In Post-*Concepcion* Era, Wireless Carriers Escape Accountability

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Acknowledgments

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Introduction

Wireless services are an integral part of American daily life. According to an industry analysis, 83 percent of U.S. adults have a cell phone of some kind and 42 percent of those individuals own a smart phone.[1] The industry counted 302.9 million wireless connections in the United States and 270 million data-capable devices on the market as of December 2010.[2]

But while the industry has experienced growth and innovation, carriers also have engaged in unfair and deceptive practices that harm U.S. consumers, who pay much more for wireless services than their counterparts in other developed nations.[3] U.S. wireless users are constantly hit with fees as well as unexpected and unannounced data and line-item charges that pad the industry's pockets while emptying consumers' wallets. A New York Times technology columnist memorably described the industry as being "one step away from a big-city mugger."[4]

Many of the wireless industry's pickpocketing practices are not only unjust, but fly in the face of various state and federal consumer protection laws. According to the Better Business Bureau, the telecommunications industry, which includes wireless services, had the most complaints of any industry in 2009, but was also noted for having the most percentage of the complaints resolved.[5] Individual states also report that the telecom industry is at the top or near the top of their annual consumer complaint lists. [6]

Problems with wireless companies' billing, contract terms and explanation of rates and coverage lead the list of consumer concerns about the industry.[7] In 2009, the Government Accountability Office noted that most wireless users were satisfied with their service, but estimated that between 9 and 14 percent were dissatisfied, which represents millions of

[1] CTIA, The Wireless Association. *The Wireless Industry Overview,* last updated September 19, 2011, at http://files.ctia.org/pdf/091911-WirelessIndustryOverview.pdf.
[2] CTIA, The Wireless Association. *The Wireless Industry Overview,* last updated September 19, 2011, available at http://files.ctia.org/pdf/091911-WirelessIndustryOverview.pdf.
[3] http://www.consumersunion.org/pdf/wireless-testimony-509.pdf.
[4] David Pogue. *Is Verizon Wireless Making It Harder to Avoid Charges?*, June 17, 2010, available at http://pogue.blogs.nytimes.com/2010/06/17/is-verizon-wireless-making-it-harder-to-avoid-charges/.
[5] Better Business Bureau. *Complaints to Better Business Bureau Up Nearly 10 Percent in 2009*, available at http://www.bbb.org/us/article/complaints-to-better-business-bureau-up-nearly-10-percent-in-2009-18034.
[6] Oregon Department of Justice, *Top 10 Consumer Complaints 2010*, available at http://www.doj.state.or.us/finfraud/pdf/2010_top_ten.pdf, and Washington State. *Telecommunications complaints rise to top of consumer complaint list*, available at http://www.utc.wa.gov/aboutUs/Lists/News/DispForm.aspx?ID=83.
[7] Government Accountability Office. *FCC Needs to Improve Oversight of Wireless Phone Service*, November 2009, at 9-10, available at http://www.gao.gov/new.items/d1034.pdf.

consumers.[8]

While consumers are deeply frustrated about unfair telecommunications practices, it has become increasingly difficult for them to hold carriers accountable for their actions. Wireless carriers use one-sided contract terms to cripple consumers' rights, while state and federal officials generally have been slow to act. Compounding these difficulties is the April 2011 Supreme Court decision in *AT&T Mobility v. Concepcion,* which narrowed states' consumer protection authority, allowing corporations to use forced arbitration clauses in their contracts to ban consumer class actions. The decision effectively allows telecom companies to block virtually all lawsuits that consumers might bring against them.

This paper describes some of the industry's worst practices and examines five ways that carriers have successfully shielded themselves from taking full responsibility for their conduct, to the detriment of their customers.

A. Exorbitant and Unauthorized Fees, Fines and Other Charges

1. Bill Shock

Bill shock is a common occurrence for consumers. The Federal Communications Commission defines bill shock as a "sudden and unexpected increase in a mobile wireless user's monthly bill that is not caused by a change in service plans."[9]Almost one-third of wireless users who contacted a provider's customer service department did so because of billing problems.[10] Some problems stem from actual disagreements about service plans, but others come from unexpected charges that appear on monthly bills. A consumer survey indicated that during 2008 and early 2009, about 34 percent of wireless phone users responsible for paying for their own phone services received unexpected charges.[11] In the last quarter of 2010, billing and rates issues made up more than 53 percent of consumer inquiries and complaints to the FCC, with a substantial number related to bill shock.[12]

A 2010 Federal Communications Commission survey found that 17 percent of American adults with a cell phone – about 30 million Americans – have had their cell phone bills increase suddenly even though they had not changed their wireless plans. The vast majority of those individuals said their cell phone carriers did not contact them about the

[8] Government Accountability Office. *FCC Needs to Improve Oversight of Wireless Phone Service*, November 2009, at 9-10, available at http://www.gao.gov/new.items/d1034.pdf.
[9] Federal Communications Commission. Available at http://www.fcc.gov/topic/bill-shock.
[10] GAO 2009, at 11.
[11] GAO report, at 11.
[12] Federal Communications Commission. *Quarterly Report of Informal Consumer Inquiries and Complaints for Fourth Quarter of Calendar Year 2010 Executive Summary*, August 15, 2011.

increase. The charge exceeded $100 for 23 percent of consumers who saw an increase, while 29 percent said the increase ranged between $25 and $99.[13]

Some charges on bills are accompanied by vague, official-sounding names, such as "regulatory charge" and "cost recovery fee," that imply that they are government mandated even though in reality they are not.[14] The deceptive billing leads consumers to believe that similar charges apply across the board, giving them no reason to seek out better wireless pricing plans.[15]

According to an FCC analysis, disputes over unexpected charges can take several months to a year to be resolved.[16] During that time, a consumer can risk negative reporting on his or her credit rating or an interruption in phone service.

Consumer advocates and the wireless industry differ greatly on their views of the significance of these unexpected charges. According to the National Association of State Utility Consumer Advocates, bill shock "distort(s) the market in favor of companies that seek to succeed not by offering products and services of superior quality at lower cost but rather by capitalizing on the confusion faced by consumers."[17] Meanwhile, the industry took offense to the FCC survey on the issue as well as its use of the term "bill shock."[18] CTIA-the Wireless Association also contended that consumers were happy with their wireless service and that the industry was sufficiently responsive to billing concerns.[19]

[13] John Horrigan and Ellen Satterwhite. *Summary of Findings of FCC survey, Americans' perspectives on early termination fees and bill shock*, 2010, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298414A1.pdf.
[14] AARP POLICY BOOK 2011–2012, CHAPTER 10 Utilities: Telecommunications, Energy and Other Services, at 10-8 available at http://www.aarp.org/content/dam/aarp/about_aarp/aarp_policies/2011_04/pdf/Chapter10.pdf.
[15] AARP POLICY BOOK 2011–2012, CHAPTER 10 Utilities: Telecommunications, Energy and Other Services, at 10-8 available at http://www.aarp.org/content/dam/aarp/about_aarp/aarp_policies/2011_04/pdf/Chapter10.pdf.
[16] Federal Communications Commission Consumer and Govermental Affairs Bureau. *White Paper on Bill Shock*, October 13, 2010.
[17] National Association of State Utility Consumer Advocates. *In the Matter of Empowering Consumers to Avoid Bill Shock Consumer Information and Disclosure*, CG Docket No. 10-207 and 09-158, January 10, 2011.
[18] CTIA – the Wireless Association Blog. *Peeling the Onion on the FCC's "Bill Shock" Survey: Part I*, (July 14, 2010), available at http://blog.ctia.org/2010/07/14/peeling-the-onion-on-the-fccs-bill-shock-survey-part-i/.
[19] CTIA – The Wireless Association. Comments, *In the Matter of Empowering Consumers to Avoid Bill Shock Consumer Information and Disclosure*, CG Docket Nos. 10-207 and 09-158 (January 10, 2011), available at http://files.ctia.org/pdf/filings/110110_-_FILED_CTIA_Bill_Shock_Comments.pdf.

2. Data Charges

A major component of "bill shock" for millions of consumers is the unexpected or unauthorized data charges that appear on monthly statements. Wireless carriers have been accused of incorrectly measuring data usage, offering misleading information on data plans, and using deceptive triggers on phone keypads to initiate data usage when inadvertently pressed by consumers. The manipulation of data usage results in additional charges for users and gratuitous revenue for carriers.

In one example, Verizon Wireless incorrectly billed 15 million subscribers $1.99 each for initiating data sessions on certain phones. According to Verizon, the pre-loaded software on certain phones would open an "acknowledgment session," which for users who did not have data plans and did not use the data features, elicited a "pay as you go" $1.99 charge.[20] This charge was incurred regardless of whether the user immediately ended the session.[21]

The company reached an agreement with the FCC in 2010 to refund $52.8 million to consumers for wrongfully imposing these data usage charges on its users and to pay a $25 million penalty. [22] Verizon also agreed to make software changes to prevent future similar charges, to form a task force to monitor data charge complaints and to report regularly to the FCC.

According to the FCC, the settlement was the largest in its history. But as observers noted, for Verizon, a company earning $4 billion each quarter, the amount could be perceived as modest.[23]

Verizon maintained that the millions of extraneous charges were a result of "inadvertent billing mistakes" but industry observers were more skeptical. They surmised that the company likely took note of the millions it was making from the extraneous $1.99 charges and put the onus on customers to identify and fix the problem.[24]

In another accusation of wrongful data charges, consumers alleged that AT&T and Apple

[20] Verizon Wireless. *Verizon Wireless Settles Data Charge Issue In Agreement With FCC*, October 28, 2010, available at http://news.vzw.com/news/2010/10/pr2010-10-28l.html.
[21] Michele Ellison. Mystery solved: *Consumers win in Verizon Wireless "mystery fees" settlement,* November 4th, 2010, available at http://www.fcc.gov/blog/mystery-solved-consumers-win-verizon-wireless-mystery-fees-settlement.
[22] Mystery solved: *Consumers win in Verizon Wireless "mystery fees" settlement,* November 4th, 2010, available at http://www.fcc.gov/blog/mystery-solved-consumers-win-verizon-wireless-mystery-fees-settlement.
[23] George Gombossy. *Verizon's $25 Million Fine May Be Big Deal For FCC, But Not For Verizon*, ctwatchdog.com, October 29, 2010, available at http://ctwatchdog.com/2010/10/29/verizons-25-million-fine-may-be-big-deal-for-fcc-but-not-for-verizon.
[24] Rob Frieden. *The Verizon Wireless Data Rip Off—A Case Study*, October 14, 2010, available at http://www.publicknowledge.org/blog/verizon-wireless-data-rip-off%E2%80%94-case-study.

pulled a "bait and switch" on their data plans for iPads. The companies discontinued an unlimited data plan and implemented a usage-based plan. Although existing subscribers could keep the unlimited plan indefinitely, they lost the ability to cancel and restart the plan whenever they wanted, as they could under the terms in place when they bought the devices. The case was dismissed and sent to individual arbitration.[25] AT&T was also sued for artificially inflated charges to consumers that were caused by data usage and data transfer.[26] There is no record that this case has been resolved.

Public interest groups have expressed concern that unexpected charges will worsen with carriers' emerging trend toward offering tiered data plans in lieu of unlimited plans. Tiered plans would increase the likelihood of overage charges because consumers may unwittingly go beyond their data allotment.[27]

3. Early Termination Fees (ETFs)

In recent years, the wireless industry has come under scrutiny for imposing costly penalties on consumers who seek to terminate their wireless contracts. The imposition of early termination fees that typically range between $150 and $400 is an anticompetitive tactic that deters consumers from changing their wireless plans. As Chris Murray of Consumers Union described the practice, "Early termination fees are penalties designed to stop consumers from switching companies for better service and better price. Period. These penalties don't save consumers money as the carriers claim; they rob consumers of the benefits that an open and competitive market would otherwise bring."[28]

Initially, the industry was criticized for charging the same flat fee regardless of when the consumer ended the contract.[29] Consumer advocates contended that the flat-rate fee violated numerous federal and state consumer protection laws and the Federal Communications Act. In response, the industry sought to preempt state consumer laws by requesting that the FCC regulate ETFs as "rates charged," a federally designated role under

[25] *In re Apple and AT&T iPad Unlimited Data Plan Litigation*, 2011 WL 2886407 (July 19, 2011).
[26] *The Guardian Corp. and Ariza v. AT&T Services, Inc*., filed Sep. 3, 2010 in the U.S. District Court, Southern District of California.
[27] *Reply Comments of the Center for Media Justice, Consumer Federation of America, Consumers Union, Free Press, Media Access Project, National Consumers League, National Hispanic Media Coalition, New America Foundation Open Technology Initiative, and Public Knowledge in Response to Notice of Proposed Rulemaking*, Before the Federal Communications Commission, In the Matter of Empowering Consumers to Avoid Bill Shock, Consumer Information and Disclosure, CG Docket Nos. 10-207 and 09-158, February 8, 2011, at 5.
[28] Testimony of Chris Murray, Senior Counsel, Consumers Union. *A hearing regarding "Early Termination Penalties" Before the Federal Communications Commission*, June 12, 2008, available at http://transition.fcc.gov/realaudio/presentations/2008/061208/murray.pdf.
[29] GAO-10-34 Telecommunications, at 14.

the Communications Act.[30] The FCC held hearings in 2008 but decline to follow through with the industry's proposal.

Following numerous customer complaints, legal actions and government scrutiny, the industry reluctantly changed the practice of applying flat-rate fees and began to prorate early termination charges.[31] Verizon Wireless, Sprint Nextel, AT&T, T-Mobile and Internet provider Earthlink have returned millions in refunds to their customers as part of class action settlements for their flat-rate ETF policies. Some carriers also agreed to assist customers in efforts to repair their credit where unpaid fees were reported to credit rating agencies.[32]

Despite changing their policies to prorate fees during the term of a contract, some companies have responded by substantially increasing the baseline fees. Verizon doubled its charge for a consumer to leave its wireless plans, from $175 to up to $350, depending on the type of phone.[33] In September 2011, Sprint announced that customers using advanced devices such as smart phones would be subject to a prorated $350 cancellation fee, a $150 increase from its previous charge.[34]

4. Cramming

Around the time that the FCC announced its record settlement with Verizon Wireless over the unauthorized data charges, the agency also proposed a rule to address cramming, another chronic problem for landline and wireless users.[35] Cramming involves unauthorized charges for services that consumers did not choose and do not want. These charges often come from third parties, but carriers have also been accused of the practice.

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[30] Cellular Telephone & Internet Association. Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts, WT Docket No. 05-194. http://files.ctia.org/pdf/filings/050314_CTIA_ETF_Petition.pdf.

[31] Sprint Nextel agreed to pay $14 million for its flat rate early termination fee, available at http://www.sprintetfsettlement.com/php/home.php;AT&TMobility agreed to pay $16 million to West Virginia subscribers, available at http://attmetfsettlement.com/pdfs/StipulationAndSettlementAgreement.pdf. Internet providers, such as Earthlink and Clearwire, were also accused of violating consumer protection statutes for charging early termination fees. http://www.broadbandreports.com/r0/download/1533858~07c990043f1481a0967a9d510b17ba84/Settlement.pdf.

[32] Gary Sattler. *EarthLink Class Action Ends in Refunds and Reduced Fees*, Bloggingstocks, April 7, 2010.

[33] David Pogue, Pogue's Posts - The Latest in Technology From David Pogue, *Verizon: How Much Do You Charge Now?*, November 12, 2009, available at http://pogue.blogs.nytimes.com/2009/11/12/verizon-how-much-do-you-charge-now/.

[34] Chris Morran. *Sprint Raising ETF To $350 For Smartphones & Tablets*, The Consumerist, August 31, 2011, available at http://consumerist.com/2011/08/sprint-raising-etf-to-350-for-smartphones-tablets.html.

[35] Federal Communications Commission. *FCC Proposes Rules To Help Consumers Identify And Prevent "Mystery Fees" On Phone Bills, Known As "Cramming," Proposals Aimed at Stopping Unauthorized Charges on Phone Bills*, July 12, 2011.

A recent congressional report described third-party cramming as a billion-dollar business, which affects consumers, small and large businesses and even government agencies.[36]

As an FCC consumer guide explains, cramming typically takes the following forms:

- "Charges for services that are explained on your telephone bill in general terms such as "service fee," "service charge," "other fees," "voicemail," "mail server," "calling plan," "psychic" and "membership;"

- Charges that are added to your telephone bill every month without a clear explanation of the services provided – such as a "monthly fee" or "minimum monthly usage fee;" and

- Charges for an authorized service, but you were misled about its actual cost."[37]

An estimated 15 to 20 million households receive cramming charges on their wireless bills each year.[38] The FCC estimated that 0.1 percent of consumers actually used the third-party service they were billed for.[39] Once consumers spot the unauthorized charges, they are difficult to remove, because the telephone provider will refuse to refund customers and instead would refer them to the virtually anonymous third-party biller.[40]

Carriers have taken modest steps to reduce cramming, such as tracking consumer complaints regarding each third-party firm and then removing those with a huge volume of complaints. The carrier responses generally have been insufficient to address the problem.[41]

[36] U.S. Senate Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, Majority Staff. *Unauthorized Charges On Telephone Bills*, Staff Report For Chairman Rockefeller, July 12, 2011.
[37] FCC *Cramming - Unauthorized, Misleading, or Deceptive Charges Placed on Your Telephone Bill*, available at http://www.fcc.gov/guides/cramming-unauthorized-misleading-or-deceptive-charges-placed-your-telephone-bill.
[38] FCC Cramming Graphic. Available at http://transition.fcc.gov/cgb/cramminggraphic.jpg.
[39] FCC Cramming Graphic. Available at http://transition.fcc.gov/cgb/cramminggraphic.jpg.
[40] Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, Majority Staff. *Unauthorized Charges On Telephone Bills*, Staff Report For Chairman Rockefeller, July 12, 2011, at 47-48. See also, Bob Sullivan, The Red Tape Chronicles. *Big telecom firms make millions from cramming fees, senator says*, July 13, 2011, available at http://redtape.msnbc.msn.com/_news/2011/07/13/7072019-big-telecom-firms-make-millions-from-cramming-fees-senator-says.
[41] U.S. Senate Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, Majority Staff. *Unauthorized Charges On Telephone Bills*, Staff Report For Chairman Rockefeller, July 12, 2011, at 41.

5. Miscellaneous Alleged Improper Charges

Wireless companies have been accused of hitting consumers with several other types of improper charges as well:

- Charging a monthly line-item "Universal Service Fund Fee" and/or a "Regulatory Cost Recovery Fee," not required by law, leading customers to believe they were government-mandated taxes. [42]
- Charging customers for telephone calls in a billing period other than the one in which the calls were made.[43]
- Charging for roaming fees, long distance fees, weekend or nighttime fees that were supposed to be free of charge.[44]
- Including a city's tax surcharge on monthly bills for consumers who lived outside the city.[45]
- Charging roaming fees while customers were physically in the coverage area.[46]
- Charging $10/month for a "Premium Data Add-On" fee on top of purchase of an unlimited data plan.[47]
- Charging a "tax" that was not mandated by state law, but was merely a discretionary cost recovery fee charged by the company.[48]
- Unilaterally imposing "administrative charges" on cell phone accounts.[49]

B. Five Ways that Carriers Escape Accountability

1. In a deregulated market that was supposed to increase competition, contract terms cripple consumers' rights.

In the Telecommunications Act of 1996, Congress sought to facilitate additional telecom companies' entry into the marketplace. Congress authorized the FCC to eliminate the requirement for companies to file their customer rates, terms and conditions with the agency and the FCC replaced the tariff-filing requirements with a "market-based system"

[42] *Lowden v. T-Mobile USA, Inc*., 2006 WL 1009279, (W.D. Wash. April 13, 2006) aff. *Lowden v. T-Mobile USA, Inc*., 512 F.3d 1213 (2008) and *Janda v. T-Mobile, USA, Inc*., 2006 WL 708936 (N.D.Cal. 2006).
[43] *Id*.; S*ee also Lowden v. T-Mobile USA, Inc*., 512 F.3d 1213 (2008).
[44] *Id.*
[45] *McKee v. AT&T Corp*., 164 Wash.2d 372 (2008).
[46] *Pendergast v. Sprint Nextel Corp*., 592 F.3d 1119.
[47] *Comstock v. Sprint Solutions*, Complaint (S.D.Cal.), available at http://www.courthousenews.com/2011/04/19/Sprint.pdf, April 18, 2011. See, also Matt Hamblen. *Sprint adds $10 monthly data charge to new smartphone users, Move seen as simple way to cover increased data use*, January 18, 2011, available at http://www.computerworld.com/s/article/9205406/Sprint_adds_10_monthly_data_charge_to_new_smartphone_users.
[48] *Carney v. Verizon Wireless Telecom, Inc*., 2011 WL 3475368 (S.D.Cal. Aug. 9 2011).
[49] *Litman v. Cellco Parnership d/b/a Verizon Wireless*, 2011 WL 3689015 (3rd Cir. Aug. 24, 2011).

where individual contracts are entered into by telecommunications companies and their customers.

In practice, wireless carriers draft contracts of adhesion and present them to consumers on a take-it-or-leave-it basis. Consumers lack a meaningful choice in entering contracts or understanding their terms. This makes it easy for wireless carriers to foist unfair or one-sided provisions on consumers. Arguably, some of the most harmful provisions in wireless contracts are the terms that restrict consumers' access to judicial remedies.

A core provision in virtually all contracts for mobile, Internet, broadband and cable TV services is the one that forbids consumers to join together in class actions and requires consumer disputes to be settled in private, individual arbitration instead of a public court. The company typically hand-picks the arbitration firm and sets forth the procedure for the arbitration. The arbitrator's decision is typically final and cannot be appealed to a court.

Class action bans remove "the only viable and economically effective remedy to redress" claims because many consumer disputes against carriers involve amounts of money that are too small for an individual to pursue on his or her own, or involve practices that most consumers are unaware of.[50] The class action ban not only releases a carrier from being held accountable in court, it also unjustly enriches the company, because it likely will never have to repay wrongful charges or other similar claims.[51] Further, class action bans in contracts are "patently one-sided" because the carrier would never initiate a class action against customers.[52] In other words, class action bans in arbitration clauses in consumer contracts have been used as "a sword to strike down access to justice..."[53]

A critical recent legal development is the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, decided in April 2011.[54] Vincent and Liza Concepcion sued AT&T in 2006, alleging that the company defrauded millions of customers by advertising phones as "free," then tacking on an undisclosed $30 charge. The $30 charge would, if multiplied across millions of AT&T customers, amount to millions of dollars in allegedly wrongful gains. Acting on its proclaimed "liberal federal policy favoring arbitration," the Supreme Court permitted AT&T to enforce a contract that bans class actions and requires individuals to bring claims to AT&T's hand-picked arbitration firm. The Court said that the Federal Arbitration Act preempts state laws that prohibit class action bans.

[50] See *Schnuerle v. Insight Communications Co*., L.P., ___ S.W. 3d ____, 2010 WL 5129850, 5 (Ky. Dec. 16, 2010).
[51] *Schnuerle* at 5.
[52] *Lozano v. AT&T Wireless*, 2003 WL 25548566 (C.D. Calif. Aug. 18, 2003) citing *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).
[53] *Mendez v. Palm Harbor Homes, Inc.,* 111 Wash.App. 446, 465, 45 P.3d 594 (2002).
[54] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

Standard wireless contracts also have included other terms to reduce access to justice, such as provisions to shorten statute of limitations periods for consumers to file claims, one-sided limits on attorneys' fees and punitive damages, confidentiality provisions that would prevent the consumer from speaking publicly about a dispute in the event that it is settled.[55] Carriers also unilaterally modify their contracts without significant notice to consumers. With contracts containing terms that stifle the legal rights of their customers, carriers can cheat large numbers of consumers out of small sums of money without fear of being held accountable.

In the months following *Concepcion*, the telecommunications industry has begun to reap its benefits. Citing the case, industry members defending class actions have sought to force consumers to arbitrate several important disputes on an individual basis, and have largely succeeded. In every instance thus far, telecommunications companies have succeeded in forcing consumer class actions out of court and into individual private arbitration.[56]

Without access to a public court system, and particularly collective class actions, consumers will be left without an adequate avenue to solve problems with their wireless service because many claims are not viable on an individual basis and many users are unaware of violations.[57] In addition, relatively few consumers are aware of the limited government resources. According to the 2009 GAO report, consumers "may be confused about where to get help and about what kind of help is available" when they face problems with their wireless service.[58]

Finally, the restrictions on consumers' rights in wireless contracts promise to have a far-reaching effect on the enforcement of public protections. As private attorneys general, individuals acting on behalf of thousands or millions of others protect their fellow consumers in the face of limited resources for government watchdogs like state attorneys general. Class action bans in wireless contracts remove this safeguard for the public as a

[55] *McKee v. AT&T Corp*., 191 P.3d 845 (Wash. 2008).
[56] Telecom-related cases dismissed after *Concepcion*: *Arellano v. T-Mobile USA, Inc. and HTC America, Inc*., 2011 WL 1842712 (N.D.Cal. May 16, 2011). *Bower v. AT & T Mobility, LLC*, 196 Cal.App.4th 1545, 127 Cal.Rptr.3d 569 (2nd app dist.. div. 1 June 29, 2011). *Boyer v. AT&T Mobility Servs*., LLC, 2011 WL 3047666 (S.D. Cal. July 25, 2011). *Cruz v. Cingular Wireless, LLC*, 2011 WL 3505016 (11th Cir. Aug. 11, 2011). *Hancock v. AT&T Co.*, et al., 2011 WL 3628957 (W.D. Okla. Aug. 11, 2011). *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407 (N.D.Cal. July 19, 2011). *Litman v. Cellco Partnership d/b/a Verizon Wireless*, 2011 WL 3689015 (3rd Cir. Aug. 24, 2011). *Murphy v. DirectTV, Inc.,* 2011 WL 3319574 (C.D.Cal. Aug. 2, 2011).
[57] See *Muhammad v. County Bank of Rehoboth Beach,* 912 A.2d 88, 100 (N.J. 2006) and *Weinberg v. Hertz Corp*., 116 A.D.2d 1, 499 N.Y.S. 693 (1986).
[58] Government Accountability Office. *Telecommunications, FCC Needs to Improve Oversight of Wireless Phone Service*, Report to Congressional Requesters, November 2009, available at http://www.gao.gov/new.items/d1034.pdf.

whole.[59]

2. Enforcement of state law is weaker.

In 1996, Congress passed the Telecommunications Act (TCA) to lower costs for communications servicers seeking to enter the market. As Congress said, the TCA's purpose was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[60]

After the law passed, the FCC took steps to deregulate the market, including rescinding the rule that prohibited entities from charging rates for services other than those specified in their filed tariffs.[61] Under the "filed rate" rule, the "rights and liabilities defined by the tariff could not be changed by tort or contract law."[62] Therefore, the federal law preempted state-law claims related to the phone service.

In its 1996 order deregulating the market in compliance with the new law, the FCC reversed the filed rate policy. It proceeded toward a new market-based mechanism, which would include individually negotiated contracts between carriers and their customers.[63] The agency specifically noted that, "in the absence of tariffs, consumers will be able to pursue remedies under state consumer protection and contract laws."[64] To the FCC, the application of state laws and judicial remedies was critical for successful deregulation of the market. The Telecommunications Act also confirmed that states had the authority to protect the public safety, ensure the quality of telecommunications services and "safeguard the rights of consumers."[65]

Major carriers objected to the FCC's detariffing proceedings, particularly AT&T, which continued to "cling to its monopolistic cloak for protection."[66] AT&T filed a petition asking the FCC to clarify that rates, terms and conditions of telecommunications services were not subject to state law.[67] The FCC's response was mixed. It said that the Communications Act continues to govern rates, terms and conditions, but not issues of contract formation and

[59] See, Alexander J. Casey. *Arbitration Nation: Wireless Services Providers and Class Action Waivers*, Wash.J.L. Tech. & Arts 15, 20 (2010), available at https://digital.lib.washington.edu/dspace-law/handle/1773.1/448.
[60] Telecommunications Act of 1996, PL 104–104, February 8, 1996, 110 Stat 56.
[61] See, *Ting v. AT&T*, 319 F.3d 1126
[62] Id.
[63] See, *McKee v. AT&T Corp*., 164 Wash.2d 372, 390.
[64] Federal Communications Commission. *In re Policy & Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Commc'ns Act of 1934*, 12 F.C.C.R. 15,014, 15057, 1997 WL 473330 (1997).
[65] 47 U.S.C.A. § 253. Removal of barriers to entry.
[66] *McKee* at 392, footnote 11.
[67] *Ting v. AT&T*, 319 F.3d 126 (2003), at 1132-1133.

breach of contract. It emphasized again that "consumers may have remedies under state consumer protection and contract laws on issues regarding the legal relationship between the carrier and customer…"[68]

The desire for exclusive federal regulation soon evolved into a consistent industry position, even for carriers that had benefitted from the detariffing by virtue of the 1996 order granting them entry into the market.[69] After AT&T and others inserted limits on liability, such as forced arbitration clauses and class action bans, in their consumer contracts, consumers challenged the provisions under consumer protection laws. Carriers defended the contract provisions by arguing that the Communications Act preempted the state consumer laws, but numerous courts rejected the argument.[70]

Carriers went further in their effort to exclude state regulation when the industry's association petitioned the FCC for a ruling that ETFs are "rates charged" that would preempt state laws under which the charges are likely unlawful.[71] The petition was an effort to evade consumer claims against the exorbitant flat-rate cancellation fees. U.S. Sen. Amy Klobuchar (D-Minn.) who testified before a 2008 FCC hearing on the matter, said: "We shouldn't deny consumers who may have been abused by the wireless companies their day in court. A grant of preemption simply locks the courthouse door for these consumers."[72]

The wireless carriers eventually received a significant preemption ruling by the Supreme Court in *Concepcion*, the effect of which was not only to lock the courthouse doors but exculpate wireless carriers from accountability for harming consumers by small individual amounts of money. The broad interpretation of the Federal Arbitration Act in *Concepcion* allows companies to avoid accountability for a broad range of bad practices and limits states' ability to protect their residents from those practices.

Before *Concepcion*, numerous individual states determined that class action bans clashed with their "fundamental public policy," violated their consumer protection laws and harmed their residents.[73] The Washington Supreme Court held that it was the state's fundamental public policy to protect its residents by ensuring the availability of class

[68] *Ting v. AT&T*, 319 F.3d 126 (2003), at 1133, citing Federal Communications Commission, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Order on Reconsideration, 12 F.C.C.R. 15014 (1997).
[69] See, e.g. *Sprint Telephony PCS, LP v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007); *Pinney v. Nokia, Inc*., 402 F.3d 430 (4th Cir.2005); *Aronson v. Sprint Spectrum, LP*, 90 F.Supp.2d 662 (W.D.Pa.2000).
[70] *Ting v. AT&T*, 319 F.3d 1126, 1135 (2003).
[71] Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts, WT Docket No. 05-194), March 15, 2005, available at http://files.ctia.org/pdf/filings/050314_CTIA_ETF_Petition.pdf.
[72] Testimony of Senator Amy Klobuchar, Federal Communications Commission, *Open Hearing on Early Termination Fees*, June 12, 2008.
[73] See, *Scott v. Cingular Wireless*, 160 Wash.2d 843, 854, 161 P.3d 1000 (2007).

actions so that they can pursue claims for small-dollar damage amounts under the Washington State Consumer Protection Act.[74] States are interested in protecting their residents from one-sided, overly harsh clauses when they are in a weak bargaining position.

A court applying California law ruled that an arbitration agreement in a consumer contract of adhesion is "unconscionable" where the agreement permits neither class actions nor class arbitration.[75] Another court interpreting New Jersey laws said that arbitration provisions in contracts of adhesion that prohibit class actions for low-value claims were unconscionable in that state.[76] Indeed, at the time the Supreme Court was considering *Concepcion*, courts applying the laws of 20 states had held unanimously that class action bans may be found unenforceable due to the negative impact on state residents. *Concepcion* reverses these decisions.

Although it may be too early to determine, *Concepcion* has the effect of eliminating most oversight of the wireless industry aside from limited efforts by state attorneys general. It is a well-established principle that private litigation, including class litigation works "in tandem with (state and federal) regulatory action to protect consumers."[77] State officials have warned that their resources are limited and are spread across competing duties, making private enforcement critical for consumer protection.[78] In an amicus brief in support of the consumers in *Concepcion,* a group of state attorneys general wrote: "The efforts of 'private attorneys general' are especially valuable in this era of state budget cuts and limited resources, and (the) attempt to do away with consumer class actions is a further affront to the States' interests."[79]

States have fielded their share of complaints from residents about questionable telecommunications practices. In 2010, the Oregon Department of Justice said that telecommunications (including satellite TV, cellular, Internet services, and bundled services) was the number one consumer complaint.[80] In Washington state, the telecommunications industry has topped the list of complaints from consumers for over a

[74] *Scott*, 160 Wash.2d 843, 854, 161 P.3d 1000.
[75] *Stoican v. Cellco Partnership*, (W. Dist. Washington, Case No. 10-10177RAJ, filed 9/20/2011) citing *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).
[76] *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 N.J. 1, 912 A.2d 88 (2006).
[77] *AT&T Mobility LLC v. Concepcion*, No. 09-893, in the U.S. Supreme Court, On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit, Amicus Curiae Brief for the States of Illinois, Maryland, Minnesota, Montana, New Mexico, Tennessee,and Vermont and the District Of Columbia as Amici Curiae in Support of Respondents, October 2010.
[78] Amicus Curiae Brief in Support of Respondents, at 35.
[79] Amicus Curiae Brief in Support of Respondents, at 6.
[80] Oregon Department of Justice, *Top 10 Consumer Complaints 2010*, available at http://www.doj.state.or.us/finfraud/pdf/2010_top_ten.pdf.

decade.[81] While states have initiated some enforcement actions to curb harmful wireless practices, consumer reports received from the National Association of Attorneys General do not indicate robust wireless service oversight.

One notable enforcement action was led by Florida's attorney general, Bill McCollum. Between 2008 and 2010, McCollum settled with four wireless providers, AT&T Mobility, Verizon Wireless, T-Mobile and Sprint, to end unauthorized billing for third-party charges on consumers' cell phone bills. According to McCollum's office the effort "resulted in millions of dollars of restitution for consumers."[82]

State enforcement may be further hampered because state authority to regulate wireless service under federal law is unclear to stakeholders, according to a 2009 government report. States may regulate "terms and conditions" of wireless phone service but not rates and entry. The lines between these concepts are often unclear, which has led to delays in deciding some legal matters, including determining whether early termination fees are rates or "terms and conditions."[83] As a result, most state utility commissions do not regulate wireless phone service.[84]

3. In Congress, pro-consumer bills are introduced but there is too little action.

When state officials are reluctant to regulate the industry and consumer legal remedies are limited, Congress becomes an important source of oversight. Congress has not passed any major telecommunications legislation since the 1996 Telecommunications Act. But members have introduced bills in response to industry abuses showing that they are aware of the problems and concerned about protecting consumers from certain deceptive and unfair practices.

- In April 2011, U.S. Sen. Tom Udall (D-N.M.) introduced the Cell Phone Bill Shock Act, S. 732. This bill responds to surprise charges that appear on consumers' bills. It would direct the FCC to write rules requiring wireless providers to notify subscribers when they have used 80 percent of their monthly limit of voice minutes, text messages or data, and obtain consent from subscribers before charging for service in excess of the limits. Udall's bill is similar to a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act that requires banks to obtain

[81] Angela Galloway, *Consumer complaints to A.G.'s office soar, 25,000 is highest amount since 2002*, Seattle Post-Intelligencer, March 3, 2009 available at http://www.seattlepi.com/local/article/Consumer-complaints-to-A-G-s-office-soar-1301529.php.
[82] McCollum Reaches Settlement With Sprint Over "Free" Ringtones, October 8, 2010, available at http://www.myfloridalegal.com/newsrel.nsf/newsreleases/38BAFFA1F77CA7E3852577B6005019A6.
[83] GAO 2009 report, at 34.
[84] GAO 2009 report, at 26.

permission from account holders before allowing transactions that would incur overdraft fees.[85]

- In response to consumer outrage at the industry's early termination fee policies and, in particular, Verizon's decision to double its fee, U.S. Sens. Mark Begich (D-Ark.), Amy Klobuchar (D-Minn.), Jim Webb (D-Va.) and former Sen. Russell Feingold of Wisconsin introduced the Cell Phone Early Termination Fee, Transparency and Fairness Act of 2009 (S. 2825). The bill would have directed the FCC to regulate early termination fees, linking them to provider costs and requiring that they be prorated over the course of a customer's contract. The bill also preserved related state and local laws. The bill was not scheduled for a vote in committee.

- In 2007, Klobuchar introduced the Cell Phone Consumer Empowerment Act (S. 2033). She described the legislation as a "bill of rights" for cell phone consumers.[86] The bill would have required that a wireless provider plainly disclose information regarding terms, charges, minutes, taxes and surcharges before a consumer enters into a contract, and in advertisements. It would have required wireless service bills to be clearly organized, use plain language, list taxes and fees separately from taxes and fees, and itemize roaming charges. It would have required the FCC to monitor the quality of U.S. wireless service by requiring semiannual reports from providers. It would have required that early termination fees be prorated over the term of a contract and would have regulated service contract extensions, cancellation penalties, and changes in rates, terms, or conditions. Finally, it would have allowed service members to terminate their wireless contracts in specific circumstances. This bill was not considered or voted on in committee.

While the bills have not progressed in the Congress, members have taken other steps to monitor the industry's practices. In May 2011, U.S. Sens. Herb Kohl (D-Wis.) and Klobuchar forwarded a letter of inquiry to AT&T's CEO to address allegations that AT&T has been overcharging its smart phone customers for data usage. In the letter, the senators mentioned a lawsuit alleging systematic overcharging of AT&T customers, indicating that the lawsuit was the senators' source of information regarding AT&T's behavior.[87] With wireless providers' increasingly able to block lawsuits by consumers, public officials like these senators will be less likely to learn about and seek solutions to industry abuses.

[85] Congressional Record, Statements On Introduced Bills And Joint Resolutions -- (Senate - April 05, 2011), Page: S2138.
[86] Testimony of Senator Amy Klobuchar before the Federal Communications Commission. Open hearing on Early Termination Fees, June 12, 2008.
[87] Senators Kohl, Klobuchar Press AT&T for More Clear and Accurate Billing Practices (with attached letter to AT&T), 2011 WLNR 10354636, May 24, 2011.

Members of Congress also face an added challenge as subjects of intense lobbying from the telecommunications industry. In 2010, as Congress prepared for hearings on major telecommunications issues, telecom firms hired 276 former government officials to lobby Congress and the executive branch.[88] The companies hired former members of Congress and staffers who served on the House and Senate committees with jurisdiction over telecom issues.[89] In the first quarter of 2011, Verizon Communications spent $9 million lobbying Congress and the federal agencies. AT&T Inc. spent $11.6 million to lobby, and the Cellular Telecom & Internet Association reported $4.9 million in lobbying expenditures.[90]

4. FCC may not be doing enough.

In 1996, when the FCC ordered "detariffing" and deregulation of the industry under the Telecommunications Act, the agency pledged to use its complaint process to protect consumers against carriers' attempt to take unfair advantage.[91] However, the complaint process has been criticized for ineffectiveness. In a 2009 analysis that reviewed the FCC's oversight of wireless phone service, the Government Accountability Office reported that the FCC failed to adequately analyze complaints about the wireless industry, rendering it incapable of identifying "emerging trends in consumer problems."[92] Consequently, the FCC was unable to determine whether carriers were failing to comply with existing rules or whether additional rules were needed to protect consumers.

An additional key finding from the GAO report was that the FCC's focus on promoting competition has caused it to deviate from its oversight of wireless phone service.[93] As a result, the FCC's enforcement of current rules was lacking.[94]

Moreover, the GAO concluded that the FCC lacked authority to address many consumer concerns such as service terms; it also observed that when the FCC had authority and acted on it, the agency used a "light touch," presumably as part of its effort to "foster

[88] Paul Blumenthal. *Former government officials hired to lobby as Congress looks to rewrite telecom law* Sunlight Foundation Blog, June 20, 2010, available at http://sunlightfoundation.com/blog/2010/06/20/former-government-officials-hired-to-lobby-as-congress-looks-to-rewrite-telecom-law/.
[89] Id.
[90] According to data compiled by opensecrets.org.
[91] Federal Communications Commission, *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 11 F.C.C.R. 20730, at 20733 (1996).
[92] GAO. Telecommunications: *FCC Needs to Improve Oversight of Wireless Phone Service*, November 2009, at 1.
[93] GAO. Telecommunications: *FCC Needs to Improve Oversight of Wireless Phone Service*, November 2009, at 15.
[94] GAO 2009 report, at 15.

competition,"[95] consistent with the agency's detariffing order where it adopted a "pro-competitive, deregulatory" policy.[96]

The "light touch" may be working against consumers and competition in the marketplace because certain abusive contract terms, such as forced arbitration clauses and class action bans, are applied by virtually all carriers in the industry, leaving consumers with little choice in selecting wireless service carriers. Indeed, a 2009 survey found that 9 out of the top 10 cell phone carriers employed forced arbitration clauses in their wireless contracts and eight of them inserted prohibitions on class actions within those clauses.[97]

Since the 2009 GAO report, the FCC has taken a few steps to improve consumer protection in the wireless industry. For example, in November 2010 it issued a proposed rule to address bill shock, or unexpected charges on consumers' bills.[98] The rule would require wireless providers to provide usage alerts to subscribers when they are approaching their allotted limits of voice, text or data usage or are incurring international or roaming charges. It would include disclosure requirements for wireless providers to inform users of tools to set usage limits or monitor balances.[99]

"People should be told they're risking extra fees *before* they incur them," said FCC Chairman Julius Genachowski in a statement about the rules. He shared the example of a business executive who had incurred $2,000 in data charges from a trip overseas, despite buying an "international plan." Consumer advocates endorsed the proposed rule, but preferred that it require a specific trigger point for notifying consumers of the approaching allotted limits in their data plans, as well as a standard procedure for customers to consent to the charges.[100]

The FCC also has been slow to respond adequately to consumer concerns through rulemaking. For over a decade, cramming has been a known problem to the FCC. In the late 1990s, the FCC sided with the telecommunications industry and opted for a voluntary

[95] GAO 2009 report, at 20-23.
[96] Federal Communications Commission, *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order*, CC Docket No. 96-61, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 11 F.C.C.R. 20730, at 20733 (1996), at 20733.
[97] Public Citizen. Forced Arbitration: Unfair and Everywhere, September 14, 2009, available at http://www.citizen.org/documents/UnfairAndEverywhere.pdf.
[98] Federal Communications Commission. Proposed Rule – *Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure*, 75 Fed. Reg. 72773, November 26, 2010.
[99] FCC Proposed Rule, 75 Fed. Reg. 72773.
[100] Comments of the National Association of State Utility Consumer Advocates, Before the Federal Communications Commission, In the Matter of Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure, CG Docket No. 10-207 CG Docket No. 09-158, January 10, 2011, available at http://www.nasuca.org/archive/Bill%20shock%20comments%201-10-11.pdf.

approach to address the issue.[101] Phone bill cramming has persisted, scamming consumers out of billions of dollars. Finally acknowledging that the first strategy failed, the FCC proposed a rule to curb the practice in July 2011.[102]

5. With reduced competition, there is less choice for consumers and less accountability for carriers.

In the past eight years, the telecom industry has undergone four major mergers, AT&T/BellSouth, AT&T Wireless/Cingular, Sprint/Nextel and Verizon/Alltel.[103] The latest merger bid is AT&T's attempt to purchase T-Mobile USA, which faces significant opposition from many corners of the public, mainly because the deal would represent a significant consolidation of players in the wireless market. Critics assert that an AT&T purchase of T-Mobile will turn the industry into a duopoly with nearly 80 percent of the market dominated by two wireless carriers, AT&T and Verizon Wireless.[104]

Consequently, a forceful opposition has developed during AT&T's merger negotiations. The U.S. Department of Justice, joined by seven states, sued AT&T, arguing that the merger would violate antitrust laws.[105] Competitor Sprint filed suit against the merger as well.

With the help of a law firm, approximately 1,000 consumers have filed individual arbitration proceedings against AT&T, also in an effort to stop the merger. Individual arbitration is the private system required in AT&T's wireless contracts along with its prohibition of class actions and civil jury trials. AT&T has sued (in court) several consumers who had initiated the arbitration actions against it.[106] Among other points, AT&T claimed that the merger issues were too complex for arbitration. Yet, the company, by inserting arbitration clauses and class action bans in its contracts, asserts that individual arbitration is suitable for consumers to vindicate their own rights in the event of a dispute.

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[101] U.S. Senate Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, Majority Staff. *Unauthorized Charges On Telephone Bills*, Staff Report For Chairman Rockefeller, July 12, 2011, at 3.

[102] FCC Proposed Rule. *Empowering Consumers To Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in- Billing and Billing Format*, 76 Fed. Reg. 52625, Aug. 23, 2011.

[103] Brad Reed. *AT&T-T-Mobile merger widely panned; Consumer groups, rivals and regulators all find something to hate in proposed deal*, Network World, 2011 WLNR 6003336, March 25, 2011. See, also, Jim Duffy. *The 10 largest U.S. telecom carrier mergers/acquisitions*, Network World, May 21, 2007, available at http://www.networkworld.com/news/2007/052107-largest-carrier-merger-acquisitions.html.

[104] Brad Reed. *AT&T-T-Mobile merger widely panned; Consumer groups, rivals and regulators all find something to hate in proposed deal*, Network World, 2011 WLNR 6003336, March 25, 2011.

[105] Department of Justice Complaint, available at http://www.justice.gov/opa/pr/2011/August/11-at-1118.html and http://www.justice.gov/opa/documents/Justice-ATT-TMobile-Complaint.pdf.

[106] *AT&T Mobility v. Gonnello et al*, Complaint (S.D.N.Y Aug. 12, 2011), available at http://newsandinsight.thomsonreuters.com/uploadedFiles/New_York/Legal_Materials/Court_Filings/2011/08_-_August/ATTComplaint.pdf.

For his part, U.S. Rep. Dennis Kucinich (D-Ohio) submitted to the FCC, which is deciding whether to approve the merger, a letter highlighting the *AT&T Mobility v. Concepcion* decision and its effect on an increasingly consolidated market. Kucinich noted that the few carriers remaining on the market use near-identical terms in their customer contracts, and all have eliminated their customers' constitutional right to jury trials by forcing them into individual arbitration and banning class actions.[107]

"The only tiny sliver of competition that remains," Kucinich said, "is that T-Mobile allows its subscribers to 'opt out' of the arbitration requirement within the first 30 days of service." He opined that should AT&T acquire T-Mobile any "sliver" of competition between the carriers will shut down. If the FCC decides to approve the merger, Kucinich called for the Commission to require the merged entity to restore consumers' rights by removing the forced arbitration clauses and class action bans from its customer contracts. "That single action will finally create some competition" for wireless subscriber contracts, he said.[108] Without this action, consumer protection in the wireless industry will continue to suffer.

Conclusion

To help cure many ills of wireless industry practices that harm consumers, legislative action is clearly necessary. In 2007, Feingold, U.S. Sen. Richard Durbin (D-Ill.), and U.S. Rep. Henry Johnson (D-Ga.) introduced the Arbitration Fairness Act (S.1782, H.R. 3010) ("AFA"). The AFA would have amended the Federal Arbitration Act to bar arbitration clauses in consumer, non-union employment and franchise contracts. By removing these clauses, the AFA would have permitted consumers and the companies to choose arbitration or the public court system after the dispute arises. This bill would have addressed a variety of consumer contracts in which forced arbitration clauses are prevalent, including cell phones services, nursing homes, banking, credit cards and home construction. The AFA was reintroduced in 2009 and 2011.

The 2011 version (S. 987, H.R. 1873), introduced by U.S. Sens. Al Franken (D-Minn.), Richard Blumenthal (D-Conn.) and Johnson in April 2011, would eliminate arbitration clauses in consumer and non-union employment contracts. Additionally in October 2011, Franken, Blumenthal and U.S. Sen. Sheldon Whitehouse (D-R.I.) introduced the Consumer Mobile Fairness Act (S. 1652) which would eliminate forced arbitration clauses specifically from mobile service contracts. Passage of either of these bills not only would eliminate forced arbitration, it likely would discourage the use of class action bans. These bills offer the best path for bringing about accountability and restoring consumers' rights as they conduct business with the wireless industry.

[107] Letter to Julius Genachowski, FCC Chairman from Dennis J. Kucinich, Member of Congress, May 3, 2011.
[108] Id.