Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing

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What do they all have in common? For years, they successfully kept corporate wrongdoing secret, through forced arbitration.

Buried in the fine print of employment contracts and consumer agreements, forced arbitration clauses prohibit you from going to court to enforce your rights. Instead, employees who experience harassment and discrimination, or consumers who are the victims of financial fraud or illegal fees, are sent to a private arbitration forum. Frequently designed, chosen, and paid for by the employer or corporation, in arbitration everything is conducted in secret. People who suffered the same abuses often can’t join together to show how rampant a problem is and confront a powerful adversary—and people are less likely to come forward at all, because they have no idea they aren’t alone.

When Gretchen Carlson sought her day in court over sexual harassment allegations against Roger Ailes, her former boss at Fox News, Mr. Ailes’s lawyers had a quick response: send the case to forced arbitration. After she filed suit, he also invoked a clause that reportedly required absolute secrecy: “all filings, evidence and testimony connected with arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence.” It was only because she resisted that clause through a creative legal theory that her allegations were made public—unleashing a tsunami of claims of sexual harassment by Ailes and others at Fox News.

Hundreds and maybe thousands of former employees of Sterling Jewelers, the multibillion-dollar conglomerate behind Jared the Galleria of Jewelry and Kay Jewelers, known for advertising slogans such as “Every kiss begins with Kay,” were allegedly groped, demeaned, and urged to sexually cater to their bosses to stay employed. The evidence of apparent rampant sexual assault was kept secret for years from other survivors and the general public through gag orders imposed in forced arbitration.

The same thing happened at American Apparel, where employees and models were forced to arbitrate sexual harassment claims and keep the details secret, and the proceedings were reportedly a sham.
We don’t yet know if Hollywood producer Harvey Weinstein used forced arbitration to suppress allegations of his decades-long campaign of sexually harassing, abusing, and assaulting young assistants, temps, employees and executives at the Weinstein Company and Miramax. But the clauses may well have played a role, and his nondisclosure agreements and secret one-by-one settlements worked to the same effect.

And forced arbitration clauses do not only hide wrongdoing in sexual harassment cases. Corporations also use forced arbitration to isolate victims and cover up massive, widespread wrongdoing in the financial sector.

For example, forced arbitration clauses found in legitimate customer accounts let Wells Fargo block lawsuits related to the 3.5 million sham accounts it opened; as a result it kept its massive scandal secret for years, and then lied to Congress about it. People began trying to sue Wells Fargo in 2013, but cases were pushed out of our public courts into secret arbitrations, and Wells Fargo continued creating fake accounts.

KeyBank, like Wells Fargo, has also used forced arbitration to keep disputes secret and block relief for people charged overdraft fees when their accounts weren’t overdrawn. A court recently ruled “unconscionable” KeyBank’s provision requiring a customer to “keep confidential any decision of an arbitrator.” But the court allowed KeyBank to force the plaintiff to arbitrate his case individually, despite the fact that thousands or millions of KeyBank customers were subject to the same abuses. These customers were not permitted to come together to challenge these abuses as a group in court, because of forced arbitration.

By imposing secrecy and isolating victims, forced arbitration shields corporate wrongdoing and leaves it more difficult for those harmed to hold the wrongdoers accountable. That’s why the Consumer Financial Protection Bureau issued a rule earlier this year prohibiting banks, payday lenders and other financial companies from using forced arbitration to cover up widespread frauds, scams and abuses. This is a first step in the right direction of restoring Americans’ rights to challenge predatory practices. But some in Congress have threatened to block this important protection.

Earlier this year, Congress and President Trump overturned rules that prohibited employers with federal contracts from forcing employees to arbitrate sexual harassment or sexual assault claims, or claims alleging discrimination on the basis of sex, race, or religion. In so doing, they took power away from women facing sexual harassment and returned it to those trying desperately to keep that harassment under wraps.

We cannot tolerate another blow against Americans seeking to hold the wealthy and powerful accountable. The CFPB’s rule must be permitted to go forward.