EDITORIAL

The Op-Ed *The New York Times* Doesn't Want You to See

By Paul Bland for Public Justice*

The following op-ed was originally submitted for publication in The New York Times, *but was not accepted by the paper's editors, despite the Times' insistence that it maintains a strong wall between its editorial and business affairs. Were editors afraid to rankle the paper's business executives? Were they embarrassed by the company's hypocritical decision regarding its recently enacted forced arbitration clause? Or have they changed their own editorial stance on the use of forced arbitration clauses, especially in consumer contracts?*

We may never know, but one thing remains clear: the Times *is refusing to listen to the deeply researched evidence its own journalists and editorial board members have uncovered over the past decade.*


The New York Times
The New York Times
QUALITY KITCHEN
SCHNIPPER'S
ARBITRATION
AGREEMENT

On November 7, 2015 *The New York Times* editorial board wrote that forced arbitration "has become vast and more entrenched as companies increasingly require customers, employees, investors, patients and other consumers to agree in advance to arbitrate any disputes that arise in their dealings with a company," adding that, "corporations effectively control the arbitration process, including the selection of an arbitrator and the rules of evidence, a stacked deck if ever there was one."

The editorial board's strong stance against such practices followed a searching, *in-depth series* in the paper earlier that year that exposed the very real harms of forced arbitration clauses. That series found that, in the prior four years, "corporations prevailed in four out of five cases" when forced into arbitration, and that those who were bound by clauses prohibiting class action lawsuits "usually dropped their claims entirely." Noting that "nursing homes, obstetrics practices and private schools" were increasingly utilizing such clauses to keep the public out of court, the *Times* editorial board went on, in subsequent years, to publish no fewer than *eight* editorials decrying the practice in some way, in addition to giving space to more than *thirty* op-eds that also slammed the use of arbitration clauses to block the courthouse doors.

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Fast forward a few years, though, and the *Times* has now bound users of its own app and other materials and services to an arbitration clause of the company's own. Last month, the company updated its terms of service to note that, "Your agreement to arbitration means that for all covered claims, you are giving up your right to file a lawsuit in court and the right to a trial by jury."

It stinks of all the hypocrisy that's fit to print – in fine print clauses that the paper itself has acknowledged few people read, understand, or have any power to oppose.

Indeed, the original 2015 series in the *Times*, and the subsequent, excellent journalism focused on the topic by *Times* reporters in the nearly eight years since, has helped to usher in a sea change in how the public – and, increasingly, policymakers – view arbitration. Prior to 2015, few people understood just what "forced arbitration" meant, or that they were bound by it when buying a cell phone, using websites, or taking part in any of the other countless everyday activities now governed by such clauses.

But in the years since, a growing chorus in Congress has advocated change. For example, the House passed *The FAIR Act,* a bill to end arbitration in consumer and employment cases. And both houses *passed legislation,* signed last year by President Biden, to prohibit forced arbitration in cases of sexual harassment and misconduct. Support for these measures has even resulted in unexpected political alliances. For example, representatives Katie Porter (D-CA) and Matt Gaetz (R-NC), for example, are both strong opponents of the use of forced arbitration clauses. Public support also *crosses political and ideological lines,* with a majority of both Republicans and Democrats supporting the end of forced arbitration. That shift in public opinion was strongly aided by the reporting in the *Times* and the call from its editorial board for "public outcry loud and long enough to stir the White House and Congress to action."

Until last month, that "loud and long" outcry included the formidable voice of the *Times* itself. So, what happened?

The *Times* can't think that things have gotten better. On the contrary, more and more people are being subjected to forced arbitration in more and more areas of their lives. During a recent Senate hearing, Public Justice Board Member Myriam Gilles *noted that*, if the trend continues in its current direction, roughly 8 out of 10 Americans will be forced to agree to arbitration *in order to be hired for a job.* And an enormous number of consumer products and services now come along with an arbitration clause. This leaves only one inescapable conclusion: The business side of the *Times* has decided that profit trumps principle and that it will not, in light of that, put its money where its mouth *was*, and where its reporters clearly landed at the end of their own investigations into the matter.

That's not just a shame but puts the *Times* – which in its best moments has helped lead the way on progressive thinking about civil rights, political extremism, and other important issues – on the wrong side of history when it comes to one of the most significant consumer and workers' rights issues of our day. It also aligns this paper of national significance with the likes of *former President Donald Trump*, former FOX News Chairman *Roger Ailes* and serial sexual predator *Charlie Sheen* – all of whom used forced arbitration clauses to hide abuse, corruption and other shocking wrongdoing – and against everyday workers, consumers and other Americans who are being locked out of our country's judicial system by a process the *Times* journalistic staff have led the way in exposing.

It's time for the Times to retract its arbitration clause and live up to the paper's own ideals and reporting.

"But" as the *Times* said in its November 17, 2015, editorial on the subject, "it is happening, and it needs to stop."

When the national paper of record ignores the lauded research of its own respected reporters and preaches a chorus of "do as we say, not as we do," its readers should – and will – take note. Hypocrisy, hyperbole, and hidden agendas might be the norm in some newsrooms today, but America expects better of *The New York Times.*

Perhaps *Times* executives should re-read their own team's coverage and re-think this ill-advised move. It's time for the *Times* to retract its arbitration clause and live up to the paper's own ideals and reporting.

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