



BOSTON HEADQUARTERS
7 Winthrop Square, Boston, MA 02110-1245
Phone: 617-542-8010 • Fax: 617-542-8028

WASHINGTON OFFICE
1001 Connecticut Avenue NW, Suite 510, Washington, DC 20036
Phone: 202-452-6252 • Fax: 202-463-9462

www.nclc.org

David Seligman Testimony

New York State Assembly

**Standing Committee on Consumer Affairs and Protection &
Standing Committee on Judiciary**

February 10, 2016

Committee Members:

Thank you for this opportunity to speak to you about forced arbitration on behalf of the National Consumer Law Center and its low-income clients. The National Consumer Law Center is immensely interested in forced arbitration and the effects that it has on our clients. The Center sees this issue as presenting a fundamental challenge not only to our fundamental rights to access a public forum but also to economic justice and fairness. I am a contributing author at the National Consumer Law Center, where I specialize in forced arbitration, and a staff attorney at Towards Justice, where I represent low-wage workers in litigation involving workers' rights.

I authored NCLC's "Model State Consumer and Employee Justice Enforcement Act," which provides eight tools for states to protect their own interests against the harms caused by pervasive use of forced arbitration. The model act provides real, robust tools for states, but is also carefully drawn to escape federal preemption by the Federal Arbitration Act. I encourage you to consider NCLC's Model Act, and I am happy to answer questions about our proposals and FAA preemption more broadly after I complete my prepared testimony.

I appreciate your willingness to take on this issue—an issue that fundamentally undermines the fairness of our marketplace but that has gone unscrutinized for far too long. You are not the only state to recognize the harms caused by forced arbitration and the role that states can and must play in addressing them, but you are one of the first states, and you are an important leader on this issue.

Others here will speak to you at length about how forced arbitration impinges the rights of individual New Yorkers. Every day, these consumers, employees, nursing home residents, students of for-profit colleges, and many others, are forced to give up their fundamental rights to a day in court, a jury of their peers, and a public place to air their grievances. And they're forced to do all of this as a cost of doing business as a "little guy" in Twenty-First Century America.

But I'm not here to speak to you about the rights of individual New Yorkers. I'm here to talk to you about your rights, as representatives of the people of Brooklyn and Buffalo, Staten Island and Syracuse, and everywhere else in between. When you enact legislation, you expect compliance with those laws. To give teeth to those laws, to make sure they have real meaning in the world, you don't rely exclusively on government enforcement. You do not require a police officer or government agency to monitor every workplace, review every subprime auto loan, and sit in every nursing home room. How could you? Instead, you give the people the right to protect themselves in court and, where it is efficient, to band together to challenge a single policy or practice that affects all of them.

This is the only way our laws can work. And yet, by cramming arbitration clauses into form contracts, predatory businesses—or really, all businesses, but predatory businesses are the ones we care about—are hijacking the system by taking away your right to allow the people harmed by wrongdoing to enforce your laws proscribing it.

This hijacking has multiple ripple effect. The first and most obvious is that it undermines the effectiveness of New York law by taking away one of the State's most important enforcement mechanism—the private cause of action. Let's look at one example. In November, your Attorney General settled a large, multi-state fraud action against Education Management Corporation, which operates for-profit colleges like the Art Institute of New York City. For a decade, complaints about for-profit colleges like the Art Institute of New York City didn't go very far, and when they did go somewhere, it required massive state resources dedicated to public enforcement to make much of a dent in the problem. Why is that? Why did it take so long, and why did New Yorkers have to spend so much tax paper money to get anywhere?

The answer is arbitration. Many for-profit colleges include an arbitration clause in their enrollment contracts that prevent students from suing the school in a public forum and from banding together to gain the efficiencies of class litigation—efficiencies that are especially important in the context of vulnerable and low-income students who may feel embarrassed, like they are the ones responsible for falling prey to the fraud of for-profit schools.

Here is another harm caused the state by forced arbitration: As you know probably too well at this point, your state spends massive amounts of public funds on private service providers and contractors. You do your best to make sure that state negotiations with these entities are as transparent and public as possible. The public, after all, has a right to know how the state spends its money. But the entities that you do business with do not have the same obligation to conduct themselves publicly and transparently. By forcing their consumers and employees into arbitration, these businesses obscure important information that you and your constituents have a right to know.

Look at nursing homes: You spend millions on Medicaid payments to nursing homes every year, and you do not have the resources to put investigators in those homes every day to make sure that they are obeying the law. To know if your money is well spent, you depend on residents and their families to come forward. But arbitration clauses prevent that.

As another example, municipalities across California are now bringing an action against Verizon alleging that they were overcharged for mobile services. It is important that they take a stand now to try and get back some of taxpayers' money. But would it have taken so long if it were not for the fact that arbitration clauses prevent private Verizon consumers from suing in open court? I don't think so. I think that consumer attorneys and consumers would have taken an interest in this type of overcharging years ago, and Verizon would never have been able to cause this alleged harm to the public fisc.

Finally, corporations claim that arbitration is necessary because litigation generally and class actions in particular are inefficient and costly. I take issue with that characterization, and I think that on the whole class actions serve an important purpose for consumers and employees and that they are necessary for the efficient enforcement of federal and state law. But that dispute aside, corporate concerns with class litigation should be irrelevant to this debate. If corporations have a problem with substantive laws or with class actions in particular, their redress is with you, with Congress, or with the Rule 23 subcommittee. Their concerns do not license them to unilaterally create a contractual fiction that strips the rights of consumers and employees under the statutes and rules that lawmakers like you have enacted.

Again, it has been wonderful testifying before you today. I am happy to answer your questions about federal preemption and what states like New York can do about this issue. As you will see from NCLC's Model State Consumer and Employee Justice Enforcement Act, you have a number of tools at your disposal.