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FAQ: VANISHING RIGHTS AND REMEDIES UNDER FORCED ARBITRATION

The right of injured or violated people to vindicate their rights in court is a fundamental precept of American democracy. The Revolutionary War was fought in part over England's repeated attempts to restrict jury trials for everyday people, and the U.S. Constitution was nearly defeated over its failure to guarantee the right to civil jury trial – a problem eventually resolved by the Seventh Amendment.

But two years ago, the U.S. Supreme Court decided that corporations can strip people of this basic right and force them into private, corporate-designed systems to resolve their disputes. The case was *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). The Court held that the Federal Arbitration Act of 1924 ("FAA") allows corporations to force injured or violated Americans into forced arbitration systems. The Court held that even when an existing state law protects individuals from abusive forced arbitration clauses, the FAA - a law originally enacted simply to help resolve commercial disputes between businesses – trumps these state laws.

What's more, the Court said that companies have the unilateral right to ban class actions by inserting class action waivers into these arbitration clauses. Where a company may have acquired a large financial windfall by violating the rights of large numbers of people, class actions are often the only way for people to gain access to the courts. Without this tool, many cases cannot be brought at all, allowing corporate wrongdoing to completely escape any legal accountability.

WHAT IS THE SCOPE OF THE PROBLEM CREATED BY THE *CONCEPCION* DECISION?

We have all noticed forced arbitration clauses and class action waivers in most every consumer contract we have now – cell phones contracts, bank and credit card agreements, gym memberships, and countless retail contracts. Employers are starting to force employees to sign them. They are in virtually all nursing home admission forms. They can be found in fracking agreements. It is only a matter of time before this practice starts to spread broadly to any type of transaction – housing, transportation, health care, and so on.

In addition, the practice of forced arbitration places in jeopardy important federal protections. Specifically, many federal laws that provide protections to the public grant victims of violations of those laws the right to go to court to vindicate their rights. These private rights of action are a cornerstone of the effective enforcement of these laws. Forced arbitration places this critical enforcement mechanism at risk in laws such as the Civil Rights Acts of 1964 and 1991, the Age

Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Uniformed Services Employment and Reemployment Rights Act, the Sherman Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Truth in Lending Act, and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act.

With specific regard to class actions, hundreds of cases have already been dismissed since *Concepcion*. David S. Schwartz, Professor of Law at the University of Wisconsin Law School, put it this way in a SCOTUS Blog commentary:

> *Wal-Mart v. Dukes*[1] caused much consternation for placing significant limits on class actions. Surprisingly little attention, by comparison, has been paid to *AT&T Mobility v. Concepcion*, decided two months before *Wal-Mart*. *Concepcion* goes much farther than *Wal-Mart*. It entirely kills most class actions.…
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> Without minimizing *Wal-Mart v. Dukes*, getting upset about that case is like flipping out over a brief thundershower a few weeks after having slept through Hurricane Irene. The implications of *Concepcion* are staggering.[2]

WHAT IS WRONG WITH FORCED ARBITRATION?

With money and politics already dominating the executive and legislative branches of government, America's court system is one of the only places left in America where everyday people can successfully confront powerful industries and institutions. Our judicial system is designed to ensure that "the little guy" has fair access to the courts. It does this by neutralizing imbalances between parties through procedural and substantive rights like the right to know and rebut evidence through discovery, cross-examination and argument, civil rules of procedure, and an impartial judge who is guided by the substantive law.

Arbitration, on the other hand, does none of these things. Arbitrators are often on contract with the businesses against which a claim is brought. Often the company, not the victim, is allowed to choose the arbitrator. This creates inherent bias and self-interest on the part of the arbitrator—the arbitrator is motivated to rule in a way that will attract future company business. At the same time, arbitration companies have a financial incentive to side with corporate repeat players who generate most of the cases they handle. Arbitrators are also not required to have any legal training and they need not follow the law. Court rules of evidence and procedure do not apply. There is limited discovery making it much more difficult for individuals to have access to important documents that may help their claim. Arbitration proceedings are secretive. Decisions are still enforceable with the full weight of the law even though they may be legally incorrect. This is especially disturbing because these decisions are binding. Sometimes, victims must split the sizeable costs of arbitration with the defense. But even if the defense handles the costs, this gives them the ability to "freeze" a proceeding in the rare situation where it seems the arbitrator is moving against them.[3]

Finally, "consent" to forced arbitration is hardly voluntary. These clauses are usually outlined in tiny print, buried it documents and paragraphs and written in legalese that is incomprehensible to

most people. And because entire industries are inserting arbitration terms into contracts – including class action waivers - there is little choice but to agree to them.

WHAT HAS BEEN THE IMPACT OF CLASS ACTION WAIVERS?

Public Justice noted in recent comments to the Bureau of Consumer Financial Protection that the abusive arbitration process – while horrible – is "comparatively less significant an issue than the huge number of cases that have been erased."[4] Public Citizen explains why:

> In his dissenting opinion in *Concepcion*, Justice Stephen Breyer, writing for four Justices, described the consequences of the Court's decision using the example of a case in which a company cheated 17 million people out of $30 each. "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30," Justice Breyer wrote, quoting Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit.[5]

Public Citizen updated its 2012 study[6] and found that since *Concepcion*, over 100 potential class actions have been dismissed.[7] However, the numbers are likely much higher than that since Public Citizen only counted cases where a posted opinion appeared in Westlaw's database. Many dismissed cases would not show up there.

In its most recent *Workplace Class Action Litigation Report*, the class action defense firm Seyfarth Shaw wrote that the widespread use of class action bans in employment contracts is coming:[8]

> Although mandatory arbitration and class action waiver provisions are already common in retail contracts, the next major step is likely to be their broader introduction into employment contracts (where only collective bargaining agreements, at least in unionized companies, may impede their use).

Indeed, in March, 2013, the Court of Appeals for the 2nd. Circuit refused to allow a sex discrimination class action to proceed against Goldman Sachs because the victims' employment contract contained a forced arbitration clause with a class action ban. The court essentially acknowledged that employers can now "curtail class actions against them, even when they're accused of violating employees' civil rights."[9]

HOW ELSE HAS THE SUPREME COURT LIMITED RIGHTS AND REMEDIES BEYOND THE *CONCEPCION* CASE?

There are other recent Supreme Court arbitration decisions that have further damaged the legal landscape for consumers and workers. These include:

- ***Stolt-Nielsen v. AnimalFeeds, Inc.* (2010).**[10] Under this decision, arbitrators cannot allow class-wide arbitration if a contract is silent on the issue. Public Citizen wrote, "If you like, you can think of it as a special clear-statement rule of federal common law -- a rule that elevates hostility to class actions above ordinary principles of contract interpretation.…"[11]

- ***Rent-A-Center v. Jackson* (2010).**[12] This decision leaves challenges even to the very worst arbitration abuses, "entirely in the hands of arbitrators themselves," so that companies can "impose one-sided terms or select clearly biased arbitrators with close ties to the company, secure in the knowledge that any challenge to the fairness of arbitration will be decided by the arbitrator whose very authority comes from the challenged arbitration agreement.… Justice Stevens pointed out that neither party had urged the rule adopted by the Court and characterized the Court's reasoning as 'fantastic.'"[13]

Finally, the Supreme Court's most recent decision in June 2013, *American Express v Italian Colors Restaurant*[14], closed the door on even more class actions. The Supreme Court reversed a long line of cases that held that arbitration with "prohibitive costs" could not prevent victims with federal statutory claims from effectively vindicating their rights. In *American Express* the plaintiffs – small business merchants - claimed exactly this. Their contracts with Amex contained forced arbitration clauses and class action bans. They argued that forcing them to arbitrate their anti-trust claims individually would be so prohibitively expensive that they could not vindicate their federal rights. But the court held that arbitration clauses and class action waivers are enforceable even when they prevent injured parties from vindicating their rights. This case has placed in jeopardy many important federal protections for victims who have used the courts to vindicate their rights.

WHAT IS THE SOLUTION?

Given these Supreme Court cases, there is only one solution: Congress must amend the FAA to restrict the use of forced arbitration and class action bans.

NOTES

[1] 131 S.Ct. 2541 (2011). In this case, the Court refused to certify a class of 1.5 million women alleging massive, company-wide discrimination. The Court basically said the class was *too big*, i.e., that there was not enough "commonality" in a class that large.

[2] David Schwartz, *Do-it-yourself tort reform: How the Supreme Court quietly killed the class action*, SCOTUSBLOG (Sep. 16, 2011, 10:52 AM), http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action/

[3] See, e.g., Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017, June 23, 2012.

[4] *Ibid*.

[5] Public Citizen and 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.

[6] *Ibid*.

[7] "During National Consumer Protection Week, Consumer Advocates Warn About Harms of Forced Arbitration," March 7, 2013; http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3830

[8] "Ninth Annual Workplace Class Action Litigation Report," Seyfarth Shaw, January 14, 2013.

[9] Alison Frankel's On the Case, "2nd Circuit squelches Title VII exception to mandatory arbitration," *Thomson Reuters*, March 21, 2013; http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=72276%20&terms=%40ReutersTopicCodes+CONTAINS+%27ANV%27

[10] 130 S. Ct. 1758 (2010).

[11] http://pubcit.typepad.com/clpblog/2010/04/supreme-court-decides-stoltneilsen-no-class-arbitration-where-clause-is-silent.html

[12] 130 S. Ct. 2772 (2010).
[13] http://pubcit.typepad.com/clpblog/2010/06/supreme-court-decides-rentacenter-v-jackson-companies-can-delegate-unconscionability-challenges-to-t.html
[14] 570 U.S. __ (2013).