December 17, 2013

The Honorable Al Franken
U.S. Senate
Washington, DC 20510

Dear Senator Franken:

Re: Statement for the Senate Judiciary Committee Hearing Record: "The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?"

We are members of a law school clinic, Civil Justice Through the Courts, at New York Law School. This is a public policy clinic, the mission of which is to raise awareness about attacks on access to the civil justice system. After studying the issue of forced arbitration, we write today to express our support for the Arbitration Fairness Act of 2013 (AFA), S.878, and to respectfully submit these comments for the hearing record of the December 17 hearing, "The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?"

The AFA is critical to the protection of the American consumer, employee, and small business. The right of injured or violated people to vindicate their rights in court is a fundamental precept of American democracy. However, recent Supreme Court cases have allowed corporations to strip away this basic right by taking away consumers, employees, and small businesses' access to civil trials and forcing them into mandatory, individual, binding arbitration.

A recent Alliance for Justice Report notes a 2007 study that "found that consumers win only five percent of cases brought before an arbitrator."[1] There are many reasons that the process is so one-sided.

To start, the company or corporation typically chooses the arbitrator. Thus the private arbitration company has a financial incentive to side with the corporation – repeat business. Alliance for Justice explains, "[b]ecause major corporations create millions of dollars in business, a firm and its arbitrators have an incentive to keep corporation clients happy or risk losing business. Stark evidence of this 'repeat player bias' was revealed by a study finding that [the National Arbitration Forum's] top arbitrators ruled for businesses against consumers 93.8% of the time."[2]

Further, as *US News and World Reports* points out, arbitration clauses are "inherently unfair, because the companies choose the arbitrators, who know they're unlikely to be re-hired if they make a habit of giving consumers an obviously fair shake. A recent Pew study[3] found that even

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[1] Alliance for Justice, "Arbitration Activism: How the Corporate Court Helps Business Evade Our Civil Justice System," December 16, 2013 http://www.afj.org/wp-content/uploads/2013/12/Arbitration-Activism-Report-12162013.pdf

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

[3] The Pew Charitable Trusts, "Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution," November 2012, http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf

when the process leads to financial compensation, the average amount is only about half what a court would bestow."[4]

Court rules of evidence do not apply to arbitration hearings and arbitrators are not required to follow the law – they do not even need legal training. As Public Citizen and the National Association of Consumer Advocates explain, "corporations can write the rules that govern arbitration proceedings involving them – such as rules concerning fees, discovery rights, or hearing venues – giving them the ability to tilt the playing field."[5]

Additionally, arbitration proceedings are secret and decisions are binding. And companies can "contend with complaints one at a time, leaving victims unable to join forces or even to unearth evidence of a pattern of bad conduct."[6]

Arbitration can be very expensive and class action bans prevent consumers from sharing the costs with other wronged parties. Often this prevents consumers from bringing their claims at all.

Over the past several years, more and more Americans have seen their rights taken away as the result of the Supreme Court's interpretation of the Federal Arbitration Act (FAA), passed in 1925, "intended to target commercial arbitration agreements between two companies of generally comparable bargaining power."[7] The Supreme Court expanded the meaning of the FAA far beyond it's original scope and, as a result, forced arbitration clauses are appearing, not just in consumer contracts, but also in employment contracts, nursing home admission forms, online agreements, and more.

The AFA is designed to limit the use of mandatory arbitration – preventing corporations from insulating themselves from liability by forcing consumers to sign away their Constitutional rights. It is intended to "restore[] the original intent of the FAA." Moreover, the AFA "restores the rights of workers and consumers to seek justice in our courts. It ensures transparency in civil litigation. And it protects the integrity of the Civil Rights Act, the Equal Pay Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, among others."[8]

Recent Supreme Court Decisions That Have Made Arbitration Fairness Act is Necessary

Three recent Supreme Court decisions in particular have altered the way cases are brought in this country. Those three cases are *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v.*

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[4] Jim Lardner, "A Corporate 'Get Out of Jail Free' Card," *US News and World Reports*, September 6, 2013, http://www.usnews.com/opinion/blogs/economic-intelligence/2013/09/06/forced-arbitration-is-a-corporate-get-out-of-jail-free-card

[5] Public Citizen and the National Association of Consumer Advocates, "Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision are Plainly Evident," April 2012, http://www.naca.net/sites/default/files/Justice%20Denied%20Concepcion%20Anniversary%20Report.pdf

[6] Jim Lardner, "A Corporate 'Get Out of Jail Free' Card," *US News and World Reports*, September 6, 2013, http://www.usnews.com/opinion/blogs/economic-intelligence/2013/09/06/forced-arbitration-is-a-corporate-get-out-of-jail-free-card

[7] Senator Al Franken, "The Arbitration Fairness Act of 2013," May 7, 2013, http://www.franken.senate.gov/files/documents/130507ArbitrationFairness.pdf

[8] *Id.*

Italian Colors Restaurant, 133 S. Ct. 2304 (2013). While each presents a unique situation, all concern the way in which litigation is directed towards and often squashed under the rules of arbitration.

Stolt-Nielson Decision

Stolt-Nielson concerned international animal feed companies who discovered the shipping companies they had contracted with were engaged in an illegal price-fixing conspiracy. Respondent AnimalFeeds brought suit alleging price fixing under the Sherman Anti-trust Act. The suit was grouped with other similarly situated customers of the shipping companies. The contract was silent on the issue of class arbitration, however, and the issue had to be resolved before the case could continue. The issue was decided before a panel of arbitrators, who found that based on the evidence, there was no "intent to preclude class arbitration"[9], and therefore class arbitration would be allowed. The decision was appealed to the District Court for the Southern District of New York, which vacated the award on the basis the arbitrators failed to conduct a choice-of-law analysis.[10] AnimalFeeds appealed to the Court of Appeals in New York, which again reversed, holding that "because Petitioners had cited no authority…against class arbitration, the arbitrators' decision was not in manifest disregard of federal maritime law."[11] The Supreme Court granted certiorari.

The Court took pains to point out that under the Federal Arbitration Act (FAA), arbitration "is a matter of consent, not coercion."[12] It was undisputed that the contract between the parties required disputes be settled in arbitration, but said nothing about class proceedings.

AnimalFeeds relies on a recently decided Supreme Court decision, *Bazzle v. Green Tree Financial Corp*., 123 S. Ct. 2402. "In Bazzle, a plurality of the court had ruled that the issue of class arbitration, where not specifically provided for in the contract, should be decided by the arbitrator, not the court."[13]

Many companies after Bazzle attempted to evade its perceived impact by including in contractual arbitration clauses provisions affirmatively prohibiting class action arbitrations. A number of courts, in increasing frequency, however, have stricken such provisions as void against public policy on a variety of grounds.[14]

The Court felt that lower courts had misinterpreted it's holding in *Bazzle*, and used its majority to eliminate the refuge consumers had sought from class action waivers. The Court began by first

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[9] *Stolt-Nielsen S.A*., 130 S. Ct. at 1766.
[10] *Id*.
[11] *Id*.
[12] *Id*. at 1773, quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*., 109 S. Ct. 1248, (1989).
[13] Susan Jordan, "Stolt-Nielsen's Effect on Consolidation of Arbitration," *Law360*, July 07, 2010, http://www.lockelord.com/files/News/9424c623-87bd-4514-97a6-9da91766731d/Presentation/NewsAttachment/a4608d66-324a-467c-82dd-9db2056704c4/2010-07_Stolt-NielsensEffect_Jordan.pdf.
[14] D. Matthew Allen & Rebecca N. Shwayri, "The Supreme Court's Class Action "Do Over" in Stolt Nielsen," *Bloomberg Law Reports*, http://www.carltonfields.com/files/Publication/580f5c76-060c-4caf-a39f-c1ade757be5f/Presentation/PublicationAttachment/0ce7a1ad-bc6b-46e4-96ca-c90feb017e23/The%20Supreme%20Court%27s%20Class%20Action%20Arbitration%20-%20Do%20Over.pdf.

noting that "only the plurality decided that question"[15], and with little explanation determined that "*Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted."[16]

The Supreme Court ultimately reached the conclusion that "a party may not be compelled under FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."[17] Because the contract between the companies was silent on the issue of class actions, it couldn't be inferred that either party had consented to class arbitration proceedings.[18] In other words, where an arbitration agreement exists, for class proceedings to proceed, agreement on the issue must be explicit.

AT&T Mobility Decision

A year after *Stolt-Nielsen*, the Court was again called upon to decide whether a class arbitration action should be permitted. Following the *Stolt-Nielsen* decision, companies made sure arbitration agreements expressly prohibited class arbitrations. Such was the case when the Concepcions purchased cellular service through AT&T. The phones that came with the service plan were advertised as free, but the Concepcions "were charged $30.22 in sales tax based on the phones' retail value."[19]

The Concepcions brought suit against AT&T in the United States District Court for the Southern District of California, and were consolidated into a class action, alleging false advertising and fraud.[20] AT&T moved compel individual arbitration, on the grounds the contract the Concepcions signed expressly required arbitration and prohibited class proceedings. The District Court held that based on a rule from the California Supreme Court case *Discover Bank v. Superior Court*, 113 P. 3d 1100 (2005), "the arbitration provision was unconscionable"[21]. The so called *Discover Bank* rule works to nullify class-action waivers in consumer contracts of adhesion where "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[22] That decision was affirmed by the Ninth Circuit, and the case ultimately made its way to the Supreme Court of the United States.

In an opinion written by Justice Scalia, the Court found that the *Discover Bank* rule conflicts with the Federal Arbitration Act (FAA), and was therefore preempted. Section 2 of the FAA says that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[23] The majority does not shy away from this language; it is the first sentence of the majority opinion. The Court says that

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[15] *Stolt-Nielsen S.A.*, 130 S. Ct. at 1772.
[16] *Id.*
[17] *Id.* at 1775.
[18] *Id.* at 1776.
[19] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).
[20] *Id.*
[21] *Id.* at 1745.
[22] *Id.* at 1745.
[23] *Id.* at 1744.

the grounds in which an arbitration agreement can be invalidated are "generally applicable contract defenses"[24], such as fraud or duress.

Like in *Stolt-Nielsen*, the majority focused on the differences between bilateral and class arbitration. "The switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[25]

Finally the majority acknowledges the concern of the dissent; "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."[26] This concern is really foundational to the issues raised by predispute arbitration agreements, when a company effectively insulates itself from liability from wrongdoing by making the process of vindicating a right so arduous that it cannot feasibly be done. Again, this important public policy issue was dealt with coldly by the majority; "States cannot require a process that is inconsistent with the FAA, even it if is desirable for unrelated reasons."[27]

The dissent reads the language of Section 2 of the FAA plainly, stating the very wording of Section 2 allows for the operation of the California *Discover Bank* rule.[28] The dissent believes the majority is simply wrong in believing that the FAA and the Discover Bank rule are inconsistent with one another; that by "increasing the complexity of arbitration proceedings"[29], the *Discover Bank* rule discourages "parties from entering into arbitration agreements."[30] The dissent first points out that contrary to the majority's argument, "class arbitration proceedings…take less time than the average class action in court."[31] And if efficiency is such a concern, surely a single class proceeding would be "more efficient than thousands of separate proceedings for identical claims."[32]

Italian Colors Decision

With the *AT&T Mobility* decision having been decided two years prior, the decision in *American Express Co. v. Italian Colors Restaurant* followed the same rationale but went even further. In short, a group of restaurants brought suit against American Express alleging that American Express ("Amex") used it's superior market position in the credit card market "to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards."[33]

The restaurant presented evidence that proving the antitrust claims would require an expert analysis, costing "several hundred thousand dollars, and might exceed $1 million, while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled."[34]

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[24] *Id*. at 1748.
[25] *Id*. at 1751.
[26] *Id*. at 1753.
[27] *Id*.
[28] *Id*. at 1756.
[29] *Id*. at 1758.
[30] *Id*.
[31] *Id*. at 1759.
[32] *Id*.
[33] *American Express Co*., 133 S. Ct. at 2308.
[34] *Id*.

Like *AT&T Mobility*, there was an explicit agreement against class arbitration in the contracts between American Express and the restaurants. But in this scenario, not only was arbitration an unlikely solution to the issue, but arbitration would have been completely insufficient to find a remedy. Essentially, this was a scenario where, if the court were to find that no class arbitration could proceed, Amex had insulated itself from antitrust violations and realized potentially millions of dollars from their wrongdoing. This concern, however, did not sway a majority of the Supreme Court.

The restaurants attempted to distinguish themselves from the *Stolt-Nielsen* holding by not expressly pursuing a remedy in class arbitration. "As the merchants explain, all they have ever sought is the effective vindication of their statutory rights. It doesn't matter whether that takes the form of class litigation, class arbitration, bilateral arbitration with cost-shifting, or something else."[35] This "effective vindication" argument resonated with the Second Circuit, which held "because respondents had established that 'they would incur prohibitive costs if compelled to arbitrate under the class action waiver,' the waiver was unenforceable and the arbitration could not proceed."[36]

But the Supreme Court was not persuaded by the "effective vindication" argument, holding "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."[37]

The Impact of These Supreme Court Cases

Many corporations have taken it upon themselves to revise their contracts to include mandatory arbitration agreements. Public Citizen illustrated the scope of the problem by compiling a list of corporations that force consumers into mandatory binding arbitration and "immuniz[e] themselves from accountability for wrongdoing."[38]

Their list, which is only a sample of the corporations that have started including these clauses in their contracts with consumers includes telecommunications corporations: DirecTV, Verizon, AT&T, Comcast, Sprint Nextel Wireless, T-Mobile, Clearwire, Time Warner Cable, and Tracfone.[39]

It also lists consumer banks and credit corporations, including Wells Fargo, US Bank, Regions Banks, BB&T, Discover, PNC Bank, Chase, TD Bank, Charles Schwab Bank, and American Express.[40]

Corporations that provide students with loan money, including Sallie Mae, Citibank, Sovereign Bank and Discover[41], are including these mandatory arbitration clauses in their contracts with

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[35]David Garcia, "Argument Preview: Under what circumstances are arbitration agreements with class action waivers enforceable?," *SCOTUS Blog*, February 22, 2013, http://www.scotusblog.com/2013/02/argument-preview-under-what-circumstances-are-arbitration-agreements-with-class-action-waivers-enforceable/.
[36] *American Express Co*., 133 S. Ct. at 2308, citing *In re American Express Merchants' Litigation*, 554 F. 3d 300, 315-316 (CA2 2009).
[37] *Id*. at 2311.
[38] Public Citizen, "Forced Arbitration Rogues Gallery," http://www.citizen.org/rigged-justice-rogues-gallery.
[39] *Id*.
[40] *Id*.
[41] *Id*.

students, which is inherently unfair given the fact that the average student in need of a school loan is not financially equipped to bring an individual suit against the corporation in an arbitration forum.

Consumer electronics corporations, such as Sony, Dell, Gateway Computers, Electronic Arts, Xbox Live, and Toshiba,[42] have included these mandatory arbitration agreements in their typical consumer contract to the detriment of all.

Nursing homes, such as Carrington Place Care Center (Candansk, LLC), Covenant Health (Covenant Dove, Inc.), Driftwood Rehabilitation and Nursing Center, Kindred Nursing Center, Manor Care of Florida, OP Winter Haven, Inc., Palm Garden of Sun City Center (SA-PG Sun City Center, LLC), and Tara at Thunderbolt Nursing and Rehabilitation Center (Triad Health Management of Georgia, III, LLC)[43] have all taken advantage of ill, elderly, and disabled consumers who require medical treatment, but lack the negotiation abilities required to avoid agreeing to the pre-dispute mandatory arbitration clauses with class action waivers.

Home builders, such as D.R. Horton, Pulte Homes, Centex, Lennar, KB Home, Hovnanian Enterprises, NVR, The Ryland Group, and Beazer Homes,[44] are all corporations that have selfishly taken advantage of American families who hire the corporation to help them begin their new life.

Starbucks, Pep Boys, Gold's Gym, Ticketmaster, Crocs, In-N-Out Burger, Red Mango, Patagonia, and Discover[45] are corporations that have included pre-dispute mandatory arbitration clauses in their contracts relating to the purchase of gift cards, immunizing themselves from liability, as no rational consumer would individually sue Starbucks over the cost of three cups of coffee.

Pre-dispute mandatory arbitration clauses have also made their way online, with websites such as Amazon.com, Barnes and Noble, Netflix, Hulu, Groupon, Match.com, Ebay, Microsoft, Paypal, Change.org, Spotify, and Stubhub[46] putting online consumers at risk of being unable to vindicate their rights over unfair trade practices relating to their purchase.

Another place people are now finding forced arbitration agreements is in their cruise ship tickets. After the Carnival Cruise Lines ship Triumph disaster in February 2013, where passengers "suffered in sweltering heat, walked through sewage and faced unspeakable conditions,"[47] many assumed they could sue the cruise line. However, as Nan Aron, President of Alliance for Justice noted, "[i]t appears that Carnival is far better prepared to prevent lawsuits than it was to contain the damage aboard the Triumph. In the fine print found in every ticket, there is a clause that bars most lawsuits, passengers must go into forced arbitration."

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[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] Nan Aron, "Arbitration Fairness Act would protect American consumers," *The Reporter*, May 12, 2013, http://www.thereporter.com/ci_23226704/arbitration-fairness-act-would-protect-american-consumers

This list makes clear why forced arbitration is not voluntary. Average consumers buying a cell phone or opening a bank account, students taking out loans, and the elderly and disabled entering nursing homes, lack the ability to fight forced arbitration clauses in the contracts they are signing. Often they don't even know they are there – and even if they do, they don't have a choice but to sign.

Case Examples

Before *Concepcion*, contracts that included forced arbitration agreements with class action waivers could have been invalidated under state contract law. But after *Concepcion*, these agreements are being upheld. Any case that may have been able to get around *Concepcion* is now in danger because of *American Express*. Examples of cases where forced arbitration clauses have prevented victims from bringing claims in court are illustrated below:

- Matthew Wolf, "captain in the Judge Advocate General Corps of the Army Reserves," had to break the lease for his Nissan Infiniti when he was called to join forces in Afghanistan, but fortunately, the Servicemembers Civil Relief Act would have protected him from losing the $400 he had paid in advance towards his monthly payments.[48] But he was deprived of the $400, so in 2010, his attorney brought a claim on behalf of Wolf and other similarly situated service members.[49] Unfortunately for them, the *Concepcion* decision brought their lawsuit to a screeching halt, because the contract between Wolf and Nissan included a pre-dispute mandatory arbitration clause with a class action waiver.[50] On a larger scale, the ramifications of this decision are more severe than a $400 loss; if this claim was tried as a class action, it would have alerted other unaware service members, who were called into active duty, that they were also entitled to reimbursement of the monthly payments that they paid in advance. In fact, Wolf never would have known that he was entitled to this reimbursement if a friend who was also a service member hadn't told him so.[51] There could be thousands of other similarly situated service men, unaware that they are entitled to this right.[52]

- The Alliance for Justice listed several examples of cases thrown out after *Concepcion*. One was the case of Lourdes Cruz. Cruz fell victim to AT&T Wireless's superior contracting power when she was faced with charges of $2.99/month for "roadside assistance service" that she was not even aware she had agreed to. She attempted to bring a class-action suit "under Florida's unfair trade practices law," but due to the Supreme Court's decision in *Concepcion*, she had to individually arbitrate her claim instead.[53] Like Wolf, the court essentially told Cruz that, in order to recover the sum of the monthly charges, she would first have to spend more than that sum individually arbitrating her

[48] David Segal, "A Rising Tide Against Class-Action Suits," *New York Times*, May 5, 2012, http://www.nytimes.com/2012/05/06/your-money/class-actions-face-hurdle-in-2011-supreme-court-ruling.html?_r=1.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] Alliance for Justice, "One Year Later: The Consequences of AT&T Mobility v. Concepcion," *Justice Watch*, April 27, 2012, http://afjjusticewatch.blogspot.com/2012/04/one-year-later-consequences-of-at.html.

claim. This situation allows corporations to take advantage of unsuspecting consumers and gives the corporations peace of mind because it is not in the consumers' best interests financially to sue the corporation for their wrongful acts.

- Arbitration clauses have been upheld even when it's clear the person signing the agreement has no idea what they're agreeing to. In *Spring Lake NC, LLC v Holloway*[54] involves the infliction of a mandatory arbitration agreement upon "a 92 year old with a fourth-grade education," who was in a state of increasing confusion and lacking normal memory functionality.[55] The trial court found that this person "could not possibly have understood what she was signing," but the mandatory arbitration clause was enforced regardless.[56]

- Another example of the impact of mandatory arbitration clauses on the elderly involves William Kurth, an eighty-four year old World War II veteran, who passed away due to the negligent staff at Mount Carmel Medical and Rehabilitation Center ("Center"), which is a Kindred Healthcare Inc. owned facility.[57] Within about an hour of arriving at the Center to admit her husband, Mrs. Kurth was fed the plain-English version of more than fifty pages of documents, which included a pre-dispute mandatory arbitration clause at the end.[58] This mandatory arbitration clause was described to Mrs. Kurth as "necessary in order to admit Mr. Kurth into the nursing home."[59] Admitting Mr. Kurth was the only practical option because of Mrs. Kurth's inability to take care of him on her own, so she truly had no choice. Mr. Kurth was immobile after he had hip surgery; the staff at the Center was expected to ensure that he did not develop pressure ulcers due to the lack of mobility. However, Mr. Kurth's care did not change to accommodate his need for increased care, and he "developed 10-11 stage 4 pressure ulcers, [which were] so severe that they left bone and organs exposed."[60] Around the same time that Mr. Kurth developed these ulcers, Kindred switched from having a "wound care team," consisting of multiple nurses, to just one nurse, whose duty was to monitor and treat the wounds of all 155 residents.[61] Unfortunately for Mr. Kurth, the wound care nurse did not treat a single one of his pressure ulcers.[62] These incidents, when taken together, directly caused Mr. Kurth's untimely demise. After two half-hearted offers by Kindred to pay for Mr. Kurth's funeral costs, Mr. Kurth's family attempted to sue Kindred; the pre-dispute mandatory arbitration cause stopped their lawsuit before it began.[63] This case took place before *Concepcion*.

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[54] *Spring Lake NC, LLC v Holloway*, 110 So.3d 916 (Fla. Dist. Ct. App. 2013)
[55] Public Justice, "Comments of Public Justice to the Consumer Financial Protection Bureau," August 7, 2013, http://publicjustice.net/sites/default/files/downloads/Public-Justice-Response-to-CFPB-re-Consumer-Survey.pdf.
[56] *Id*.
[57] American Association for Justice, "The Real Life Consequences of Forced Arbitration," http://www.justice.org/cps/rde/justice/hs.xsl/2961.htm.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*.

- A recent US News article[64] cites a case involving New York citizen, and disabled resident, Bernadita Duran. Duran was a victim of a "last-dollar" scam and lost "$4000 to a 'debt settlement' company, which pocketed the whole amount in fees without settling any of her debts."[65] Because of an arbitration clause, she learned she would be forced to "take her complaint outside the public court system to a private arbitration firm of the company's choosing."[66] In addition to her monetary loss, Ms. Duran was expected to travel to Arizona, where the debt company and its chosen arbitrator were. And, "if she considered that an unfair burden, well, Duran was free to raise the point- with the Arizona arbitrator, once she got there."[67]

- The Second Circuit recently upheld an arbitration clause in an employment contract in *Parisi v Goldman Sachs & Co*.[68] In this case, upon becoming a managing director at Goldman Sachs in 2003, Lisa Parisi "signed a Managing Director Agreement, which contained an arbitration clause. The scope of the clause included any claim arising out of "employment related matters."[69] After she was fired in 2008, Parisi sued Goldman Sachs, alleging Title VII gender discrimination, along with two other former employees, "as part of a putative class, alleging a continued pattern of gender discrimination."[70] Goldman Sachs filed a motion to compel arbitration. The lower courts denied the motion to compel, but on appeal, the Second Circuit "found that Congress has expressly allowed for arbitration of Title VII claims." Doing so, the court recognized "two circumstances in which motions to compel arbitration must be denied because they would prevent plaintiffs from vindicating a statutory right. First, arbitration agreements have been invalidated when they have interfered with the recovery of statutory damages. Second, when dealing with some antitrust actions under the Sherman Act, arbitration clauses containing class waivers have been held unenforceable because individual arbitration would be cost prohibitive to the point of precluding plaintiffs from brining such claims."[71]

  Parisi attempted to argue that the Court should allow her claim to continue because Title VII's "pattern-or-practice" clause was only available only to class plaintiffs, and the arbitration clause prevented her from following through on her "substantive right" on the claim. Unfortunately, but not surprisingly, the Court "disagreed with Parisi, saying that 'pattern-or-practice' is not an independent cause of action, but merely a method of proving the disparate treatment element of a Title VII claim…[and] the Court therefore

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[64] Jim Lardner, "A Corporate 'Get Out of Jail Free' Card," *US News and World Reports*, September 6, 2013, http://www.usnews.com/opinion/blogs/economic-intelligence/2013/09/06/forced-arbitration-is-a-corporate-get-out-of-jail-free-card
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Parisi v. Goldman Sachs & Co*., No. 11-5229-cv (2d Cir. March 21, 2013).
[69] Jeremy Gray, "Parisi v. Goldman Sachs & Co.: Second Circuit Upholds Arbitration Clause Barring Title VII 'Pattern or Practice,'" *LawUpdates.com*, May 22, 2013, http://www.lawupdates.com/commentary/iparisi_v._goldman_sachs_co._isecond_circuit_upholds_arbitration_clau/
[70] *Id*.
[71] *Id*.

held that 'such a right does not exist."[72]

Jeremy Gray, a partner in an employment law firm who wrote about this case for *Lawupdates.com* explains, the "Second Circuit's holding in *Parisi* has demonstrated the strength of the FAA and the courts' subsequent unwillingness to invalidate arbitration agreements, even when they forbid discrimination class actions."[73]

The United States has always been a leader in the right to be guaranteed a fair day in court. Cases like those above are affecting those who most desperately need our judicial system. They clearly illustrate why the Arbitration Fairness Act is so desperately needed.

What the AFA Will Do

Whether or not the AFA remedies the problems that exist because of forced arbitration depends on what exactly the AFA purports to do. The text of the bill itself it short, but the summary does a good job of describing what the bill hopes to accomplish. "Arbitration Fairness Act of 2013 - Declares that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute."[74] Thus it would give consumers the freedom to choose whether or not to submit themselves to the arbitration process.

There are occasions where people may prefer arbitration; the system of arbitration is faster and easier in some cases. The important point is that this bill would give the injured party a choice.

Thank you for hearing our views on this important legislation. If you have any questions, please contact Zakary Woodruff, Zakary.Woodruff@law.nyls.edu, Jessica Braunstein, Jessica.Braunstein@law.nyls.edu, or Parul Nanavati, Parul.Nanavati@law.nyls.edu.

Respectfully submitted,

Law Student Clinic Members
Civil Justice Through the Courts
New York Law School
185 West Broadway
New York, NY 10013

[72] *Id*.
[73] *Id*.
[74] S. 878, 113th Cong. (2013-2014), http://beta.congress.gov/bill/113th/senate-bill/878?q={%22search%22:[%22arbitration%20fairness%20act%22]}.