



Fair Arbitration Now

Forced arbitration stacks the deck against consumers and workers. It's time we even the scales.

January 22, 2015

Ted Mitchell
Under Secretary, U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Use of Forced Arbitration in Corinthian College Acquisition

Dear Mr. Mitchell:

Fair Arbitration Now, a network of more than 70 consumer, labor, legal and community organizations, write to urge you to ensure that the legal rights of students are fully restored in the ECMC Group's acquisition of 56 Corinthian College campuses. Specifically, in its transition from for-profit institution to *non*-profit status, the Corinthian College system must be barred from continuing a predatory for-profit college practice: the use of predispute binding mandatory (or forced) arbitration clauses in its student enrollment documents.

Increasingly, Corinthian and other for-profit colleges have buried terms in their enrollment contracts that eliminate students' constitutional rights to legal protections and access to the federal and state courts.¹ Instead, according to the enrollment terms, students with legal claims must resolve the disputes in secret and often costly arbitration proceedings.

By contractually removing students' access to the court system, Corinthian and other for-profit colleges have shielded themselves from being held accountable for actual and potential wrongdoing and harm caused to their students. Students seeking an education to improve their lives and persuaded by the aggressive recruiting tactics and sleek marketing ploys of for-profit colleges, have been cheated and misled by many of these schools about career training potential and have been induced to incur thousands of dollars each in student loans.

Corinthian has received significant scrutiny for its business practices.² It has been accused of considerable misconduct and violations of numerous consumer protection laws, including use of

¹ See, e.g. *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 930 (9th Cir. 2013).

² Republic Report, *Law Enforcement Investigations and Actions Regarding For-Profit Colleges*, <http://bit.ly/1zuAzL1>, last updated Jan. 6, 2015.

false, misleading and deceptive misrepresentations, such as providing false data about job placement rates to induce students to enroll in its schools.³

However, due to the arbitration clauses in the fine print, students have been denied the basic American right to seek to make themselves whole through the civil justice system. The terms, inserted in contracts without any input or understanding from students, specify the arbitration process, including the for-profit institution's preferred arbitration provider, the arbitration venue and fee payments. Arbitration providers face a risk of losing income if they decide disputes against their repeat customers, for-profit colleges.

Arbitrators do not even have to follow the rule of law in their decision-making, yet appeals of their rulings are rarely permitted. Meanwhile, the proceedings are secret. Unlike the courts, there are no public opinions, development of law, or factual findings that potentially could have long ago revealed to the public and the Department of Education, a pattern of risky behavior by the institutions, which only recently has become evident as a result of state and federal government investigations.⁴

The growing use of arbitration clauses in corporate contracts is due to the U.S. Supreme Court's expansive view of the Federal Arbitration Act (FAA), which ultimately led to its 2011 decision, *AT&T Mobility v. Concepcion*. In *Concepcion*, the Court permitted class action bans in consumer contracts and held that the FAA generally preempted state laws that said otherwise. When students have tried to band together in class actions to recover damages, for-profit colleges have been successful in requesting that courts compel the students to settle the disputes in individual arbitration or not at all.

For example, soon after the *Concepcion* decision, a Colorado federal court, which said it was "sympathetic" towards students' arguments against Westwood College and/or Westwood College Online in Colorado, reluctantly adhered to the Supreme Court's holding.⁵ "There is no doubt that *Concepcion* was a serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals," the court wrote, as it enforced the arbitration clause in the enrollment contracts.⁶

Similarly, by assenting to the continued use of arbitration clauses and class action bans in enrollment documents under ECMC Group – Corinthian's prospective new owner – the Department of Education would be failing to do its due diligence to ensure that appropriate safeguards are in place to protect Corinthian students, including restoring their right to seek accountability in court. Moreover, the Department would be going in the exact opposite direction of its counterparts in the federal government.

Congress has passed laws limiting forced arbitration clauses in numerous circumstances, to protect consumers with respect to residential mortgages; auto dealers in their transactions with

³ Complaint, *California v. Heald College, LLC*, <http://bit.ly/1sWvgl0>; Complaint, *Massachusetts v. Corinthian Colleges, Inc.*, <http://1.usa.gov/15sHebj>, and Complaint, *Wisconsin v. Corinthian Colleges*, <http://bit.ly/1J4O1GR>.

⁴ See, e.g. Consumer Financial Protection Bureau, *CFPB Sues For-Profit Corinthian Colleges for Predatory Lending Scheme*, Sept. 16, 2014, <http://1.usa.gov/1qKBKS1> and Eric Kelderman, *State Attorneys General Open New Investigations Into For-Profit Colleges*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 28, 2014, <http://bit.ly/1BaKO51>.

⁵ *Bernal v. Burnett*, 793 F. Supp. 2d 1280 (D. Colo. 2011).

⁶ *Bernal*, at 1288.

manufacturers; livestock and poultry growers; military members with respect to payday loans, vehicle title loans, and tax refund anticipation loans; and employees of government defense contractors with Title VII and sexual assault tort claims.⁷

In September 2014, the Department of Defense issued a proposed rule to further expand the current military financial protections and the ban on forced arbitration under the Military Lending Act to a wider range of high-cost loans made to active-duty service members and their dependents.⁸ A few months earlier, President Obama issued an executive order to protect employees of federal contractors. Now companies with federal contracts worth \$1 million or more may not require their workers to submit to forced arbitration for discrimination under Title VII of the Civil Rights Act of 1964, sexual harassment, or assault claims.⁹

Congress also has granted the Consumer Financial Protection Bureau (CFPB) and the Securities and Exchange Commission the authority to ban forced arbitration in consumer and investor contracts under their respective jurisdictions.¹⁰ The CFPB, which is studying the use of forced arbitration clauses in consumer financial services contracts, released preliminary data showing that very few consumers, despite the existence of valid claims, go to arbitration on an individual basis, while hundreds and even thousands of consumers have been compensated in class actions.¹¹

Further, state officials have acknowledged that forced arbitration and class action bans greatly limit consumers' ability to seek redress for corporate wrong doing. In a recent letter to the CFPB, 16 state attorneys general said that "(i)n some cases...private class action lawsuits or at least class action arbitrations afford consumers the only opportunity to seek relief, due to the expense of individually bringing their own case or the inability to procure legal representation."¹² The letter added that consumer class actions can impact and complement public enforcement work of consumer protection laws.

Finally, there has been an emphasis on the nonprofit status of prospective owner ECMC Group, and the transition of the Corinthian College system from for-profit to nonprofit entity. Nonprofit colleges generally do not impose the predatory practice of forced arbitration on their students. And even if they did, the nonprofit status of a school should not shield it from accountability for wrongdoing or deny its students the ability to seek remedies in court.

As it oversees the acquisition of Corinthian Colleges, the Department of Education should insist on restoring individuals' legal rights. It must bar ECMC or any other potential owner from using forced arbitration against Corinthian students.

⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Sec. 1414(e), Pub. L. 111 – 203; Motor Vehicle Franchise Contract Arbitration Fairness Act (2002), Pub. L. 107-273; Food, Conservation, and Energy Act (2008), Pub. L. 110-234; Military Lending Act, 10 U.S.C. 987(e)(3) and (f)(4); Department of Defense Appropriations Act, 2010, Sec. 8116, Pub. L. No. 111-118.

⁸ Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 79 Fed. Reg. 58602, Sept. 29, 2014.

⁹ Exec. Order, Fair Pay and Safe Workplaces, No. 13,673, 79 Fed. Reg. 45309, July 31, 2014.

¹⁰ Dodd-Frank Act, Pub. L. 111 – 203, §§ 921 and 1028.

¹¹ Consumer Financial Protection Bureau, Arbitration Study Preliminary Results, Section 1028(a) Study Results To Date, Dec. 12, 2013, at 62-64, 105-110, <http://1.usa.gov/18WUWEy>.

¹² Letter from 16 State Attorneys General to Consumer Financial Protection Bureau, Nov. 19, 2014, Regarding a Study Pursuant to Section 1028 of the Dodd-Frank Act, at 3, Nov. 19, 2014, <http://1.usa.gov/1xG16WS>.

If you have any questions or concerns, please contact Christine Hines, Public Citizen, chines@citizen.org, (202) 454-5135 or Ellen Taverna, National Association of Consumer Advocates, Ellen@consumeradvocates.org, (202) 452-1989 ext. 109.

Sincerely,

Fair Arbitration Now

(Organizations that support ending the predatory practice of forced arbitration in consumer and non-bargaining employment contracts: <http://www.fairarbitrationnow.org/coalition/>).

cc: Dave Hawn, President and CEO of ECMC Group

Rohit Chopra, Student Loan Ombudsman, Consumer Financial Protection Bureau