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Yael Shavit Testimony (prepared with David Seligman)

Connecticut General Assembly

Banking Committee – HB 5561 (“An Act Concerning Fairness in Consumer Contracts.”)

March 8, 2016

Committee Members:

Thank you for this opportunity to speak to you about forced arbitration on behalf of the National Consumer Law Center’s low-income clients. Forced arbitration presents a critical challenge not only to our fundamental rights to access a public forum but also to economic justice and fairness.

Others here will speak to you about how forced arbitration impinges on the rights of individual consumers. But I’m here to speak to you about your rights, as representatives of the people of Connecticut. When you enact legislation, you expect compliance with those laws. To give teeth to those laws, you don’t rely exclusively on government enforcement. You do not require a government agency to monitor every workplace and review every payday loan. Instead, you give the people the right to protect themselves in court and, where it is efficient, to band together to challenge a single policy or practice that affects all of them.

This is the only way our laws can work. And yet, by cramming arbitration clauses into form contracts, predatory businesses are hijacking the system by taking away your right to allow the people harmed by wrongdoing to enforce your laws proscribing it.

The proposed legislation takes an important step in protecting Connecticut consumers and Connecticut’s own interests in enforcing its laws. It appears from our perspective, however, that there are two important things that Connecticut can do to ensure that this legislation is both effective and legally viable.

First, the bill creates a *qui tam* action—meaning an action that a private individual brings on behalf of the state—for enforcement of Section 3 of the bill. Title I of NCLC’s Model State Consumer and Employee Justice Enforcement Act similarly creates a *qui tam* action, but allows for the enforcement of all consumer protection laws on behalf of the state. Along with our written testimony today, we’re submitting proposed language based on Title I of the NCLC model law that could be incorporated into the bill to accomplish this result.

Extending the *qui tam* portion of the bill to all consumer protection laws would be an enormous benefit for the state of Connecticut. Attorney General offices across the country are facing squeezed budgets. Now more than ever, they need private enforcement to police payday lenders, credit repair companies, debt collectors and many others. And, yet, arbitration has taken that mechanism away. The *qui tam* provisions of the bill, if extended to all consumer protection laws, would fill this void by allowing private individuals to initiate action on behalf of the state. After seeing the action, the state could decide what is in the best interests of its residents: intervening and dismissing the action, intervening and prosecuting the action, or allowing the *qui tam* relator to go forward with the action on the state’s behalf.

Second, we recommend that Section 3 be revised to set out clearly that there is a presumption against severability in cases where terms like those highlighted in Section 3 are included in the contract. This presumption derives not from any distaste for arbitration in particular, but rather from general contract law rules that prohibit severance of unenforceable terms like a requirement that Connecticut consumers arbitrate disputes against a payday lender in Arizona in cases where it seems that the drafter may have included unfair terms for the purpose of chilling valid claims. Attached to our testimony, we’ll be submitting proposed language for this provision as well.

Again, it is a privilege to testify before you today. I am happy to answer your questions about federal preemption and what states like Connecticut can do about this issue.