

**Senate Judiciary Committee – Questions for the Record from Senator John Kennedy
April 4, 2019**

Hearing entitled “Arbitration in America”

Questions for Kevin Ziober, Myriam Gilles, Alan Kaplinsky, F. Paul Bland Jr., Alan Carlson, and Victor Schwartz

Alan Carlson’s answers:

- 1. I will be introducing the Stop Blaming Victims Act to address the problem of Nondisclosure agreements being used to protect government employees who sexually harass others. It would limit the ability of government employees to hide behind non-disclosure agreements. NDA’s are dangerous because they are often mandatory elements of a settlement that prevent victims from speaking out later on when they see similar abuses repeated. How are mandatory NDA’s used in forced arbitration? Are they also used to silence wronged parties who might seek to expose wrongdoing at a powerful company?**

I do not know how NDA’s are used in the forced arbitration process because I was never able to enforce my rights in *any* forum; such is the case for most small businesses that are bound by forced arbitration and want to go up against a much larger corporation. One of the worst things about forced arbitration clauses with class action waivers is that they prevent small business owners like me from being able to bring our dispute in any forum because it’s impossible for small businesses to go it alone. In my case, because of the forced arbitration clause that Amex uses (that I never saw) which said that I had to go to forced arbitration on my own and could not join together with other small businesses to share the costs of taking on Amex, I could not afford to bring my dispute AT ALL. Whether there would have been a mandatory NDA associated with my arbitration is irrelevant because I never got that far. Because I could not join with other businesses in a similar situation to me, my antitrust claim against Amex was never heard in any forum. I am a silenced, wronged party that continues to be wronged by a powerful company because of forced arbitration.

- 2. Courts consistently rule that claims under the Uniformed Services Employment and Reemployment Rights Act, which protects the employment rights of members of the armed forces, are subject to arbitration under the Federal Arbitration Act. We should be ensuring that our military men and women are adequately protected. How is it fair that an employer can fire an employee who leaves for combat and often times their only recourse is arbitration? What in your opinion needs to be done to correct this?**

I agree with you 100% that it is not fair for members of the military who sacrificed to serve our country to be forced into arbitration when they bring cases under federal laws that were

passed to protect them. I feel that my fellow witness, Kevin Ziober, was wronged twice – once by his employer who violated the law by firing him, and once by the U.S. legal system that forced Kevin to arbitrate his claim instead of allowing him to use the public court system. But servicemembers and veterans are not only wronged by violations of laws particularly designed to protect them. Members of the military are also business owners and consumers. Congress should pass the Forced Arbitration Injustice Repeal Act to ensure that servicemembers and all Americans have the right to bring disputes before a judge and jury.

3. In the past couple of years, more and more companies have eliminated forced arbitration. Over the last year, Uber, Lyft, Facebook, and Google and many others have scrapped their arbitration policy. Why do you think we are seeing this uptick in companies ending their forced arbitration policy?

Some companies have placed limits on their arbitration policies in response to an outcry from their employees and the public. People are starting to hear and learn what binding forced arbitration is all about and how it affects each and every one of us in our daily lives. If it has not affected them personally as of yet, they more than likely know someone who has been harmed by forced arbitration. The media attention around the Wells Fargo scandals and the sexual harassment at Fox News helped to educate the public about how very unfair and devastating forced arbitration can be.

However, as I understand it, the companies you listed have not eliminated forced arbitration completely, and certainly not for the majority of consumers or small businesses. The vast majority of major corporations continue to use forced arbitration with class action waivers in their employment and consumer contracts and those that don't only seem to have stopped because of negative media attention. While it's good that some companies have stopped using forced arbitration, I don't think my rights as a consumer or as a small business owner should be in the hands of big corporations making decisions based on what's in the press.

Polls show that a large majority of people do not like forced arbitration once they understand what it is. But most people don't understand how forced arbitration works, and therefore, the response from the public against forced arbitration will never be great enough to make most companies change their policies. The only way they will change is if the law is changed. I strongly believe that everyone deserves their day in court and the ability to fight for their rights as guaranteed by our constitution. That is why I am asking Congress to pass the FAIR Act and protect the rights of American small businesses, consumers and workers.