



MEMORANDUM

TO: Members of Assembly Consumer Affairs
FROM: Alida Kass, President & Chief Counsel
SUBJECT: A4972
DATE: March 7, 2019

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's leading employers, trade associations, and medical organizations dedicated to improving New Jersey's civil justice system and fostering economic growth. On behalf of our members, **we respectfully oppose A4972.**

Two elements of this legislation are of particular concern.

The legislation would impose a set of substantive requirements exclusively on arbitration agreements. Although arbitration agreements are typically drafted to be very generous to consumers, and often provide for fees to be covered by the business, the Federal Arbitration Act precludes the state of New Jersey from requiring such substantive elements as a matter of law.

The FAA requires that arbitration agreements be "placed on an equal footing with other contracts." And it is similarly a principle of the FAA that arbitration is a matter of contract, and that courts must "enforce them according to their terms," save upon such grounds as exist "for the revocation of any contract."

Requiring that a consumer cannot be required to bear any fees if the consumer does not prevail in arbitration, requiring that all fees be waived for indigent consumer, and requiring that indigence must be conclusively established on consumer's say-so – would all be imposed uniquely on arbitration, while no such similar requirements are imposed on litigants proceeding in court. Because these requirements do not apply equally to disputes resolved in court, and would potentially interfere with the terms agreed to in arbitration agreements, they are in plain violation of Federal Arbitration Act.

The second concern relates to the set of disclosure requirements imposed on organizations conducting arbitration. These requirements are not limited to organizations based in New Jersey, or to the disclosure of disputes involving New Jersey residents. It is therefore not clear that the state of New Jersey has the authority to reach such organizations and demand such disclosure.

But perhaps more importantly, this demand profoundly misses how arbitration facilitates individualized dispute resolution. Even if this data could be required, it would not provide the answers that legislators are seeking.

Consumer-friendly arbitration is expensive. The agreement described in the landmark *Concepcion* case provided for the business to cover all fees, and even offered a bounty of \$7500 if the consumer prevailed in arbitration, winning more than had last been offered by the business. The real value of arbitration is preserving for the business the opportunity to make an individual consumer whole, in a timely fashion, and keep that consumer as a customer. Where the business can resolve the dispute and keep the customer, it is typically in their interests to do so. So the sub-section of cases that make it to full arbitration will always be weakest complaints with most unreasonable demands.

Preserving individualized treatment of disputes over class actions actually works to the benefit of consumers. Arbitration is a faster and more efficient means of addressing consumer disputes. Consumers receive equal or greater recoveries in arbitration at lower cost. The incentive structure of class actions, on other hand, encourages self-dealing to the benefit of the attorneys bringing claims, at the expense of the class, and what studies exist indicate that consumers typically fare better with ADR than class actions. Unfortunately, the requirements of this bill would not capture that success, and would produce a distorted image of the value of alternative dispute resolution.

In light of these concerns, I would request that the committee hold this bill.