



National Association of Home Builders

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April 30, 2021

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Jerry Nadler
Chairman
Committee on the Judiciary
2132 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
2056 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Durbin, Ranking Member Grassley, Chairman Nadler, and Ranking Member Jordan:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I write to share our opposition to H.R. 963/S. 505, the *Forced Arbitration Injustice Repeal (FAIR) Act*. NAHB strongly supports the use of alternative dispute resolution (ADR), including binding, predispute arbitration agreements, in residential construction contracts. That support extends to the current position of the United States Supreme Court that the parties must expressly agree to class arbitration – class proceedings will not be read into the arbitration agreement.

In enacting the Federal Arbitration Act, Congress declared a national policy favoring arbitration. NAHB members rely on this long-standing public policy when they negotiate and enter into residential real estate and construction contracts that include predispute arbitration clauses.

NAHB has found that in many cases ADR is often the most rapid, fair and cost-effective means to resolving disputes—for both the builder and the buyer—arising out of the construction and/or sale of the home. In contrast, litigation is expensive, time consuming and unlikely to produce the desired result—getting the problem repaired.

Those who are opposed to predispute arbitration contend that both parties can agree to arbitration after the dispute arises. However, it is doubtful that they will be able to achieve the benefits of arbitration by subsequent agreement because it is likely that strategic factors will lead one of the parties to refuse to arbitrate, even if the other makes a request. See Theodore

Eisenberg and Geoffrey Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335 (Winter 2007).

While critics of arbitration often argue that these are clauses of adhesion, a person seeking a home has numerous options from which to choose, including selecting a builder from among the thousands of large and small builders in their state who do not use predispute arbitration, or any arbitration at all. Or the consumer may opt for a preexisting home rather than new construction. Ultimately, home buyers all share the position of greatest strength in the transaction – the ability to walk away from a deal they do not like.

More importantly, for the home buyer, use of arbitration also provides them with certainty that any dispute will be resolved in a quick, fair and less costly manner than litigation. Due to the higher costs of litigation, homeowners are frequently left with insufficient funds to perform repairs once legal fees and costs are deducted from their recoveries. Ultimately, arbitration offers the home buyer a cost-effective means of dispute resolution. As such, precluding the use of predispute arbitration could have the unintended effect of harming housing affordability.

There may be other unintended consequences; for example, many home builders offer home warranties from third party providers. Many of those home warranty companies offer arbitration as the preferred method of resolving disputes arising out of the construction of the home. They too will likely be forced to raise the price of their warranties if they need to go to court to settle disputes, rather than through utilizing arbitration.

NAHB recognizes that binding arbitration remains a viable ADR tool only if the process is fair to all parties. Indeed, consumers are already protected in this regard. The courts closely scrutinize arbitration agreements and regularly strike down those arbitration clauses that are deemed to be overreaching. To the extent there are legitimate issues with the use of predispute arbitration in residential construction contracts, Congress should focus specifically on those problems. However, H.R. 963/S. 505's complete prohibition on predispute arbitration clauses is unwarranted. NAHB urges you to oppose H.R. 963/S. 505.

Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Tobin III". The signature is stylized and cursive, with a prominent "J" and "T".

James W. Tobin III

cc: Members of the United States Senate
Members of the United States House of Representatives