

February 21, 2023

Chairwoman Jessica Rosenworcel
Federal Communications Commission
45 L Street NE
Washington, DC 20554

RE: Comments to a Notice of Proposed Rulemaking on Data Breach Reporting Requirements, WC Docket No. 22-21

Dear Chairwoman Rosenworcel,

We, the undersigned organizations, strongly recommend the Federal Communications Commission consider banning forced arbitration clauses in your effort to update and strengthen the data breach rule for telecommunications carriers. The NPR states that the purpose of the proposed rule is to “provide greater protections to the public.” This is a laudable goal, but providing greater rights without remedies will not adequately protect the public. Telecommunications carriers, such as wireless companies and cable operators, often insert forced arbitration clauses and class action bans in their terms of service with consumers. Forced arbitration sends consumers into a rigged and secretive system that is selected by the wrongdoing company. Studies show that most consumers do not bring their claims to arbitration, and when they do, they usually lose.¹ The best way for the Agency to protect consumers and their personal information is to use your authority to limit forced arbitration. When bad actors have to answer claims in court, it has a strong deterrent effect from future negligent behavior. It also offers consumers a real chance at being made whole.

I. Forced Arbitration Clauses Are Detrimental to Consumers

Buried in the fine print of everything from cell phone to credit card to nursing facility contracts, forced arbitration allows corporations to eliminate fundamental legal rights of consumers before any harm actually occurs. Perhaps the most offensive characteristic of forced arbitration is that it is something corporations require consumers to “agree” to pre-dispute (i.e. before any harm occurs). This highlights the sharp contrast in bargaining power between consumer and corporation: instead of being able to bring claims in a court of law, claims are funneled into a corporation’s hand-picked dispute mill which is rigged, secretive, and final, with limited ability to appeal. We applaud and support the proposed updates addressing telecommunications carriers’ breach notification duties. In addition to the proposed updates, we recommend that the Commission considers a ban on forced arbitration provisions in consumer contracts with telecommunication carriers. As the number of data breaches continue to increase annually, allowing telecommunication carriers to impose forced arbitration agreements in consumer contracts create an additional burden on customers seeking legal recourse.

¹Velasco, A., & Gregg, R. (2022, February 23). *Forced Arbitration Stacks the Deck Against Everyday People, Especially Against Workers and Consumers of Color*. Retrieved from Public Citizen Web site: <https://www.citizen.org/news/forced-arbitration-stacks-the-deck-against-everyday-people/>

Further, forced arbitration is implemented by private arbitration companies with no government oversight or standardized rules. Under such circumstances, reaching a fully informed “agreement” to surrender fundamental legal rights in favor of a complex, secretive, and inherently biased legal process like forced arbitration is not possible. Data breach victims often find themselves at a disadvantage in these circumstances, and while addressing notification duties is imperative, eliminating forced arbitration provisions would provide greater protection by allowing victims to enforce the law.

A forced arbitration clause typically dictates the rules for an arbitration, including specifying the arbitration provider, the location for the arbitration, and the payment terms, all written for the benefit of the corporation. Private arbitration also lacks due process protections that are normally assured in our courts, including the ability to obtain key evidence necessary to prove one’s case. And arbitration proceedings are secret and provide virtually no right to appeal. Moreover, corporations benefit even more due to the repeat business that they deliver to private arbitration firms, providing incentive for arbitrators to rule in their favor.

II. The FCC Can Protect Consumers from Data Breaches By Using Their Authority to Restrict the Use of Forced Arbitration in Broadband Privacy Claims

a. Authority Under the Communications Act

The FCC has authority to ban forced arbitration under § 201 of the Communications Act, which requires all practices in connections with communications service to be reasonable, and that any practice that is unjust or unreasonable is prohibited. It further gives the FCC authority to prescribe regulations that are necessary in the public interest to carry out such provisions. As noted above, there are many examples of how the use of forced arbitration clauses is inherently unreasonable and unjust, and prohibiting its use in this context would be in the public interest. It is therefore clearly within the purview of the FCC’s authority to ban the abusive practice of forced arbitration. It would also promote the principles of transparency and choice, which the FCC notes are key components of the § 222 framework.

b. The FCC Can and Should Ban Forced Arbitration as a Part of This Rulemaking

Finally, under the Communications Act, it is clear that Congress contemplated a private enforcement mechanism of violations in §§ 206 and 207.² Including a ban on forced arbitration would be in line with Congressional intent under the Act. It is therefore worth considering imposing a ban on forced arbitration in telecommunication consumer contracts in addition to the Commission’s proposed measures. Eliminating waiting periods and updating the methods in which telecommunication carriers notify consumers of data breaches will provide much needed support and protection for consumers. Banning forced arbitration agreements will provide stronger protections for victims of data breaches by enabling victims to hold telecommunication carriers accountable for their actions.

² See 47 U.S.C.A. § 206-207. Carriers’ liability for damages.

III. Conclusion

The undersigned understand and appreciate the challenges faced by the FCC as the Commission crafts rules for communications providers. We believe that those rules should include a dispute resolution process that serves and protects the interests of consumers. The undersigned do not oppose *post*-dispute, truly voluntary arbitration, as well as other types of dispute resolution processes under specific circumstances. For instance, when the consumer has a clear choice of whether to take her complaint to arbitration or court, and has power over how an arbitration process should proceed.

We urge the entire Commission to support banning forced arbitration when updating data breach reporting requirements and to adopt dispute resolution procedures that are open and transparent and which protect consumers' legal rights. In order to protect consumers from the ever-growing harms of breaches of personal information across sectors, their rights to justice must also be protected.

American Association for Justice
Americans for Financial Reform Education Fund
Alliance for Justice
Center for Justice & Democracy
Consumer Action
Consumer Federation of America
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
National Consumers League
People's Parity Project
Public Citizen
Public Justice
U.S. PIRG