

TESTIMONY
OF

VILDAN A. TESKE
PARTNER AT CROWDER, TESKE, KATZ & MICKO, PLLP

**“THE FEDERAL ARBITRATION ACT AND ACCESS TO JUSTICE:
WILL RECENT SUPREME COURT DECISIONS UNDERMINE THE
RIGHTS OF CONSUMERS, WORKERS, AND SMALL BUSINESSES?”**

HEARING BEFORE THE
U.S SENATE JUDICIARY COMMITTEE

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Chairman Franken, Committee Ranking Member Grassley, and distinguished members of the Judiciary Committee, thank you for inviting me to testify about the recent Supreme Court decisions, mandatory pre-dispute arbitration clauses and class action ban provisions within those clauses.

I. Introduction

In today's testimony, I will share with you my perspective as an advocate for consumers and servicemembers from experiences over the length of my career. I will describe the types of cases consumers and servicemembers are no longer able to bring to our country's judicial system because of mandatory arbitration. I will explain how the prolific use of forced arbitration clauses and class action bans will ensure that illegal and abusive practices will go unchecked and largely undetected. Many cases simply will not be possible to bring due to the disproportionate expense of bringing a relatively small individual claim rather than banding with others in a class action. I will discuss the importance of protecting access to our public justice system and the right to a jury trial which will vanish for the many consumers and servicemembers whose claims will be pushed into the private, and most times secret, arbitration system against their will.

I want to be clear, at the outset, that I am referring to pre-dispute mandatory binding arbitration clauses, not voluntary arbitration where the parties agree to take their dispute to arbitration, after the dispute has arisen. I believe that the latter is an option parties should have. It is only forced arbitration clauses and the class action bans within them that are the subject of my testimony today.

II. Pre-Dispute Forced Arbitration Clauses are Usually Buried in Fine Print and are Not Negotiated by Parties of Equal Bargaining Power.

All of our clients, like the overwhelming majority of consumers, are not aware of the pre-dispute mandatory arbitration clauses and class action bans that are found in contracts for the goods and services they use every day. These clauses are usually buried in the fine print of lengthy contracts (whether in paper form, or electronic “terms and conditions” found in almost all internet transactions that require the consumer to click to accept before one can go any further). Many of these clauses are over multiple pages of indecipherable text that only attorneys have a shot at understanding.

These lengthy, fine print clauses are rarely read by consumers.¹ Even if they do attempt to read them, most consumers do not understand the legal ramifications of forced arbitration or a class action ban within an arbitration clause.

Even assuming the consumer understands the effect of these contract clauses, the opportunity to negotiate the terms is not available. Most consumer contracts are presented as a take it or leave it proposition. They are standard-form contracts of adhesion. The only choice the consumer has is to not purchase that good or service. However, when most, if not all, of the providers of those goods and services in a

¹ If each and every consumer read every word of the contracts, or terms and conditions, with which they are presented every time they are contemplating entering into a transaction, commerce in our country would come to a grinding halt. Businesses count on, and design their processes around, consumers *not* reading the lengthy legalese-laden contracts. Imagine the car rental counter at a busy airport, with a long line of travelers standing behind you as you painstakingly go over each word in the contract, ask questions, and ask to negotiate the terms. Now imagine every single renter doing the same. A very unlikely scenario. In fact, many businesses now ask you to sign a small electronic screen at the counter that says you’ve read their agreement or terms and conditions, when they have not actually given you the document that contains the agreement.

particular industry put such clauses in their contracts, there is no choice in the true sense. When, for example, nearly every car rental company puts such clauses in their contracts, is there really a choice? How about if the only cable or internet provider in your area requires such clauses before it will install your cable or internet?

Arbitration was originally meant to be an option for parties of equal bargaining power to take their dispute outside the court system, if they each chose to do so. Forced arbitration, however, is a completely different animal.

III. Forced Arbitration Takes Away the Constitutionally Guaranteed Right to Trial by Jury in Our Public Court System.

The Seventh Amendment of the U.S. Constitution guarantees a right to trial by jury in most situations when there is a dispute among two parties. The right to have a jury decide the facts of a case is one of the most important pillars of our justice system. The right to have one's day in court has long been ingrained in our system. Access to justice is critical to curbing unjust and illegal practices by those that would flout our laws. Like other constitutionally guaranteed rights, we must, as a society, take very seriously any attempts to eradicate these rights from our citizens, whether they are consumers, servicemembers, employees, investors, or seniors.

The constitutionally guaranteed right to have one's day in court, however, is being eroded by every contract that contains a forced arbitration clause. Unfortunately, consumers realize their right to seek redress in our public justice system before a judge or jury is destroyed only after a dispute arises and it is too late to do anything about it.

Our public court system provides a number of procedural and substantive due process protections, developed over several centuries of jurisprudence. Losing one's ability to have a jury decide the facts, or the ability to appeal a judge's decisions on the law, is an affront to our system of justice. Yet, these important rights are being taken away in forced arbitration clauses buried in fine print of contracts.

IV. Class Action Bans Within Pre-Dispute Mandatory Arbitration Agreements Will Ensure that Many Claims Cannot Be Brought.

Pre-dispute, forced arbitration clauses eviscerate the ability of consumers, servicemembers, seniors, investors, employees, small businesses, and others to effectively vindicate their rights under our country's longstanding federal and state laws.

The principal effect of an arbitration agreement requiring consumers and servicemembers to forfeit their right to bring their claims as a class action is not, as some would argue, to provide an alternative forum to court; it is, instead, to *suppress* consumers' and servicemembers' ability to prosecute their claims by joining others subjected to the same wrongdoing. Following the U.S Supreme Court's decisions in the *Concepcion* and *Italian Colors* cases², groups of individuals, as well as small, "mom and pop" businesses, have lost the right to join together to use our country's court system to enforce federal and state laws.

² *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011) and *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

Important laws dealing with civil rights, employment discrimination, consumer protection, servicemember rights, and fair marketplace practices have become more and more difficult to enforce whenever there is a pre-dispute forced arbitration clause with a class action ban in an underlying contract. In effect, practically all challenges to such clauses on *any* ground are now foreclosed by these two U.S. Supreme Court decisions.

As a result of these rulings, the courthouse doors have been closed to consumers and servicemembers nationwide. Forced arbitration clauses are now included in almost all consumer and employment contracts. A recent study issued by the Consumer Financial Protection Bureau (“CFPB”) demonstrates that forced arbitration clauses are becoming standard business practice in contracts for financial products like payday loans, credit cards and checking accounts. The CFPB study found that 9 out of 10 arbitration clauses prevent consumers from banding together to bring collective claims.³ This has an enormous impact on consumers—where the value of claims can be small individually, but large in the aggregate, and class actions are often the only way of revealing widespread corporate fraud. The myth of less expensive proceedings and faster results for the consumer is quickly dispelled by the evidence. There are cases, across industries, where forced arbitration has placed the consumer or servicemember at a distinct disadvantage, leaving them worse off, financially and emotionally, than if they had been afforded access to justice. This new dystopia must and should come to an end.

Americans deserve better.

³ Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results*, p.13 (December 12, 2013) http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf

In my practice, I have had the privilege of representing our brave military men and women in matters dealing with consumer financial issues. Congress provided important financial and civil protections for our servicemembers and their families through the Servicemembers Civil Relief Act (SCRA)⁴, formerly known as the Soldiers and Sailors Civil Relief Act. These protections have been on the books since before World War I, with periodic amendments to reflect modern life and new financial products and services. The stated purpose of the law is to “provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation.” 50 U.S.C. App. §502.

The law includes potent protections for active duty servicemembers against foreclosures on their homes, repossession of vehicles and other personal property, protection against default judgments, evictions, the right to a cap of 6% interest on any loan or obligation (including student loans, credit cards, mortgage loans, car loans, business loans, personal loans, etc.) entered into prior to active duty status, and also certain rights when terminating vehicle and premises leases, as well as cell phone contracts, when the servicemember is deployed or receives a Permanent Change of Station (PCS) outside the area.⁵ As the Supreme Court stated, the law is meant to “protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

⁴ 50 U.S.C. App. § 501, *et seq.*

⁵ The listed protections are the most common consumer financial provisions encountered under the SCRA. The Act provides a number of other protections that are not discussed here.

With the large number of deployments over the past decade, the financial crisis our country has experienced over the past six years, and reckless (if not intentional) business practices violating servicemember rights, SCRA claims have been more prevalent than in previous years. My firm has been contacted by a number of servicemembers from across the country that have been dealing with financial difficulties, or who have asked creditors for their SCRA rights but were denied them. In addition to advising the servicemembers pre-litigation, where appropriate, we have filed private enforcement actions against the creditors.

My colleagues and I were able to bring some of the cases as class actions on behalf of all servicemembers that were affected because our investigations revealed that there were likely numerous other servicemembers whose SCRA rights were violated by the same creditor, and the underlying contracts did not contain forced arbitration clauses with class action bans. Most of those contracts were entered into approximately 8-20 years ago, before many consumer financial companies began to, almost uniformly, include such provisions in their contracts. We were able to recover millions of dollars for thousands of servicemembers without each servicemember having to take the time and effort to bring an individual action on his or her own behalf.

The reality is that an overwhelming majority of those servicemembers would not, and could not, have brought these actions on their own without being part of a class action. Average damages were from several hundred to several thousand dollars- scarcely enough to make it economically feasible to bring individual actions. Many of the

hundreds of servicemembers we have spoken with did not know that they could bring an action to enforce their rights.⁶ Those that knew their creditor was likely breaking the law did not have the time to pursue the claim or resources to hire an attorney to take the case on. Also, as with many consumer claims, expert testimony may be required, making an individual case prohibitively expensive to bring⁷. We have heard from many class members thanking the servicemember class representative and us for taking on the defendant in what was a David vs. Goliath scenario. Unfortunately, such cases on behalf of classes of servicemembers are now almost impossible to bring due to the Supreme Court's decisions in *Concepcion* and *Italian Colors*.

It is not sound public policy to require our military men and women to take time and energy away from their mission to handle such matters one by one, when their interests can be well served by one servicemember class representative and class counsel who are willing to shoulder the risk and commit substantial time and resources to the litigation. Imagine thousands of our armed forces members having to submit their claims to costly, time consuming, individual arbitrations, having to take time away from their service and/or from their families in order to vindicate their rights under our laws. Yet, this is exactly what has to happen when there is a class action ban in a servicemember's consumer contract. Or, more likely, the servicemember has to forgo enforcing his/her rights and the wrongdoer is not brought to justice. Forced arbitration clauses with class

⁶ Although all servicemembers receive information on the SCRA when they go through basic training, one cannot expect they will become experts in the legal nuances of the Act.

⁷ It is not unusual for the services of an expert to run into the tens of thousands of dollars, and in some, more complex cases, for expert fees to total up to six figures or more.

action bans directly contradict the national interest when our military men and women cannot band together to bring their claims in one class action case.

The Department of Defense prepared a report for Congress in 2006 regarding predatory lending practices facing the military and found areas of concern that needed to be addressed, including forced arbitration clauses and class action bans in the consumer contracts servicemembers enter into.⁸ The DoD, recognizing the harm such clauses impose, stated:

Service members should maintain full legal recourse against unscrupulous lenders. Loan contracts to Service members should not include mandatory arbitration clauses or onerous notice provisions, and should not require the Service member to waive his or her right of recourse, such as the right to participate in a plaintiff class. Waiver is not a matter of “choice” in take-it-or-leave-it contracts of adhesion.⁹

Throughout its report, the DoD emphasized that servicemembers need to have “judicial remedies through the courts for redress.”¹⁰ Our nation’s two million servicemembers, like all other consumers, are now subjected to these forced arbitration clauses and class action bans in millions of contracts for a variety of goods and services.

Lower courts have been presented with these issues in the form of motions to compel arbitration and to dismiss class actions in SCRA cases over the last few years. Following the U.S. Supreme Court’s recent rulings, the courts have uniformly enforced the mandatory pre-dispute arbitration clauses and class action bans in consumer contracts

⁸ Department of Defense, Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents (Aug. 9, 2006), <http://1.usa.gov/rVdafq>.

⁹ *Id.* at 7-8.

¹⁰ *Id.* at 46.

entered into by servicemembers. One example is the decision in *Wolf v. Nissan Motor Acceptance Corp.*, 2011 WL 2490939 (D.N.J. June 22, 2011), where a servicemember that entered active duty service sought to enforce his right under the SCRA to terminate an auto lease agreement into which he had entered prior to his service. He sought the return of an advance payment of \$595.00 required by the creditor, as well as other amounts he prepaid. The auto finance company denied his request even though the SCRA clearly prohibits the company from keeping such advance, unearned payments. He brought a case on behalf of himself and all other servicemembers who had such fees retained by this national finance company. However, because the servicemember had signed a lease agreement that contained, in the fine print, a forced arbitration clause and class action ban, the defendant swiftly moved to force him into arbitration and to dismiss his class action case.

Citing the recent U.S. Supreme Court decisions, the district court sent the servicemember's case out of our public justice system and into private arbitration. The judge also ruled that, as a result of the class action ban in the arbitration agreement, the servicemember and his attorneys could not represent the interests of the other servicemembers who had been subjected to the same, illegal practice. This, of course, meant that the hundreds, if not thousands, of other servicemembers were left on their own to try to redress this wrong, even though the amount of the damages are relatively small and a class action would be the most efficient, and likely the only way, to get relief. Experience instructs us that the other servicemembers likely did not have the opportunity,

time, or the resources to bring their cases to enforce the protections that have long been guaranteed to them by federal law.

Another stark example is a case that we brought against a national mortgage lender for foreclosing on our servicemember client while he was on active duty and protected by the SCRA. The mortgage lender held a sheriff's sale and sold our client's house while he was being deployed to Iraq. The SCRA prohibits non-judicial foreclosures (also known as "foreclosure by advertisement" in some states) while a servicemember is on active duty or during other periods of SCRA coverage. In other words, the only way a lender can legally foreclose is to file a foreclosure action in court, and convince a judge that it should be able to move forward with the foreclosure even though the servicemember is on active duty. This is because the public policy behind the SCRA foreclosure protections is that our active duty servicemembers should not have to worry about their homes being foreclosed on while they are trying to focus their energies on serving our nation.

The lender in our case, however, did not go to court and get permission to foreclose. It simply published notice in the newspaper and attempted service of foreclosure papers on our client (he was already gone). In addition to the notice of foreclosure, it also filed an affidavit in the property records swearing that he was not currently in military service when, in fact, he was. Some months later, while he was in Iraq, he learned he lost his home in a foreclosure but, at that time, he did not know he was

protected by federal law from this unlawful foreclosure and, more importantly, had the right to go to court to remedy this wrong.

After hearing about some other SCRA foreclosure cases against various lenders in the national media, he contacted us. We investigated the facts of his case, as well as the practices of this particular mortgage lender. We found a report that had been issued as a result of an enforcement action, stating a review of a sample of foreclosures conducted by this particular lender found over 80 foreclosures that were subject to the protections of the SCRA. In discussing this with our client, he made the decision to file his case not only on his own behalf but also as a class representative for other servicemembers that had been wrongfully foreclosed on by this lender. Like many of our selfless servicemembers, this client didn't want this type of illegal conduct to happen to his military brothers and sisters while they were on active duty. And our country's laws have a simple way to accomplish that: a class action.

Much to our client's surprise,¹¹ the lender, rather than answering the complaint we filed in federal court, brought a motion to compel him to arbitrate his claim. It turned out that in the thick stack of closing documents he had been directed to sign when he purchased the house years before, there was a mandatory arbitration clause, which provided that the lender could force him to arbitrate any claims he may have relating to the mortgage loan, including a wrongful foreclosure. The arbitration clause also contained a class action ban. Thus, following the Supreme Court's rulings on arbitration,

¹¹ Following the foreclosure, he no longer had copies of his closing documents.

the judge decided that our client was not able to represent other servicemembers that had been foreclosed on. He lost his right to a day in court and his constitutionally guaranteed right to present these facts to a jury. One cannot escape the irony that while he was serving his country and protecting our freedoms, he had lost his freedoms and rights under our constitution.

Although it was likely other servicemembers had been foreclosed on in the same way, rather than one class action, it would be up to each member of the military to know that they have rights under the SCRA, find their own lawyer, and take the time and energy to prosecute their own case in arbitration, with their limited resources, and presumably, after coming home from serving their country.

Another example is a case in California, against a national lender that repossessed active duty servicemembers' vehicles without court order, in violation of the SCRA. *Beard v. Santander Consumer USA, Inc.*, 2012 WL 1292576 (E.D. Cal. Apr. 16, 2012) report and recommendation adopted, 2012 WL 1576103 (E.D. Cal. May 3, 2012). In that case, when the servicemember was about to be deployed to Iraq and asked for some help with payments, the lender offered a forbearance of a few months and had him sign a modified lease agreement that contained a mandatory arbitration clause and class action ban. Later, as he was serving in Iraq, he fell behind in his payments. The lender repossessed the vehicle without obtaining a court order, in violation of the SCRA. After seeking help from the military legal assistance lawyers, and letters being sent on his behalf informing the creditor that it was in violation of the SCRA to no avail, Sgt. Beard

brought a class action against the lender to enforce his and others' SCRA rights.

Predictably, that court also enforced the arbitration clause and Sgt. Beard lost his right to bring his and the other servicemembers' claims in court.

Unfortunately, with the proliferation of forced arbitration clauses and class action bans in consumer contracts, these scenarios will continue to play out for our servicemembers, as well as all other consumers. Due to class action bans in the underlying consumer contracts, my office has had to turn down cases that are not possible to bring when the individual damages amount at stake are relatively small. Not only are the protections of the SCRA being eviscerated, the scores of other consumer financial protections our laws provide for servicemembers, and non-servicemembers alike, will not be prosecuted fully, if at all.

V. Conclusion

At this juncture, Congressional action is the only way to ensure a fair marketplace for all consumers, employees, investors, seniors and other individuals. It is also needed to protect the rights of our military men and women under long-standing federal laws providing civil and financial relief to our active duty servicemembers and veterans. The only way to effectively remedy this grossly unfair situation is by passing federal legislation such as the Arbitration Fairness Act. As an advocate for consumers and servicemembers, I can definitively say that, without such legislation, our ability to enforce the laws of this country, that were meant to protect *all* Americans, will be greatly diminished, if not rendered impossible.

Thank you for the opportunity to testify today, and I look forward to answering your questions.