

From the Conference Room to the Courtroom:
Consumer Protection and Antitrust Law under the FAIR Act

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“Forced arbitration” is quickly becoming a popular buzzword in the news especially as new bills related to forced arbitration are being introduced on Capitol Hill. But what exactly is “forced arbitration”? Forced arbitration refers to the process where a “company requires a consumer or employee to submit any dispute that may arise to binding arbitration as a condition of employment or buying a product or service. The employee or consumer is required to waive their right to sue, to participate in a class action lawsuit, or to appeal. Forced arbitration is mandatory, the arbitrator’s decision is binding, and the results are not public.”¹ Forced arbitration affects ordinary people every day through disputes about labor issues, business, consumer, and antitrust issues, family law issues, and sexual harassment issues. This article will discuss arguments for and against the implementation of the FAIR Act, the origins of the FAIR Act, and the effect of the FAIR Act on the future of consumer and antitrust disputes.

Pros of Forced Arbitration

Timeliness, low costs, confidentiality, and fairness, though fairness is contested as an asserted but not universally accepted benefit of arbitration, are some of the advantages of forced arbitration. Forced arbitration resolves legal disputes quicker than a trial. The process of forced arbitration is less formal and more flexible in terms of scheduling and the discovery process

¹ *Arbitration*, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, <https://www.consumeradvocates.org/for-consumers/arbitration/>.

often entails of one phone call.² The arbitration process is also cheaper than other legal resolutions like a trial because there are no expert witnesses and much less legal preparation is required.³ Both parties generally split the cost of the arbitration which also makes the cost much less expensive.⁴ Moreover, the arbitration process is confidential and private which appeals to employers and other private parties who would rather not have a large media spectacle.⁵ Though some, as discussed later, challenge this assertion, arbitration also usually results in a fair outcome, because both parties have agreed to the arbitrator and are encouraged to come up with a solution together.⁶

Cons of Forced Arbitration

Forced arbitration does have some disadvantages including a prohibition on class actions, no appeals, and a lack of consistency. The decision made through the arbitration process is final and there are no formal appeals processes available to the parties. Thus, if one party feels as though the resolution is unfair or biased, they are unable to appeal it.⁷ Additionally, companies typically use forced arbitration clauses to prevent class action lawsuits. This type of prohibition allows companies to have a type of legal immunity in areas where they have benefitted through small injuries to a large number of people.⁸ Moreover, arbitrations have a lack of consistency. This is due to the fact that there are no set standards for arbitration and that the arbitration

² *What are the Advantages and Disadvantages of Arbitration?*, UPCOUNSEL, <https://www.upcounsel.com/what-are-the-advantages-and-disadvantages-of-arbitration>.

³ *Id.*

⁴ *Id.*

⁵ *Pros and Cons of Mandatory Arbitration Policies for Employment Disputes*, JD SUPRA (Mar. 6, 2019), <https://www.jdsupra.com/legalnews/pros-and-cons-of-mandatory-arbitration-91461/>.

⁶ *Id.*

⁷ *What are the Advantages and Disadvantages of Arbitration?*, *supra* note 2.

⁸ *Mandatory Arbitration Clauses are Discriminatory and Unfair*, PUBLIC CITIZEN, <https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair/>.

process is not evidence based.⁹ Rather, the arbitrator, who is generally chosen by the company, is entrusted with making the correct legal decision.¹⁰

The Start of the FAIR Act

Forced arbitration clauses began making headlines as the #MeToo movement gained momentum. The movement culminated with the passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, colloquially called the “MeToo” Law, which enforced a ban on mandatory arbitration agreements for sexual harassment and assault claims.¹¹ Following the passage of the “MeToo” Law, Representative Johnson (D-GA), introduced the Forced Arbitration Injustice Repeal Act (FAIR Act) in the House of Representatives.¹² The House passed the FAIR Act on March 17, 2022. Rep. Johnson based his promotion of the Act in the Seventh Amendment which exemplifies the right to seek justice and accountability through the court system.¹³ A companion bill has also been introduced in the Senate, however, the bill’s supporters have had a tough time garnering bipartisan support. This is likely because the FAIR Act supports the ban of forced arbitration clauses for all types of employment claims.¹⁴ Currently, there are no Republican sponsors of the bill in the Senate and, as such, the FAIR Act will have an uphill battle in amassing the support needed to pass.¹⁵

⁹ *What are the Advantages and Disadvantages of Arbitration?*, *supra* note 2.

¹⁰ *Id.*

¹¹ Mark A. Konkel & Alison Frimmel, *The FAIR Act: A New Bill Banning Mandatory Arbitration Agreements*, KELLEY DRYE (Mar. 25, 2022), <https://www.laboradaysblog.com/2022/03/the-fair-act-a-new-bill-banning-mandatory-arbitration-agreements/>.

¹² Press Release, House Committee on the Judiciary, Chairman Jerrold Nadler, Nadler, Johnson, & Cicilline Commend House Passage of H.R. 963, the FAIR Act of 2022 (Mar. 17, 2022), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4896>.

¹³ Press Release, Hank Johnson Congressman for Georgia’s 4th District, Rep. Johnson Re-Introduces Legislation to End Forced Arbitration & Restore Accountability for Consumers, Workers (Feb. 11, 2021), <https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-re-introduces-legislation-end-forced-arbitration-restore>.

¹⁴ Konkel & Frimmel, *supra* note 11.

¹⁵ *Id.*

What is the FAIR Act

The FAIR Act would amend the Federal Arbitration Act that codified the use of arbitration in 1925.¹⁶ While the FAIR Act pertains to employment, consumer, antitrust, and civil rights disputes, this article will address the implications to antitrust and consumer disputes. The Act defines antitrust disputes as those arising from an alleged violation of the Sherman or Clayton Acts or state antitrust laws, when the plaintiffs seek class certification.¹⁷ The scope of consumer disputes under the Act extends to disputes between individuals who seek class certification, and sellers (or involved third parties), regarding an exchange of real or personal property, services, securities, investments, money, or credit for personal, family, or household purposes.¹⁸

The main provision of the FAIR Act would prohibit predispute arbitration agreements for consumer and antitrust disputes.¹⁹ The Act defines “predispute arbitration agreement” as “an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement.”²⁰ The House Committee on the Judiciary recommended passage of the bill and emphasized the law’s purpose of protecting millions of Americans from ubiquitous forced arbitration clauses, that are often buried within contract fine print, which deprive consumers of their day in court to enforce state and federal rights.²¹ For example, in consumer contracts, these forced arbitration clauses are hidden inside envelopes, delivery boxes, and privacy policies, and apply to common goods and services that consumers can’t avoid, such as 90% of mobile phone service providers.²²

¹⁶ H.R. Rep. No. 117–270, at 7 (2022).

¹⁷ H.R. 963, § 501(1), 117th Cong. (2022).

¹⁸ *Id.* at § 501(3).

¹⁹ *Id.* at Sec. 2(1).

²⁰ *Id.* at § 501(5).

²¹ H.R. Rep. No. 117–270, at 4 (2022).

²² *Id.* at 9.

Additionally, the Act would prohibit stand-alone class action and collective action waivers for consumer and antitrust disputes.²³ The language of the Act frames the prohibitions on collective action waivers as a protection against such “practices that interfere with the right” to participate in joint actions.²⁴ This supports the proponents’ position that the protections in the law would merely restore the right to access the courts to those who have been locked out from joining together to resolve their disputes under the promise of justice in the courts. The House Committee wanted to protect “fundamental notions of fairness and equity” that can only be ensured through the transparency and precedent of the judicial system, in contrast to arbitration protocols that lack procedural safeguards and prioritize privacy above all.²⁵

By protecting the ability to join together in class actions and collective actions, this specifically restores private antitrust rights that were previously destroyed by class action waiver clauses. The House Committee heard testimony from antitrust law professors who emphasized the importance of the FAIR Act in protecting consumers’ and small businesses’ ability to privately enforce antitrust laws.²⁶ While criminal enforcement of antitrust laws is important to deter and punish antitrust conspiracies, private enforcement is virtually the only way to actually compensate businesses and consumers as victims of these antitrust violations.²⁷ Additionally, given the complex evidentiary proof requirements in antitrust cases, class actions are often the only means of making such private enforcement actions affordable.

The Act also provides that decisions of whether a dispute is applicable under the Act must be decided by a court, not an arbitrator.²⁸ This provision provides fairness to questions of

²³ H.R. 963, Sec. 2(2), 117th Cong. (2022).

²⁴ *Id.*

²⁵ H.R. Rep. No. 117–270, at 4 (2022).

²⁶ *Id.* at 12–13.

²⁷ *Id.*

²⁸ H.R. 963, § 502(b), 117th Cong. (2022).

arbitrability and invalidates clauses in arbitration agreements that try to delegate questions of applicability to an arbitrator.²⁹

The FAIR Act passed the House on March 17, 2022, by a vote of 222-209, with one Republican joining all 221 Democrats in voting yes.³⁰ As to whether the Act could pass the Senate, the Act would need the support of at least ten Republicans to survive a filibuster, if one were to be made.³¹ Senators across both parties agree that arbitration should be made more transparent.³² However, while some Republicans express support for arbitration reform, most think this bill is too broad in scope.³³ There is concern that the restriction on forced arbitration clauses would overburden state and federal courts.³⁴ Further, critics of a broad arbitration reform law argue that the FAIR Act would deprive consumers of a faster and cheaper alternative to litigation.³⁵ Additionally, opponents argue that this reform would be worse for consumers in the long run because businesses will pass on costs from more litigation leading to more expensive prices for consumers.³⁶ While the Senate may be split on the issue, the American people overwhelmingly support the reform, as “84% of Americans across the political spectrum support ending forced arbitration in employment and consumer disputes.”³⁷

²⁹ John Phillips & Andrew Scroggins, *Another Step Down the Slope: The House of Representatives Votes to Ban Mandatory Employment Arbitration and Class and Collective Action Waivers*, JD SUPRA (Mar. 12, 2022), <https://www.jdsupra.com/legalnews/another-step-down-the-slope-the-house-5211138/>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Kellen Scott, *House Passes FAIR Act to Ban Pre-Dispute Arbitration Agreements*, SHALE MAG (June 12, 2022), <https://shalemag.com/house-passes-fair-act-to-ban-pre-dispute-arbitration-agreements/>.

³⁴ Daniel Wiessner, *House passes bill to end mandatory arbitration of legal disputes*, REUTERS (Mar. 17, 2022), <https://www.reuters.com/legal/transactional/house-passes-bill-end-mandatory-arbitration-legal-disputes-2022-03-17/>.

³⁵ *U.S. Chamber Letter on the "Forced Arbitration Injustice Repeal (FAIR) Act"*, U.S. CHAMBER OF COMMERCE (Mar. 8, 2021), <https://www.uschamber.com/lawsuits/arbitration/us-chamber-letter-the-forced-arbitration-injustice-repeal-fair-act>.

³⁶ Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. (2001).

³⁷ H.R. Rep. No. 117–270, at 6 (2022).

The Future of Consumer Protection and Antitrust Disputes under the Act

Should the FAIR Act pass into law, consumers will be granted newfound agency in deciding where they can bring their case. While this measure may lead to greater equity in consumer protection and antitrust claims, the cases resulting from Amazon dropping its forced arbitration provisions signal that the courtroom is not always as consumer-friendly as the Act's advocates might hope.

As it stands, forced arbitrations rule against the consumer in 90% of the time.³⁸ In 2020, only 4.1% of consumers received a monetary award – a decrease from a 5-year average of only 5.3%.³⁹ With win rates so low, consumers who have been disenfranchised are often forced to bet the house on a losing game, risking substantial legal fees for an overwhelming chance of failure. By providing consumers with the option to proceed in litigation as individuals or a class, the FAIR Act promises to give consumers a fighting chance in court.

However, the courtroom will not prove to be a cure-all for consumer grievances, as courts may provide uneven results. While the courtroom may be more sympathetic to consumer claims than a panel of arbitrators, courts are not guaranteed to rule in their favor. This is well-illustrated by the legal battles that followed Amazon removing forced arbitration clauses from its terms and conditions. In 2020-21, over 75,000 individual arbitration claims were filed by consumers, alleging that Amazon's Echo devices recorded customers without their consent.⁴⁰ Rather than contend with this flood of claims, Amazon announced that it had dropped the forced arbitration clause from its terms and conditions. Litigators and consumers wasted no time in filing class

³⁸ "Advocates Applaud House Passage of the FAIR Act." National Consumer Law Center. March 17, 2022. <https://www.nclc.org/advocates-applaud-house-passage-of-the-fair-act/>

³⁹ "Forced Arbitration in a Pandemic: Corporations Double Down." American Association for Justice. October 27, 2021. <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>

⁴⁰ Corkery, Michael. "Amazon Ends Use of Arbitration for Consumer Disputes." *The New York Times*. July 22, 2021. <https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html>

action consumer protection and antitrust claims.⁴¹ While filing thousands of arbitration claims to compel companies to drop forced arbitration clauses is not a sustainable method of ending the practice at large, the resulting cases against Amazon provide insight into the mixed results consumers may receive in the courtroom should the FAIR Act pass into law.

First, some courts may be more sympathetic to antitrust claims than a panel of arbitrators hired by the company defendant, resulting in favorable rulings and higher settlement amounts. In the midst of the mass arbitrations being filed against Amazon, consumers in Seattle, Washington, filed a would-be class-action suit against Amazon in the Western District of Washington.⁴² The complaint alleged that Amazon utilized a clause in its agreements with third-party vendors that prevented them from selling good in other markets with better prices and terms.⁴³ Amazon shortly set up the first hurdle consumers will face in the courtroom by filing their motion to dismiss, citing a lack of standing and a failure to state an anticompetitive claim.⁴⁴ In what would be a rarity in arbitration proceedings, the Western District ruled partly in favor of the consumers , finding that they had sufficient standing and had sufficiently pled an anticompetitive claim to proceed as a class action in federal court.⁴⁵ However, the Court went on to dismiss the plaintiff's state antitrust claims and unjust enrichment claims, finding that the plaintiffs failed to plead sufficient facts for either.⁴⁶ If *Frame-Wilson* is any indicator, consumers may find that while the burden to establish a valid antitrust claim is high, judges may be more sympathetic to their claims than a panel of arbitrators.

⁴¹ See, e.g., *District of Columbia v. Amazon, Inc.*, Superior Court of District Columbia, Case No. 2021 CA 001775 B; see also *Frame-Wilson v. Amazon.com Inc.*, W.D. Wash., No. 20-cv-424

⁴² *Frame-Wilson v. Amazon.com Inc.*, W.D. Wash., No. 20-cv-424

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

In reality, however, courtroom results may vary for consumers pursuing claims across the nation. On May 25, 2021, Karl Racine, Attorney General for the District of Columbia, filed an antitrust suit against Amazon in the Superior Court of District of Columbia, in large part repeating the claims by consumers in Seattle.⁴⁷ Less than a year later, the Superior Court proved that not every court would be as sympathetic to consumer claims as the Western District of Washington. On March 18, 2022, in an oral ruling the Superior Court granted Amazon’s motion to dismiss the suit for failure to state an anticompetitive claim.⁴⁸ While the initial decision may seem disheartening to consumer activists, the case is also illustrative of the pathways available to consumers in a world without forced arbitration. In August, Racine filed a notice of appeal, stating that “consumers deserve a fair online marketplace that promotes competition, innovation, & choice-- not one that’s rigged to line a single company’s pockets.”⁴⁹ While the initial suit may not have resolved in the consumers’ favor, the hope of an appeal would ordinarily be denied under forced arbitration clauses.

In using Amazon as a roadmap for consumer protection litigation, however, it is imperative to note that Amazon is better resourced than most companies. As of 2022, Amazon’s market capitalization is \$1.22 trillion, making it the fifth most valuable company in the world.⁵⁰ For companies with less resources at their disposal, attorneys that can produce the same results as Amazon may be hard to come by. The result could be that courts are more consumer-friendly

⁴⁷ *District of Columbia v. Amazon, Inc.*, Superior Court of District Columbia, Case No. 2021 CA 001775 B

⁴⁸ *Id.*

⁴⁹ Racine, Karl. Tweet dated August 25, 2022. <https://twitter.com/AGKarlRacine/status/1562818912072650753>

⁵⁰ “Amazon, Inc.” GoogleFinance. October 21, 2022.

https://www.google.com/finance/quote/AMZN:NASDAQ?sa=X&ved=2ahUKEwjFj6SFt_f6AhVSIkEHa08BI0Q3e_cFegQIHxAh; see also, “Market capitalization of Amazon (AMZN)” Companies Market Cap, October 21, 2022. <https://companiesmarketcap.com/amazon/marketcap/#:~:text=As%20of%20October%202022%20Amazon.cap%20according%20to%20our%20data>

than the Amazon cases may indicate, or, as the FAIR Act’s critics fear, the costs of litigation will simply be passed along to consumers.

All in all, the death of forced arbitration does not mean that consumers are guaranteed a win in the courtroom, and the FAIR Act does nothing to address current inequities consumers face in litigation. As evidenced by the Superior Court of District of Columbia’s ruling, the bar for asserting an anticompetitive claim is incredibly high. Additionally, companies may be more likely to remove any state court claims to federal court, which is notoriously less sympathetic to plaintiff consumer claims.⁵¹ If the lawmakers behind the FAIR Act wish to provide consumers with a wholly equitable forum for consumers to seek redress, careful consideration must be given to the roadblocks currently presented by our existing legal system.

Conclusion

In total, the FAIR Act undoubtedly presents potential for radical changes for consumer protection and antitrust law. While arbitration may provide a faster, more cost-effective way to resolve disputes, forcing consumers to present claims before arbitrators chosen by the corporation has resulted in 90% of claims being resolved against consumers. Further, by mandating forced arbitration, consumers across the nation are robbed of the ability to bring their claim as a class, an essential tool for low-income consumers. By changing the arena from the conference room to the courtroom, the FAIR Act presents great promise in providing consumers with a chance to have their voices heard in a more equitable venue before more objective judges.

However, the need for bipartisan support and issues raised by critics of the Act present significant challenges to its passage and efficacy. Key issues raised by the Act’s critics center on

⁵¹ Diego A. Zambrano, Federal Expansion and the Decay of State Courts, 86 U. CHI. L. REV. 2101, 2164 (2019). See also Zachary D. Clopton, Procedural Retrenchment and the States, 106 CALIF. L.REV. 411, 432–434 (2018) (tracking state court rulings on the “commonality” requirement after Wal-Mart v. Dukes).

the inefficiency and cost of litigation as well as the fact that litigation has not been shown to be a particularly consumer-friendly venue. In fighting for bipartisan support of the Act and ensuring a more equitable legal system upon its passage, proponents and lawmakers must consider ways to ameliorate the substantial cost and inefficiency of our court system. However, these critiques apply to our legal system at large, including the wide span of practice areas that do not force litigants out of the courtroom as a matter of rule. While the FAIR Act may not be a cure-all for consumer disenfranchisement, by providing consumers with the *choice* of whether they would like to have their claims heard before a panel of arbitrators or a judge, the FAIR Act promises a world where consumers have more agency in deciding where their claims are heard.