years.<sup>2</sup> We have handled three cases in the U.S.

---

<sup>2</sup> Among the cases that Public Justice has won as lead or co-lead counsel are *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc) (unconscionable to require California resident to arbitrate in Boston, court may consider fact that contract is adhesive even though that applies to the entire contract); *Nat'l Federation of the Blind v. The Container Store, Inc.*, 2018 WL 4378174 (1st Cir. Sept. 14, 2018) (no arbitration agreement existed because flat touch-screen interface was inaccessible to blind customers so they did not know a contract was being offered to them, and even for one consumer who did have notice, the contract was illusory because the retailer could modify the terms at any time without notice to consumers); *Goodwin v. Branch Banking & Trust Co.*, 699 Fed. Appx. 274 (4th Cir. 2017) (refusing to sever one-sided portions of arbitration clause and striking entire clause as unconscionable); *Dang v. Samsung Electronics Co.*, 673 Fed. Appx 779 (9th Cir. 2017) (refusing to enforce arbitration provision found in warranty section of brochure packaged with Samsung smartphone, because a reasonable consumer would not have been on notice of the term); *Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047 (8th Cir. 2016) (employer waived its ability to compel arbitration by first litigating in court for eight months and trying to transfer the case to another jurisdiction before mentioning the arbitration clause); *Sgouros v. TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016) (arbitration clause struck down because online customers not given adequate notice of the agreement); *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085 (8th Cir. 2007) (finding waiver of right to compel arbitration by a lender); *Cain v. Midland Funding, LLC*, 156 A.3d 807 (Md. 2017) (by pursuing collection action to judgment against consumer, debt buyer waived its right to arbitrate subsequent class action challenging its collection practices); *FIA Card Services, N.A. v. Weaver*, 62 So.3d 709 (La. 2011) (arbitration clause not enforced where lender failed to prove the consumer had agreed to it); *Rivera v. American Gen. Fin. Servs., Inc.*, 150 N.M. 398 (2011) (where selection of National Arbitration Forum was an integral term of an arbitration clause, the court struck the entire clause, rather than appoint a substitute arbitrator); *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091 (Ak. 2009) (selective appeal provision unconscionable; case would only be sent to arbitration if employer would pay all substantial costs of arbitration);

Supreme Court on the topic of forced arbitration, most recently arguing *New Prime v. Oliveira*, No. 17-340, in the Court on October 3 of this year. We have also successfully opposed petitions for certiorari in at least eight cases where lower courts had refused to enforce abusive or overbroad arbitration provisions.

In addition to directly representing consumers in litigation, Public Justice has also assisted a large number of consumer attorneys, state government attorneys, and consumers with advice and input in their resistance to being forced into arbitration in their own cases. Over the past 18 years, Public Justice attorneys have responded to several thousand such requests for assistance. We have also presented on issues involving mandatory arbitration at more than 100 continuing legal education programs in over 30 states, always talking to participants about what they are seeing in their practices.

I believe that Public Justice's experience with the law surrounding forced arbitration provisions and their enforceability could be useful to the Commission as you look for ways to protect Maryland consumers, ensure that Maryland's laws are enforced, and also comply with the Supreme Court's guidance regarding the FAA. In the next section of my comments, I focus on the FAA's text and the concept of treating arbitration provisions like other types of contracts (the "equal treatment principle"). I will then describe a series of key Supreme Court cases in which the equal treatment principle has been applied, and explain the distinction between

---

*Addison v. Lochearn Nursing Home LLC*, 411 Md. 251 (2009) (trial court order compelling arbitration was not an appealable final order); *Cordova v. World Fin. Corp. of NM*, 146 N.M. 256 (2009) (one-sided arbitration provision unconscionable); *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707 (Fl. 2005) (broker waived right to compel arbitration, even though investor proved no prejudice); *Toppings v. Meritech Mortg. Servs., Inc.*, 212 W. Va. 73 (2002) (where a lender's arbitration clause designates an arbitration forum that is paid through a case volume fee system, and the arbitration forum's income is dependent on continued referrals from the creditor, this so impinges on neutrality and fundamental fairness that the clause is unconscionable and unenforceable); *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232 (2001) (credit card issuer's arbitration clause not binding on consumer, FAA did not preempt state procedural law of appealability).

those cases that found state laws to be preempted by the FAA and those that did not.

## **The FAA and the Equal Treatment Principle**

The Federal Arbitration Act was passed in 1925 to combat a long-standing judicial hostility towards private arbitration agreements. As the House Report accompanying its passage explained:

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

H.R.Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924).

The FAA mandates that “[a] written provision” in “a contract evidencing a transaction involving commerce” to arbitrate future disputes “shall be valid, irrevocable and enforceable,” but it also contains a “saving clause” providing that arbitration agreements may be held unenforceable on “such grounds as exist at law or in equity for the revocation of any contract,” such as the generally applicable contract defenses of fraud, duress or unconscionability. 9 U.S.C. § 2. Or, as the United States Supreme Court has explained, “the purpose of Congress [in enacting the FAA] in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). *See also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (Congress’s purpose in enacting the FAA was “to place an arbitration agreement upon the same footing as other contracts, where it belongs”).

While the House Report from 1924 speaks of federal court procedures for enforcing arbitration agreements, the U.S. Supreme Court has held that because the FAA was passed pursuant to Congress's power under the Commerce Clause, it applies in state as well as federal courts. And it follows that when the FAA conflicts with a state law, the FAA can preempt that conflicting state law under the Supremacy Clause. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”).

Whether courts will find that a state law conflicts with and is preempted by the FAA often turns on whether the state law in question falls within the FAA's saving clause, that is, whether it is a ground that would support the revocation of any contract, or at least a broader class of contracts than just arbitration agreements. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (“§ 2 [of the FAA] gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles”). Some examples may help to illustrate this equal treatment principle in practice.

### **Preemption Case Studies**

West Virginia determined as a matter of public policy that patients entering nursing homes, or the family members of those patients, should not be permitted to waive their right to sue for negligence leading to the personal injury or death of the patient while in the nursing home's care. As a result, the West Virginia Supreme Court held all pre-dispute arbitration agreements entered with nursing homes to be unenforceable as they pertained to later-arising personal injury or wrongful death claims, finding the FAA inapplicable because there was only a “collateral” connection between contracts affecting interstate commerce and subsequent personal injury or wrongful death claims. The U.S. Supreme Court vacated this opinion, finding it preempted: “West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.” *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 531, 533 (2012).

Montana had pursued a different course in its efforts to regulate pre-dispute arbitration clauses: subjecting them to a heightened conspicuousness requirement. Specifically, Montana required any contract containing an arbitration provision to place that provision on the first page of the contract in underlined capital letters. The Montana Supreme Court ruled that this statute was not in conflict with the FAA because it did not preclude arbitration altogether but simply sought to ensure that people enter into arbitration agreements knowingly. But justice Ginsburg, writing for a near unanimous U.S. Supreme Court, disagreed, citing the equal-treatment principle: “Montana’s law places arbitration agreements in a class apart from ‘any contract,’ and singularly limits their validity.” *Doctors Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). Because the Montana law “singl[ed] out arbitration provisions for suspect status,” it was preempted. *Id.* at 687.

Finally, state laws that don’t single out arbitration by name but that have been found to discriminate against a fundamental attribute of arbitration have also landed on the wrong side of the preemption line. In *AT&T Mobility LLC v. Concepcion*, the Supreme Court considered a California judge-made doctrine known as the *Discover Bank* rule, which prevented corporations from enforcing class action bans in contracts of adhesion with consumers where disputes between the parties were likely to involve small amounts. The California courts had grounded the *Discover Bank* rule in the concept of unconscionability, a general contract defense, and the rule applied to all adhesive contracts regardless of whether they contained an arbitration provision. But Justice Scalia, writing for a four-justice plurality of the U.S. Supreme Court with Justice Thomas concurring, still found preemption. He stated that classwide arbitration was “not arbitration as envisioned by the FAA” because “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Concepcion*, 563 U.S. 333, 348, 351 (2011). And because the *Discover Bank* rule allowed consumers to arbitrate on a classwide basis by invalidating the class action bans imposed by corporations, Scalia reasoned, that rule “interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA.” *Id.* at 344.

## Non-Preemption Case Studies

But not every FAA preemption challenge is successful in every court, and it might be instructive to review some situations where courts have refused to enforce arbitration agreements based on general contract law principles. In *Norcia v. Samsung Telecommunications America, LLC*, 845 F.3d 1279 (9th Cir. 2017), the Ninth Circuit affirmed the district court's order denying Samsung's motion to compel arbitration of a class action complaint alleging that Samsung misrepresented the performance of its Galaxy S4 phone. Samsung argued that plaintiffs were bound by an arbitration provision contained in the "Product Safety & Warranty Information" brochure inside the Galaxy S4 box. The court held that Samsung had failed to demonstrate that any exception to the general rule in California law that "silence or inaction does not constitute acceptance of an offer" applied here. The Ninth Circuit concluded that because nothing on the outside of the box or the brochure indicated that the brochure contained bilateral contract provisions, and because warranties do not typically bind consumers to additional contract terms that have nothing to do with warranty coverage, no reasonable person would have been on notice that the brochure contained an obligation on consumers outside the scope of the warranty. Thus a customer would lack adequate notice that Samsung was offering a contract in the brochure and that the customer's mere purchase and use of the phone would be deemed to constitute acceptance, and so the brochure was not enforceable as an in-the-box contract. The opinion in *Norcia* is notable because it focused entirely on what level of notice was adequate for consumers faced with adhesive contract terms, but none of the California law it relied on was unique to arbitration clauses or treated arbitration clauses differently from other types of contracts, in contrast to the Montana law in *Doctors Associates*. Samsung filed a petition for certiorari with the U.S. Supreme Court seeking review of this opinion, but the Court did not take the case.

*King v. Bryant*, 795 S.E.2d 340 (N.C. 2017), a medical malpractice case, presents another interesting example of an approach very different from West Virginia's wholesale refusal to enforce arbitration agreements with nursing homes where personal injury or wrongful death claims were at issue. In *King*, the North Carolina Supreme Court held unenforceable an arbitration clause that a surgeon required a new patient, Robert King, to sign before his first consultation appointment for a hernia operation. Although the lower court had found the clause unenforceable on grounds of unconscionability, a majority of the North Carolina high court pursued a different, and novel, approach, holding that by seeking

medical help from the surgeon and disclosing confidential health information on various other forms that he filled out the same day that he signed the arbitration agreement, Mr. King had entered into a confidential relationship with the doctor and his staff that triggered a fiduciary duty on the doctor's part to fully explain the legal significance of the arbitration clause to Mr. King. By failing to draw the clause to Mr. King's attention and simply presenting it in a pile of other paperwork he was required to complete, the court held, Dr. Bryant and his staff breached their fiduciary duty, which constitutes fraud as a matter of North Carolina law regardless of whether the doctor and his staff had any deceptive intent. Although proof of fraudulent intent is not required, proving a breach of fiduciary duty under North Carolina law does require a finding that the defendant sought to benefit himself at the expense of the other party. Here, the majority held that "defendants benefitted from Mr. King's action in signing the arbitration agreement by ensuring that any subsequent dispute between the parties would be resolved using the forum, procedures, and decision makers of their choice. As a result, defendants failed to act consistently with their fiduciary duty to Mr. King by requesting that he sign a document with substantial legal ramifications and which they believed to be of benefit to themselves without making full disclosure to Mr. King." *Id.* at 350. As with the *Norcia* case, the defendants in *King* sought certiorari review from the U.S. Supreme Court, but their petition was denied.

Finally, a common problem with adhesive consumer contracts, whether they contain arbitration clauses or not, is that their corporate drafters have an incentive to lard the contract with one-sided and unfair provisions and then, if the contract is challenged on grounds of unconscionability, simply ask the reviewing court or arbitrator to sever the most egregious provisions and enforce the rest of the contract. The New Mexico Supreme Court rejected this approach in *Cordova v. World Finance Corp.*, 208 P.3d 901 (N.M. 2009), where it had rejected as unconscionable a lender's one-sided arbitration provision that allowed the lender to go to court to pursue judicial foreclosure or repossession actions but required the borrower to arbitrate all claims against the lender. Rather than attempting to rewrite the arbitration provision to make it more fair, the New Mexico Supreme Court struck the arbitration provision in its entirety while enforcing the rest of the loan agreement, concluding that to do otherwise would require "a type of judicial surgery that inevitably would remove provisions that were central to the original mechanisms for resolving disputes between the parties." *Id.* at 911. Title X of the National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act suggests legislative language that would codify the approach to severance taken by the New Mexico Supreme Court in *Cordova*.<sup>3</sup>

---

<sup>3</sup> David Seligman, NCLC, Model State Consumer and Employee Justice Enforcement Act: Titles IX & X (January 2017), available at <https://www.nclc.org/images/pdf/arbitration/model-arb-law-titles-ix-x.pdf>.



Thank you again for the opportunity to discuss these issues with the Commission, and I look forward to answering any questions you may have.

Very truly yours,

A handwritten signature in black ink, appearing to read "Karla Gilbride". The signature is written in a cursive, slightly slanted style.

Karla Gilbride  
Cartwright-Baron Staff Attorney  
Public Justice