ALLIANCE FOR JUSTICE

ARBITRATION ACTIVISM

How the Corporate Court Helps Business Evade Our Civil Justice System

A report by

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About Alliance for Justice

Alliance for Justice is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. It is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

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Arbitration Activism

Under the leadership of Chief Justice John Roberts, the Supreme Court has radically rewritten the law governing arbitration, advancing an agenda to shield corporations form liability at the expense of the rights of everyday Americans. In a perfect world, arbitration works as a simplified system for resolving legal disputes under the mutual agreement of those involved. However, the Supreme Court in recent years has allowed big businesses to abuse forced arbitration contracts, building up a privatized legal system that robs everyday Americans of the chance to be heard by an impartial judge and jury. Today, even when Congress and the states have worked hard to protect the rights of consumers, employees, and victims of discrimination, justice has become unobtainable for millions because the Court has made it nearly impossible to avoid being forced into arbitration.

I. The Forced Arbitration System Limits Access to Justice

Whether they know it or not, most Americans go about their daily lives and conduct their most important and personal business while bound to dozens of forced arbitration contracts. Corporations routinely require individuals to waive their rights by inserting just a few sentences in the fine print of contracts for cell phones; credit card applications; home, payday, and car loans; job applications and employee handbooks; even gym memberships and social-coupon deals. Privatized arbitration makes it extremely difficult for everyday Americans to prevail against a corporation and obtain justice for injury or loss. Of course, this is precisely why forced arbitration is written into so many contracts.

Among the worst attributes of forced arbitration are:

- The Repeat Player Bias – Businesses pick from among several major firms that provide arbitration services, such as the National Arbitration Forum (NAF). These firms collect steep fees and pay arbitrators by the hour. Because major corporations create millions of dollars in business, a firm and its arbitrators have an incentive to keep corporate clients happy or risk losing business. Stark evidence of this "repeat player bias" was revealed by a study finding that NAF's top arbitrators ruled for businesses against consumers 93.8% of the time.[1]

- Prohibitive Costs – Arbitration firms often charge higher filing fees than state or federal courts, and frequently on a sliding scale that charges higher fees for higher value claims.[2] When deciding whether or not to file a claim against a corporation, these up-front costs can weigh heavily against bringing a complaint, artificially limit the damages requested, and often exceed the value of low-dollar claims. These problems are exacerbated when arbitration contracts block people from joining together to fight widespread corporate misconduct and spread the cost over a larger group.

- Hidden Evidence – Public courts employ a system of pre-trial discovery whereby parties request and exchange evidence under rules established by law, judicial supervision, and threat of sanction for misconduct. On the other hand, arbitration firms are free to fashion whatever rules they want, and contract writers can pick and choose the rules that will govern disputes against them. Federal law gives arbitrators subpoena power over parties to a contract, but it is totally within their discretion to use and may be subject to additional constraints according to the terms of the contract.[3] Without access to evidence as a matter of right, Americans, and particularly victims of discrimination, have less chance of proving their claims against giant corporations.[4]

- Secret Proceedings – Unlike open courts, most arbitration firms' rules treat disputes as confidential.[5] No transcription is required, or may be provided only at the expense of the requesting party,[6] and documents do not need to be kept on file.[7] The secret nature of arbitration is one of the reasons it is so appealing to corporations. Open court proceedings can expose corporate misconduct in the public record, but through arbitration, corporations can prevent negative publicity, keep their wrongdoing secret, and avoid emboldening other customers and workers from bringing legal action. Further, secrecy exacerbates the problem of repeat player bias: without a public record, it is extremely difficult to prove that a specific firm is systemically biased in favor of corporations.

- No Review – Federal law gives courts very narrow grounds to reverse or modify the decision of an arbitrator.[8] The Court of Appeals for the Seventh Circuit, for example, has said that even if a contract interpretation is "incorrect or even wacky" an arbitrator's decision will be upheld.[9] A losing party must demonstrate "manifest disregard of the law" to win an appeal,[10] an extremely difficult standard to meet, and even more difficult given the secretive nature of arbitration.

In any individual case, these flaws present a significant risk to justice. However, when forced arbitration clauses are written into consumer and employee contracts on a massive scale, corporations are effectively given a free pass to break the law. Despite years of work by Congress and the states to protect everyday Americans, the Supreme

Court has repeatedly endorsed this broken system and espoused an agenda in favor of forced arbitration and against access to justice, with no regard for the legislative branch.

II. The Supreme Court Has Ignored Congress and Rewritten Federal Law to Protect Corporate Giants

The Supreme Court has dramatically rewritten the law governing arbitration. The Federal Arbitration Act of 1925 ("FAA") permits non-judges to settle business disputes. It was passed as a reaction to many judge's hostility toward arbitration agreements.[11] The FAA states that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[12] In other words, Congress merely meant to place arbitration agreements "upon the same footing as other contracts."[13]

The underlying assumption was that these agreements would exist in negotiated contracts between parties with relatively equal bargaining power.[14] In the 1980s, however, the Supreme Court began radically expanding the scope of the arbitration law, applying it to a plethora of fine print consumer and employment contracts the FAA's drafters never could have imagined.[15] The drafters also intended for the statute not to apply to employment contracts,[16] though the Supreme Court has largely ignored this exemption.[17]

The Roberts Court has been especially aggressive in using the FAA to rubber stamp forced arbitration clauses and allowing big business to hide behind the fine print. In 2006, in ***Buckeye Check Cashing, Inc. v. Cardegna***, it enforced an arbitration clause in a payday loan despite the fact that the whole contract may have been illegal under Florida law.[18] In 2010, the Court decided two major cases. In ***Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.***, it created a presumption that when contracts are silent on the issue, class arbitration is not allowed – individuals must pursue their claims alone.[19] In ***Rent-a-Center West v. Jackson***, it held that it is permissible parties to assign questions of the validity of an arbitration clause to the very arbitrator who would be paid to resolve the case.[20] Indeed, Justice Kennedy indirectly noted the Court's success in driving cases into arbitration when he said that there were fewer corporate cases on the Court's current docket because "[a] lot of big civil cases are going to arbitration."[21]

III. Forced Individual Arbitration: The Latest Supreme Court Ruling to Let Corporations Free Themselves from Class Liability

This last term, the Corporate Court dropped its biggest bombshell in ***AT&T Mobility v. Concepción***[22] by letting corporations use forced arbitration clauses to swindle large numbers of customers. The case arose when Vincent and Liza Concepción signed up for a "free" cell phone with AT&T (then Cingular), but were later billed $30.22 for the sales tax on the full retail value of the phone.[23] Thousands of others were taken in by the same bait-and-switch, and the Concepcións became the lead plaintiffs in a class action to recover their money and hold AT&T accountable for its misleading advertisements.

However, buried in the fine print of AT&T's cell phone service contracts was a forced arbitration clause and a class action waiver. By segregating its aggrieved customers into individual arbitration proceedings, AT&T could be all but certain that no customers would spend the time and money to recover their money.[24] That's why in *Discover Bank v. Superior Court*, the California Supreme Court held that a class action waiver in a standard-form consumer contract can be unenforceable if, in practice, it amounts to an exemption from responsibility for fraud or willful misconduct.[25] Both a federal district court and the Ninth Circuit Court of Appeals found that AT&T's arbitration clause violated the *Discover Bank* rule.

But when the case reached the Supreme Court, the five conservative Justices ruled that California's *Discover Bank* rule was preempted by the FAA. Justice Antonin Scalia, writing for the Court, reasoned that requiring the availability of class proceedings altered the "fundamental attributes of arbitration and [was therefore] inconsistent with the FAA."[26] Specifically, Scalia wrote that the increased difficulty of keeping arbitration proceedings confidential when more people are involved, the procedural formality required in a class arbitration, the increased financial stakes for corporate defendants, and the lack of significant appeals (again, for corporate defendants) all interfere with the terms corporations "bargained for" when writing forced arbitration contracts.[27] Essentially, the Court held that states may not stop corporations from writing their own "get out of jail free cards" because the FAA protects the corporate goal of escaping trial.

IV. By Blocking Access to Judges and Juries, The Supreme Court Shields Big Business from Important State and Federal Laws

As the Supreme Court continues to expand the power of forced arbitration clauses and class action bans, more and more companies are including these terms in new contracts and modifying existing contracts to take away citizens' power to stand up

for their rights in a court of law. This means that the necessities of everyday life, from credit cards and cell phone service to home loans and fair working conditions, are increasingly available only if one "agrees" to forgo the possibility of ever holding corporations accountable for their practices in a court of law. Despite the efforts of Congress and the states to provide legal protections against corporate fraud and abuse, the Supreme Court has twisted of the FAA to put the fundamental rights of everyday Americans in jeopardy.

As Justice Scalia's majority opinion acknowledge, the Court's rulings on arbitration mean that some important claims might "slip through the legal system."[28] The following examples are illustrative, not comprehensive, and represent only a fraction of the wide-ranging harm that the Court's arbitration rulings are having.

A. Consumer Protection Laws Are Less Likely To Be Enforced When Courts Are Replaced by Privatized Forced Arbitration

- Credit and Debt Abuse –The Fair Debt Collection Practices Act "prohibits debt collectors from engaging in unfair, deceptive, and abusive acts or practices and identifies specific conduct that is banned."[29] Similarly, the Credit Repair Organization Act prohibits a number of specific misrepresentations by companies offering to "fix" problems with credit reports that they can't actually change. Consumers harmed by violations of these laws are likely to be in tough financial situations, where every dollar is critical and up-front costs of arbitration, the complexity of potential claims, and relatively modest recoveries erect significant practical barriers to individual pursuit of justice. Class proceedings allow experienced lawyers to seek recovery without a prohibitive investment of time and money by disadvantaged consumers, but after *Concepción* consumer rights provided by these laws are already being hampered by forced individual arbitration contracts.

Just days after the Supreme Court decided *Concepción*, it granted cert and agreed to hear yet another arbitration case in the upcoming 2011-12 term. In ***CompuCredit Corp. v. Greenwood***,[30] the Court will decide if disputes under the Credit Repair Organization Act are protected from forced arbitration clauses. That law requires that consumers be informed that they "have the right to sue a credit repair organization that violates the [Act],"[31] and declares that "any waiver by any consumer of any right under the [Act] shall be treated as void."[32] Both a district court and the Court of Appeals for the Ninth Circuit held that Greenwood's case could not be forced into arbitration. The Court's decision to hear CompuCredit's appeal does not bode well for consumer rights, despite the clear purpose behind the Act.

AT&T Aftermath

Sham Credit Repair Business Takes Money, Runs, Escapes[33]

Miranda Day wanted to pay off her debt and rebuild her credit, so she enrolled in CareOne's credit counseling service. She sent CareOne $1,274.34 to put towards her debt, but they never paid her creditors or contacted them to negotiate for better terms, and eventually Day had to file for bankruptcy. She then took CareOne to court under the Credit Repair Organizations Act and Florida law on behalf of herself and other victims. However, buried in the paperwork and electronic forms she filled out was an arbitration clause that prohibited class actions. Before *Concepción*, Day argued that the ban on class arbitration was unconscionable and void under Florida contract law, but after the decision, Day conceded the Supreme Court had defeated her argument.

- Cellular Industry Dishonesty – Americans own over **302 million** cellular phones.[34] Nearly all of these phones' purchase agreements and service contracts contain forced arbitration clauses banning class actions.[35] Cases that arise from cell phone contracts are prime examples of why class actions are the most effective remedy for consumers and the strongest deterrent against illegal practices. State and federal enforcement agencies such as the Federal Trade Commission are burdened by enormous caseloads and cannot investigate every instance of deceptive trade practices. Individual claims are often for a small amount of money, such as the few hundred dollars a phone costs or usage charges measured in cents per minute or kilobyte. While these claims aren't cost-effective for customers to pursue by themselves, multiplied by 302 million customers, cell phone companies are positioned to reap huge profits from deceptive advertising and hidden charges.

AT&T Aftermath

No Public Accountability for False Claims about Smartphone Speeds[36]

Stacie Lee Arellano bought a "MyTouch 4G" smartphone from T-Mobile, and signed a two year contract for service. But, according to Arellano, the phone and T-Mobile's network don't actually provide "4G" service or speeds, just a rebranded "3G" connection. Questionable "4G" labeling is an ongoing problem in the cellular industry,[37] and Arellano sought to represent a class of consumers in seeking damages and injunctive relief against T-Mobile's advertising. Arellano argued that the contract's class waiver was unenforceable because it would preclude any possibility of obtaining an

injunction to prevent T-Mobile from continuing to deceive the general public. The district judge ruled that "perhaps regrettably, this argument was rejected" by the Supreme Court's *Concepción* decision.

- Car Dealer Fraud – Consumers who buy, lease, or finance a car are quite likely to be subjected to forced arbitration clauses.[38] As a result, laws against fraud, false advertising, and a wide variety of state "lemon laws" are taken out of the hands of juries and placed into the privatized arbitration system. In 2002, Congress passed the Automobile Dealers' Day in Court Act,[39] which ironically protects auto dealers from forced arbitration in disputes with manufacturers, even while auto dealers routinely inflict the same agreements on their customers.

AT&T Aftermath

Servicemembers Denied Benefits Are Denied Their Day in Court[40]

Matthew Wolf is a captain in the Army Reserve JAG Corp who was deployed oversees in late 2007. A year earlier, Captain Wolf leased a new car through Nissan on a 39 month lease, and paid about $600 in advance costs. The Servicemembers Civil Relief Act provides that when called to active duty, reservists and National Guard members are entitled to terminate automotive leases and recover a portion of upfront costs paid. Nissan, however, refused to refund any portion of Wolf's payments. Wolf filed a class action on behalf of himself and all other servicemembers whose rights Nissan would not honor. However, Nissan's lease agreement contained an arbitration clause with a class action waiver. The district court held that, in light of *Concepción*, the FAA and its "policies favoring and promoting arbitration" required individual arbitration, even if it hindered the policy goals behind the SCRA.

B. Employment and Anti-Discrimination Laws Are Being Ignored With No Recourse for the Victims

- Underpaying Workers – The federal Fair Labor Standards Act, first passed in 1938, provides for a national minimum wage, prohibits child labor, and regulates overtime pay. Despite the fact that the FAA by its terms does not apply to employment contracts,[41] in 2001 the Supreme Court has held that most employees can be subject to forced arbitration.[42] After *Concepción*, Corporate defense firms are already advising clients to start including forced individual arbitration clauses with class action bans in their employment contracts.[43] One has suggested that "the class action under the Fair Labor Standards Act arguably is the employer's most dreaded legal claim."[44]

AT&T Aftermath

Companies Get to Judge Their Own Compliance with Wage Law[45]

Carlos Quevedo worked at a Macy's in California. When he was terminated, Macy's did not promptly pay him his final wages as required by state labor law. Quevedo filed a lawsuit on behalf of himself and all other victims of Macy's practices. But Macy's required all new employees to agree to use its so-called "InSTORE" dispute resolution program, which culminates in binding arbitration proceedings and requires workers to waive any right to form a class. The court brushed aside Quevedo's argument that the arbitration clause was unconscionable, and ruled that, after *Concepción*, Quevedo could not even use California's Private Attorney General Act, a law which lets citizens stand in the shoes of state law enforcement officials, to take Macy's to court for its illegal practices.

- Racial Discrimination by Employers – The Civil Rights Act of 1964 represents a hard-fought victory for equality and justice. Title VII of the Act prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin,[46] and allows courts to order injunctions to stop discriminatory practices.[47] Workers can prove a Title VII case by showing that a policy of their employer had a disparate impact on minorities. Such claims are much more difficult to prove when an individual cannot band together with other victims and obtain access to company-wide discovery available through class litigation. After *Concepción*, large corporations are more likely than ever to use forced individual arbitration as a way to hide evidence of illegal discrimination.

- Sexual Harassment – Title VII of the Civil Rights Act also prohibits sexual harassment in the workplace. However, the secret nature of arbitration is often used to silence women subjected to this abuse and shield corporations from liability. For example, Dov Charney, CEO of American Apparel, has been repeatedly sued for sexual harassment of young female employees.[48] The lawsuits contain a number of disturbing allegations, including eight months of forced sex with a teenager in New York, and frequent meetings held in Charney's Los Angeles bedroom leading to undressing and attempted sex, and employees forced to pose nude for pictures later posted online. Despite the numerous allegations, no employee has ever had her day in court, due in part to the forced arbitration and confidentiality clauses all employees are required to sign in order to work for American Apparel. Cases are pending in Los Angeles and New York courts in which women are fighting Charney and his company's attempts to force them into arbitration.

- Unequal Pay for Women –Congress passed the Lilly Ledbetter Fair Pay Act of 2009 to ensure that companies are held accountable for their discrimination, reversing a Supreme Court decision that Title VII disparate pay claims had to be brought within 180 days of the first discriminatory paycheck, rather than treating pay discrimination as an ongoing wrong.[49] However, Congress's intent to protect victims of pay discrimination is severely undermined by the Court's interpretation of the FAA. Because pay discrimination claims are often inefficient to pursue in forced individual arbitration, companies can escape liability for paying women less by requiring as a condition of employment that employees "agree" to give up the right to go to court or be part of a class. As with the *Ledbetter* case, Congress has the power to overturn the Supreme Court's shielding of discriminatory employers.

  In June, the Supreme Court issued another high-profile decision limiting the ability of women to obtain justice. In *Wal-Mart v. Dukes*, the Court made it more difficult to hold large corporations accountable by making it more difficult for victims of widespread corporate misconduct to prove that they have enough in common to form a class.[50] Those outraged by the ruling in *Wal-mart* should be equally disturbed by effects of *Concepción*. Whereas Wal-Mart left some potential, small as it might have been, for meeting the new threshold to forming a class, particularly in the case of large corporations, *Concepción*'s interpretation of the FAA allows **employers of any size to block all class actions** regardless of evidence of "commonality" among the claims, simply by forcing workers to sign a contract with clauses requriing them to forefo their rights.

- Age Discrimination – In 1967, Congress passed the Age Discrimination in Employment Act to expand workplace protections to older workers, frequent victims of prejudiced hiring and firing decisions. At age 62, a Mr. Gilmer was fired from his job as a stock broker. The registration rules of the New York Stock Exchange required all brokers to submit to forced arbitration for any claims between them and their employers. Mr. Gilmer sued in federal court and the New York Stock Exchange sought to compel arbitration. The Supreme Court rejected Mr. Gilmer's arguments that biased arbitrators, limited discovery, and the lack of written opinions were real procedural barriers to his ability to obtain justice or to Congress's deterrent goals in the Age Discrimination in Employment Act.[51] After *Concepción*, systemic discrimination against older workers will be very difficult to expose and remedy in any industry.

- Fair Housing – While many civil rights cases involving a forced arbitration clause arise in the employment context, the Fair Housing Act is also being subsumed by the Supreme Court's expansion of the FAA. The Act prohibits discrimination based on race, color, national origin, religion, sex, familial status, or handicap in

home purchases, rentals and leases, and mortgages. Banks and other lenders commonly insert forced arbitration clauses in their contracts, resulting in several cases under the Fair Housing Act being sent to arbitration.[52] This trend is particularly problematic given the practice of "reverse redlining" – the practice of offering unaffordable loans in predominantly minority communities.[53] In individual arbitration, the limited discovery often makes it difficult, if not impossible, to prove reverse redlining claims, which require evidence of broad patterns of discrimination. Forced arbitration in this area of law is also problematic because the few courts that have heard "reverse redlining" cases have applied different legal standards,[54] and taking more cases out of public courts creates less precedent and leaves the law unclear at a time when certainty is needed to help recover from the financial crisis.

V. Congress Must Act to Protect the Rights of Everyday Americans

Although arbitration was envisioned an agreement between equal parties to engage in informal, alternative dispute resolution, in the United States it has been twisted into a privatized system of dispute suppression that is supplanting our public court system and letting corporations ignore the laws that protect consumers and workers. If parties are free to elect arbitration *after* a legal dispute arises, alternative dispute resolution can be transparent and fair. But today, everyday Americans have little or no bargaining power against corporate giants, and forced arbitration strips them of the opportunity to stand up for their rights in a fair, public forum. Bans on class actions further reduce the chance for justice to be done and our laws to be enforced. Without the threat of all its victims banding together, huge corporations now have little incentive to ensure compliance with consumer, employee, and civil rights laws.

Congress can restore American's legal rights and give force to our consumer protection, employment, and civil rights laws by amending the Federal Arbitration Act to undo the damage of the Supreme Court's pro-corporate activism. The **Arbitration Fairness Act of 2011** prohibits the enforcement of pre-dispute, mandatory arbitration clauses in the vast majority of the take-it-or-leave-it contracts that dominate our economy.[55] The Act would prohibit forced arbitration in contracts involving:

- Civil Rights: Claims based on individuals' constitutional rights and statutes prohibiting race, sex, and other invidious types discrimination

- Consumer Disputes: Any claims by individuals obtaining goods, services, credit, or investments for personal, family, or household purposes

- Employment Disputes: Any claims arising out of an employment relationship, not including collective bargaining agreements between unions and employers

Congress should act immediately to ensure that nearly a hundred years of progress in crafting a fair and equal society are not swept away, and that all Americans have the right to stand up for their rights in court.

Notes

[1] Public Citizen, "The Arbitration Trap," at 15-16. Sept. 2007, http://www.citizen.org/documents/ArbitrationTrap.pdf.

[2] Id. at 36.

[3] *See* 9 U.S.C. § 7.

[4] *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) ("In many cases, the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.").

[5] *See e.g.* JAMS, The Resolution Experts, Inc., "Streamlined Arbitration Rules & Procedures," at 21 (2009) (Rule 21), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_streamlined_arbitration_rules-2009.pdf.

[6] *Id*. at 19 (Rule 17(k)).

[7] *See id.* at 11 (Rule 6(d)). California has a one-of-a-kind law mandating disclosure of prevailing parties and award amounts by arbitration firms, which provides some insight into the system, *see e.g*. Public Citizen, supra at note 1.

[8] 9 U.S.C. § 10, 11.

[9] *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006) (Posner, J.).

[10] 9 U.S.C. § 10.

[11] *AT&T Mobility v. Concepción*, 131 S.Ct. 1740, 1757 (2011) (Breyer, J., dissenting) (citing S.Rep. No. 536, 68th Cong., 1st Sess., 2 (1924)); *Circuit City Stores v. Adams*, 532 U.S. 105, 125 (2001) (Stevens, J., dissenting).

[12] 9 U.S.C. § 2.

[13] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

[14] *See Concepción*, 131 S.Ct. at 1759 (Breyer, J., dissenting) (collecting sources).

[15] *See e.g.* Alan Morrison, "Saved by the Supreme Court: Rescuing Corporate America," ACS Issue Brief, Oct. 3, 2011; *Allied Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995) (home termite protection plan); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (home loan).

[16] 9 U.S.C. § 1; Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923).

[17] The Court has taken a cramped reading of the employment, holding that it only excludes transportation workers. *See generally Adams*, 532 U.S. 105.

[18] 546 U.S. 440 (2006).

[19] 130 S.Ct. 1758 (2010).

[20] 130 S.Ct. 2772 (2010).

[21] Adam Liptak, *In New Term, Supreme Court Shifts Focus to Crime and First Amendment,* N.Y.TIMES, Oct. 1, 2011, *available at* http://www.nytimes.com/2011/10/02/us/supreme-court-turns-to-criminal-and-first-amendment-cases.html

[22] 131 S.Ct. 1740.

[23] While AT&T was likely correct that the state of California was owed tax on the full retail value, the Concepcións' claim related to the advertisement of the phone as "free" and the concealment of the fact that there would be a subsequent charge.

[24] After legal proceedings began, AT&T modified its contract, apparently in an effort to avoid a court striking the arbitration clause, so as to award additional damages to customers who win more in arbitration than AT&T's "last written settlement offer" (which would presumably have been $30.22). *See Concepción*, 131 S.Ct at 1744. The practical effect of this provision is somewhat dubious, as consumers would be unlikely to know the legal merits of their claims with any certainty or to consult an attorney in order to make an informed choice if AT&T refused to settle.

[25] 113 P.3d 1100 (Cal. 2005).

[26] *Concepción*, 131 S.Ct. at 1748.

[27] *Id.* at 1750-53.

[28] *Concepción*, 131 S.Ct. at 1753 (stating that "even if it is desirable" to require class arbitration because small-dollar claims might "slip through," the FAA as construed by the Court trumps public policy).

[29] Federal Trade Comm'n, "Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration," at 6 (July 2010), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf. This report focused on the offensive use of arbitration as a tool of debt collectors, rather than defensive use against consumer enforcement of CROA rights. However, it highlights a number of the problems with the forced arbitration system in practice.

[30] No. 10-948.

[31] 15 U.S.C. § 1679g.

[32] *Id.* § 1679f(a).

[33] *Day v. Persels & Assocs. LLC*, 2011 US Dist LEXIS 49231 (M.D. Fla. May 9, 2011).

[34] CTIA – The Wireless Association, "Semi-Annual Wireless Industry Survey," at 2 (2011), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2010_Graphics.pdf.

[35] *See* Public Citizen, "Forced Arbitration: Unfair and Everywhere," at 13 (Sept. 2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf.

[36] *Arellano v. T-Mobile USA, Inc*. 2011 US Dist LEXIS 52142 (N.D. Cal. May 16, 2011).

[37] *See e.g.* MobilIdia, "US Carriers Fudge '4G' Branding," http://www.mobiledia.com/news/79125.html

[38] *See id.* at 17-19.

[39] 15 U.S.C. §§ 1221, *et seq.*; *See also* S.Rep 107-266.

[40] Wolf v. Nissan Motor Acceptance Corp., 2011 U.S. Dist. LEXIS 66649 (D.N.J. June 22, 2011).

[41] 9 U.S.C. § 1.

[42] *Adams*, 532 U.S. 105.

[43] *See e.g.* http://www.orrick.com/fileupload/3737.pdf at 3 ("Concepion is a potential 'game changer'"); http://www.huntonlaborblog.com/2011/05/articles/employment-policies/supreme-court-holds-that-class-arbitration-waivers-are-enforceable-under-the-faa/ ("Employers should examine their arbitration agreements to ensure that a class action waiver is included").

[44] http://www.huntonlaborblog.com/2011/07/articles/wage-hour/classless-claim-in-topless-bar-arbitration-clause-strips-flsa-action-bare/

[45] *Quevedo v. Macy's, Inc.,* No. 09-cv-01522 (C.D. Cal. June 16, 2011).

[46] 42 U.S.C. § 2000e-2.

[47] *Id*. § 2000e-5(g).

[48] *See* http://www.nytimes.com/2011/03/24/business/24bias.html; http://newsandinsight.thomsonreuters.com/Legal/News/2011/04_-_April/Ex-workers_say_American_Apparel_posted_their_nude_photos_online/; http://us.mobile.reuters.com/article/businessNews/idUSTRE72O5PY20110325?irpc=932.

[49] P.L. 111-2.

[50] No. 10-277 (2011); see Written Testimony of Melisa Hart before the Senate Committee on the Judiciary, June 29, 2011, at 5-6, *available at* http://judiciary.senate.gov/pdf/11-6-29%20Hart%20Testimony.pdf.

[51] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).

[52] See e.g. *Fordjour v. Wash. Mut. Bank*, 2008 U.S. Dist. LEXIS 10924 (N.D. Cal. 2008).

[53] Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 Alb. Gov't L. Rev. 164, 179 (2009). The term is derived from "redlining," a historical and now-illegal practice in which minority neighborhoods were literally marked-off on a map and no credit was offered there at all.

[54] *See id*. at 187.

[55] S. 987.