ALLIANCE FOR JUSTICE

ARBITRATION ACTIVISM

How the Corporate Court Helps Business Evade Our Civil Justice System

A report by

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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 that shields corporations from 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 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, 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 sign away their rights by inserting just a few sentences in the fine print of contracts for cell phones; credit card applications; 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. A study commissioned in 2007 found that consumers win only five percent of cases brought before an arbitrator.[1] 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.[2]

- Prohibitive Costs – Arbitration firms often charge higher filing fees than state or federal courts, frequently on a sliding scale that charges higher fees for higher value claims.[3] When deciding whether or not to file a claim against a corporation, these upfront 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.[4] 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.[5]

- Secret Proceedings – Unlike open courts, most arbitration firms' rules treat disputes as confidential.[6] Transcription is not required, or may be provided only at the expense of the requesting party,[7] and documents do not need to be kept on file.[8] The secret nature of arbitration is one of the reasons it is so appealing to corporations. Open court proceedings can expose corporate misconduct on the public record, but through arbitration, corporations can prevent negative publicity, keep their wrongdoing secret, and avoid emboldening other customers and workers to bring 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.[9] 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.[10] A losing party must demonstrate "manifest disregard of the law" to win an appeal,[11] an extremely difficult standard to meet, and even more difficult given the secretive nature of arbitration.

- Claims Suppression – It has been documented that because the deck is stacked against individual consumers, claims that may be meritorious are never brought to an arbitrator in the first place. A study commissioned in 2004 revealed that over a period of four years there were approximately 50,000 debt collection arbitration proceedings brought by corporations per year and only 256 cases brought by consumers during the same period.[12] In Maryland, a credit card issuer never denied that its arbitration clause, had the court enforced it, would have suppressed claims by preventing individuals from pursuing their valid claims on an individual basis.[13]

In any individual case, these flaws present a significant risk to justice. 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

In a remarkably short period of time, the United States 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 judges' hostility toward arbitration agreements.[14] 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."[15] In other words, Congress merely meant to place arbitration agreements "upon the same footing as other contracts."[16]

The underlying assumption was that these agreements would exist in negotiated contracts between parties with relatively equal bargaining power.[17] 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.[18] The drafters also intended for the statute not to apply to employment contracts,[19] though the Supreme Court has largely ignored this exemption.[20]

The Roberts Court has been especially aggressive in using the FAA to rubber stamp forced arbitration clauses and allow big business to hide behind 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 entire contract may have been illegal under Florida law.[21] In 2010, the Court decided two major cases: **Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp** and **Rent-a-Center West v. Jackson**. In *Stolt-Nielsen*, it created a presumption that when contracts are silent on the issue, class arbitration is not allowed – individuals must pursue their claims alone.[22] In *Rent-a-Center*, it held that it is permissible for parties to assign questions of the validity of an arbitration clause to the very arbitrator who would be paid to resolve the case.[23] 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."[24]

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

In 2011, the Corporate Court dropped a bombshell in **AT&T Mobility v. Concepción**[25] 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 illegally billed $30.22 for the sales tax on the full retail value of the phone.[26] 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 ban. By segregating its aggrieved customers into individual arbitration proceedings, AT&T could be all but certain that virtually no customers would spend the time and money to recover their money.[27] 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.[28] 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."[29] 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.[30] 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.

Just days after the Supreme Court decided *Concepción*, it granted cert and agreed to hear yet another arbitration case the following term. In **CompuCredit Corp. v. Greenwood**,[31] the Court decided that a mandatory arbitration clause was enforceable, thereby preventing aggrieved consumers from joining together to file their case as a class action in court. This is in spite of the fact that Congress specified in the Credit Repair Organization Act that "[y]ou have a right to sue a credit repair organization that violates the … [a]ct." In a fit of twisted logic, the Court held that the CROA grants persons the right to receive the statement that they can sue, but it does not grant the actual right to sue.

Most recently, the Roberts Court erected another brick in the wall insulating corporate actors from the legal ramifications of their own wrongdoing. In **American Express Co. v. Italian Colors Restaurant**, the Court, in a 5-3 opinion (Sotomayor recused) written by Justice Scalia, held that corporations can enforce class action bans in arbitration agreements even when doing so would make it effectively impossible for individuals and small businesses to

vindicate their legal rights.[32] American Express was accused of using its monopoly power to force small businesses to pay higher swipe fees for American Express credit cards, a practice that would violate antitrust laws. In order to prove their case, the small businesses would have had to spend hundreds of thousands of dollars in expert testimony and economic studies, even though each individual plaintiff could only secure a maximum recovery of $38,000. Although acknowledging that enforcing the class action ban might prevent the corporation from ever being held accountable for the alleged antitrust violations, the Supreme Court majority enforced American Express's class arbitration ban.

In her powerful dissent, Justice Kagan recognized the majority opinion for what it truly was: another step in this conservative Court's march to protect large corporations from accountability for their actions. She noted that, for victims of corporate malfeasance, the court has nothing to offer except to say "[t]oo darn bad."[33] Justice Kagan also called the majority opinion a "betrayal of our precedents, and of federal statutes like the antitrust laws."[34]

The effects of *American Express* are already being felt. After *Concepción* the Massachusetts Supreme Judicial Court, the highest court in the state, held that an arbitration clause including a class-action ban was invalid because it rendered the consumers' claims nonremediable.[35] However, in light of *American Express* the very same court was forced to reconsider the issue. On August 1, 2013, the court held that "…following *Amex,* our analysis… no longer comports with the Supreme Court's interpretation of the FAA."[36] After *Concepción*, a court could still find grounds to hold that if a class-action ban prevented the effective vindication of statutory rights, it would be unenforceable. This decision makes clear that, in light of *American Express*, that is no longer the case.

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 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 the FAA to put the fundamental rights of Americans in jeopardy.

As Justice Scalia's majority opinion in *Concepción* acknowledges, the Court's rulings on arbitration mean that some important claims might "slip through the

legal system."[37] The following examples are illustrative, not comprehensive, and represent only a fraction of the wide-ranging harm stemming from the Court's arbitration rulings.

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."[38] Similarly, the Credit Repair Organization Act (CROA) prohibits a number of specific misrepresentations by companies offering to "fix" problems with credit reports that they can't actually change. The CROA requires that consumers be informed that they "have the right to sue a credit repair organization that violates the [Act],"[39] and declares that "any waiver by any consumer of any right under the [Act] shall be treated as void."[40] 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.

AT&T Aftermath

Sham Credit Repair Business Takes Money, Runs, Escapes[41]

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, forcing Day 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.

- Payday Lending Rates – Before 2001, Florida had in place a law that forbade interest rates for loans exceeding 45 percent. In 2001 the state legislature passed a law that made an exception for payday loans. Since then, loan rates have risen as high as 300 or even 1,000 percent. Most cases involving these illegal practices settled, but one, *Betts v. McKenzie Check Advance of Florida*,[42] did not. During an evidentiary hearing it became clear that no competent lawyer would take the case because of a class

action waiver in the loan contracts, and that it would thus be impossible for individuals to vindicate their rights, which "would 'defeat the [Florida Consumer Protection statutes'] remedial purposes and undercut their deterrent value.'"[43] The case ended up in the state Supreme Court, which held that, in light of *Concepción*, the FAA preempted any Florida law that would have struck down a class action ban in an arbitration clause. This ruling left those who suffered the ills of these predatory loans unable to vindicate their state law rights, and left predatory lenders completely unfazed by the threat of any class action suits.

- Cellular Industry Dishonesty – Americans own more than **326 million** cellular phones, tablets, and other wireless devices.[44] Nearly all of these devices' purchase agreements and service contracts contain forced arbitration clauses banning class actions.[45] 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 326 million devices, 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[46]

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,[47] 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.[48] 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,[49] which

ironically protects auto dealers from forced arbitration in disputes with manufacturers, even while auto dealers routinely inflict the same agreements on their customers.

- Weakening Consumer Privacy – In the summer of 2011, Sony's PlayStation Network was the target of a data breach in which millions of consumers' personal records were corrupted. The following summer Netflix was forced to settle a class action suit in which it retained customers' rental histories long after they terminated their membership with the online video site. In the wake of these events that jeopardized personal privacy, both companies updated their privacy policies to preclude the possibility of consumers joining together to form a class in the future. If these policies are deemed enforceable in light of *Concepción* and *American Express*, customers who are wronged by these corporations in the future will likely be relegated to arbitration and will not have their day in court in front of a judge and a jury.[50]

AT&T Aftermath

Servicemembers Denied Benefits Are Denied Their Day in Court[51]

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.

- Decimating Investor Protections – Early in 2013, the Financial Industry Regulatory Authority (FINRA) held that it did not have the power, in light of *Concepción*, to prohibit Charles Schwab from inserting class action bans into arbitration agreements. However, in a commendable step, Charles Schwab unilaterally altered its policy, eliminating its class action ban.[52] Though Schwab's initiative is praiseworthy, forced arbitration is all too common in investment arrangements. These clauses are especially to the detriment of individual investors, as opposed to institutional investors, which have more resources with which to vindicate their rights. Since FINRA's ruling, the North American Securities Administrators Association (NASAA), a group of state securities regulators, has sent a letter asking the SEC to ensure that investors have meaningful protections;

an authority granted to the SEC by the Wall Street Reform law passed in 2010. A group of 37 Senators, led by Senator Al Franken of Minnesota, and 16 consumer groups have also asked the SEC to exercise this power.[53]

- Preying on the Elderly – In early 2013, a 92-year-old woman with a fourth grade education and memory problems was asked to sign a contract that the Florida District Court of Appeals admitted was "so complex that she could not possibly have understood what she was signing."[54] The appellate court, however, noted that our "modern economy simply could not function" if a "meeting of the minds required individualized understanding of all aspects of the typical standardized contract." In essence, the court found that the woman could not go to open court to vindicate rights that were deprived of her by a contract that she could not possibly understand.

- Loser Pays Provisions – The Houghs, a Georgia family, were unfairly assessed overdraft charges on their checking account despite having sufficient funds in the account. They sued along with other similarly situated families, alleging that the bank breached its duty of fiduciary trust and fair dealing, and was unjustly enriched. The bank moved to compel arbitration, which the Houghs alleged was unconscionable because the provisions relating to arbitration asked them to shoulder the upfront cost of arbitration and cover the banks' costs should the bank prevail at arbitration. The Eleventh Circuit reversed the District Court and held that the provisions in dispute were enforceable and that they were neither procedurally nor substantively unconscionable.[55]

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. Although the FAA by its terms does not apply to employment contracts,[56] in 2001 the Supreme Court held that most employees can be subject to forced arbitration.[57] After *Concepción*, corporate defense firms are advising clients to include forced individual arbitration clauses with class action bans in their employment contracts.[58] One has suggested that "the class action under the Fair Labor Standards Act arguably is the employer's most dreaded legal claim."[59]

- 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,[60] and allows courts to order injunctions to stop discriminatory practices.[61] 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.[62] 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. However, in May 2013, a Los Angeles Superior Court held that an arbitration agreement signed by an American Apparel store owner was invalid because the agreement, which included a confidentiality provision, was unconscionable.[63]

AT&T Aftermath

Companies Get to Judge Their Own Compliance with Wage Law[64]

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.

- 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.[65] However, Congress's intent to protect victims of pay discrimination could be undermined by the Court's interpretation of the FAA. Because pay discrimination claims are often inefficient to pursue in forced individual arbitration, companies may be able to escape liability for illegally underpaying women 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 and should remain vigilant to ensure that the promise of the statute is realized.

In June of 2011, 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 imposing higher standards for victims of widespread corporate misconduct to prove that they have enough in common to form a class.[66] Those outraged by the ruling in *Wal-mart* should be equally disturbed by the 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 requiring them to forego 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, 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.[67] 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 could also be 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.[68] This trend is particularly problematic given the practice of "reverse redlining" – offering unaffordable loans in predominantly minority communities.[69] 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,[70] 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 and the Administration Must Act to Protect the Rights of Everyday Americans

Although arbitration was envisioned as an agreement between equal parties to engage in informal, alternative dispute resolution, 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 their victims banding together, huge corporations now have little incentive to ensure compliance with consumer, employee, and civil rights laws.

Congress can restore Americans' 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 2013** 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.[71] 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 of 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[72]

The Consumer Financial Protection Bureau (CFPB), an agency created by the Dodd-Frank Wall Street reform legislation, is also taking encouraging steps to address these problems. In April 2012, the CFPB, in accordance with Section 1028 of the law, issued a Request for Information regarding its study of pre-dispute arbitration.[73] In June 2013, the CFPB announced that, in order to comply with this provision, it will conduct a nationwide survey of 1,000 credit card holders to determine their awareness of the dispute resolution terms embedded in their contracts.[74] Perhaps most significantly, the CFPB issued a new rule that went into effect on June 1, 2013, which prohibits forced arbitration clauses in mortgage and home equity contracts.[75] The Bureau has broad authority under Dodd-Frank to protect consumers subject to mandatory arbitration and it should exercise that authority so that the landmark financial reform legislation fulfills its intended purpose.[76]

The rights protected by virtue of some of the past century's most treasured statutes hang in the balance. The Civil Rights Act, the Equal Pay Act, and the Age Discrimination in Employment Act are but a few of the statutes that are rendered effectively toothless when the rights granted therein can be arbitrated away in silence without the standard due process of law that we hold dear. It is essential that Congress act immediately to ensure that nearly one hundred years of progress are not swept away, and that all Americans have the ability to stand up for their rights in court.

Notes

[1] Phuong Cat Le, *Binding arbitration a loser for consumer*, SEATTLE POST-INTELLIGENCER, Sep 27,2007, *available at* http://www.seattlepi.com/business/article/Binding-arbitration-a-loser-for-consumer-1250929.php.

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

[3] *Id*. at 36.

[4] *See* 9 U.S.C. § 7.

[5] *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.").

[6] *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.

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

[8] *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.

[9] 9 U.S.C. § 10, 11.

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

[11] 9 U.S.C. § 10.

[12] Public Justice, "Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements," 14-15, (2012).

[13] *Id*. at 16-17.

[14] 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).

[15] 9 U.S.C. § 2.

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

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

[18] *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); *GreenTree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (home loan).

[19] 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).

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

[21] 546 U.S. 440 (2006).

[22] 130 S.Ct. 1758 (2010).

[23] 130 S.Ct. 2772 (2010).

[24] 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.

[25] 131 S.Ct. 1740.

[26] 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.

[27] 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.

[28] 113 P.3d 1100 (Cal. 2005).

[29] *Concepción*, 131 S.Ct. at 1748.

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

[31] CompuCredit Corp. v. Greenwood, 132 S.Ct. 665 (2012).

[32] Am. Exp. Co. v. Italian Colors Rest., 570 U. S. ____ (2013).

[33] *See* Am. Exp. Co. v. Italian Colors Rest., 570 U. S. ____ (2013). (Kagan, J., dissenting).

[34] *Id.*

[35] Feeney v. Dell Inc., 989 N.E.2d 439 (Mass. 2013).

[36] Feeney v. Dell Inc., 2013 Mass. LEXIS 635, *2 (Mass. Aug. 1, 2013).

[37] *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).

[38] 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.

[39] 15 U.S.C. § 1679g.

[40] *Id.* § 1679f(a).

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

[42] *See* http://publicjustice.net/blog/class-actions-against-payday-lenders-show-how-concepcion-has-been-used-gut-state-consumer-prote

[43] *Id.*

[44] CTIA – The Wireless Association, "Semi-Annual Wireless Industry Survey," at 2 (2012), *available at* http://files.ctia.org/pdf/CTIA_Survey_YE_2012_Graphics-FINAL.pdf.

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

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

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

[48] *See* Public Citizen, "Forced Arbitration: Unfair and Everywhere," at 17-19 (Sept. 2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf.

[49] 15 U.S.C. §§ 1221, *et seq.*; *See also* S.Rep 107-266.

[50] *See* Matt Brownwell, *Forced Arbitration: Killing the Right to Sue Big Companies, One TOS Agreement at a Time*, DAILY FINANCE, March 7, 2013, *available at* http://www.dailyfinance.com/on/forced-arbitration-killing-class-action-lawsuits-tos-agreements/.

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

[52] *See Schwab Eliminate Class Action Waiver in Customers' Agreements – At Least For* Now, SECURITIES LAW PROF BLOG, May 17, 2013, *available* at, http://lawprofessors.typepad.com/securities/2013/05/schwab-eliminate-class-action-waiver-in-customers-agreements-at-least-for-now.html.

[53] *See* Suzanne Barlyn, *States Urge SEC to Halt Forced Investor Arbitrations*, REUTERS, May 3, 2013, *available at* http://news.yahoo.com/states-urge-sec-halt-forced-investor-arbitrations-215101077.html.

[54] *See* Paul Bland, *What does 'Consent' Even Mean* Anymore, PUBLIC JUSTICE BLOG, February 19, 2013, *available at* http://publicjustice.net/blog/what-does-consent-even-mean-anymore.

[55] In re Checking Account Overdraft Litig. *MDL No. 2036*, 672 F.3d 1224, 1229 (11th Cir. 2012) *cert. denied*, 133 S. Ct. 430, (U.S. 2012).

[56] 9 U.S.C. § 1.

[57] Circuit City Stores v. Adams, 532 U.S. 105 (2001).

[58] *See e.g.* Orrick Employment Law Alert, *AT&T Mobility v. Concepcion: Unprecedented Support for For Class Action Waivers in Employment Arbitration Agreements*, June 13, 2011, *available at* http://www.orrick.com/fileupload/3737.pdf at 3 ("Concepion is a potential „game changer""); Hunton & Williams LLP, *Supreme Court Holds That Class Arbitration Waivers are Enforceable Under the FAA*, Hunton Employment and Labor Perspectives, May 16, 2011, *available at* 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").

[59] *See* Hunton & Williams LLP, *Classless Claim in Topless Bar: Arbitration Clause Strips FLSA Bare*, Hunton Employment and Labor Perspectives, July 11, 2011, *available at* http://www.huntonlaborblog.com/2011/07/articles/wage-hour/classless-claim-in-topless-bar-arbitration-clause-strips-flsa-action-bare/.

[60] 42 U.S.C. § 2000e-2.

[61] *Id*. § 2000e-5(g).

[62] *See* Laura M. Holson, *Chief of American Apparel Faces 2nd Harassment Suit*, NY TIMES, March 23, 2011, *available at* http://www.nytimes.com/2011/03/24/business/24bias.html; Terry Baynes, *Ex-Workers Say American Apparel Posted Their Nude Photos Online*, Reuters Legal, Apr. 27, 2011, *available at* http://newsandinsight.thomsonreuters.com/Legal/News/2011/04_-_April/Ex-workers_say_American_Apparel_posted_their_nude_photos_online/.

[63] Matthew Heller, *American Apparel Can't Arbitrate Claim CEO Choked Employee*, LAW360, May 24, 2013, *available at* http://www.law360.com/articles/445001/american-apparel-can-t-arbitrate-claim-ceo-choked-employee.

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

[65] P.L. 111-2.

[66] 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.

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

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

[69] 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.

[70] *See id*. at 187.

[71] *See The Arbitration Fairness Act of 2013, Senator Al Franken*, *available at* http://www.franken.senate.gov/files/documents/130507ArbitrationFairness.pdf.

[72] Agreements between unions and employers are excepted because many of the flaws of arbitration are not present or mitigated in the collective bargaining context. Unions and employers are typically repeat players with the resources and wherewithal to fairly engage in the arbitration process.

[73] *See*, Bureau of Consumer Financial Protection, *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, *available at* http://files.consumerfinance.gov/f/201204_cfpb_rfi_predispute-arbitration-agreements.pdf.

[74] *See*, Will Wade-Gery, *Help us design a consumer survey about mandatory pre-dispute arbitration*, CONSUMER FINANCIAL PROTECTION BUREAU BLOG, June 7, 2013, *available at* http://www.consumerfinance.gov/blog/help-us-design-a-consumer-survey-about-mandatory-pre-dispute-arbitration/.

[75] Loeb & Loeb LLP, *TILA Prohibition On Mandatory Arbitration Provisions In Mortgage Agreements Takes Effect June 1, 2013*, MONDAQ, June 9, 2013, *available at* http://www.mondaq.com/unitedstates/x/242546/Dodd-Frank+Wall+Street+Reform+Consumer+Protection+Act/TILA+Prohibition+On+Mandatory+Arbitration+Provisions+In+Mortgage+Agreements+Takes+Effect+June+1+2013

[76] 1028(b) of the law provides that "The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."