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March 13, 2013

The Honorable Trent Franks, Chairman
The Honorable Jerrold Nadler, Ranking Member
House Judiciary Subcommittee on the Constitution and Civil Justice
Washington, DC 20515

Re: Hearing titled “Examination of Litigation Abuses,” March 13, 2013

Dear Chairman Franks and Ranking Member Nadler:

We’re writing to share our views for the purpose of the hearing, titled “Examination of Litigation Abuses,” scheduled for Wednesday, March 13, 2013 before the House Judiciary Subcommittee on the Constitution and Civil Justice. The current state of civil justice does not reflect “litigation abuses,” as the hearing title implies. Rather, due to business practices and recent Supreme Court decisions, we have entered an era where it has become increasingly difficult for American consumers and employees to access the courts to seek redress for corporate misconduct. As a result, corporations are often able to insulate themselves from accountability for wrongdoing and enforcement of state and federal laws.

Recent difficulties in the civil justice system stem from a prevalent corporate practice of inserting terms in the fine print of everyday non-negotiable employment contracts and consumer contracts—including contracts for cell phone service, nursing home admission, credit card accounts, banking transactions, home construction, auto loans and leases, ecommerce, investment and brokerage accounts—that require any to disputes to be resolved in private arbitration instead of in open court.¹ Because forced mandatory arbitration clauses are ubiquitous in these form contracts, individuals have no choice but to accept the terms or relinquish the product, service, or job altogether. Although arbitration is an appropriate means of dispute resolution in some instances, it lacks many legal protections for consumers and employees. It is secret; arbitrators rely on major corporations for repeat business; the system lacks accountability to the public; and appeals

¹ For a list of some of the many corporations using contracts with forced arbitration clauses and class action bans, see <http://www.citizen.org/forced-arbitration-rogues-gallery>.

of arbitration decisions are rarely permitted. It also imposes high and unpredictable costs, including private arbitrator expenses that most Americans cannot afford.

***AT&T Mobility v. Concepcion*: A ‘Tsunami’ Wiping Out Class Actions**

In recent years, corporations expanded forced arbitration clauses in contracts to block consumers and employees from bringing class actions, forcing them to arbitrate disputes on an individual basis. Previously, although courts applying the laws of at least 19 states struck down class-action bans or waivers, concluding that they were “unconscionable” under state contract law, the U.S. Supreme Court’s 2011 decision *AT&T Mobility v. Concepcion* (2011),² nullified the states’ position. The Court decided that the Federal Arbitration Act (FAA) “preempts” these state-law doctrines, thus inciting a host of corporations to insert class-action bans and forced arbitration clauses in their contracts with consumers, employees, and even small businesses.

Many types of cases can be litigated only as class actions because, due to the size of each individual’s claim, proceeding collectively is the only economically feasible way for consumers and employees to seek and obtain redress. Many class actions involve claims seeking recovery for small-dollar losses (e.g. illegal fees on monthly cell phone or cable bills), or systemic discriminatory employment practices. As a result, corporations are able to sidestep valid legal claims and evade accountability for practices that cheat consumers and victimize employees.

Jean Sternlight, Saltman Professor of Law and Director of the Saltman Center for Conflict Resolution, likened the 5-4 *Concepcion* decision to “a tsunami that is wiping out existing and potential consumer and employment class actions.”³ Indeed, in the year after *Concepcion* was decided, a Public Citizen analysis identified 76 potential class action cases where courts cited *Concepcion* and held that class-action bans within arbitration clauses were enforceable.⁴ The consumers and employees who brought these cases were forced to seek redress in arbitration on an individual basis and, as a result, many may have had to forgo their claims altogether.

Public Citizen’s recent review of cases up to January 31, 2013 found that since *Concepcion*, courts have enforced arbitration clauses and class action bans in more than 100 cases, including cases involving allegations of lenders applying undisclosed fees to student loans, gender discrimination in the workplace, illegal lending practices harming active-duty

² *Concepcion* is one of a string of U.S. Supreme Court decisions that expanded the meaning of the Federal Arbitration Act, a 1925 law which was passed to facilitate business-to-business arbitration.

³ Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 Or. L. Rev. 703, 704 (2012).

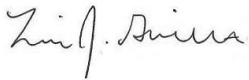
⁴ Public Citizen, *Justice Denied, One Year Later: The Harms to Consumers from the Supreme Court’s Concepcion Decision Are Plainly Evident*, April 2012, <http://bit.ly/JcxLlw>

service members, and numerous violations of state and federal civil rights, employment and consumer protection laws. The plaintiffs in these cases alleged that these violations have affected hundreds of thousands of consumers and employees, most of whom will probably never have the resources or opportunity to seek recourse on their own for monetary losses or harm they have suffered.

The fact is that the prospect of class actions deters unscrupulous business conduct and is often the only means of holding companies accountable for wrongful conduct that harmed a large number of people in a small way. As the subcommittee reflects on deficient practices in litigation, we urge it to consider the detrimental impact of forced arbitration and class-action bans on their constituents' constitutional right to seek redress in a civil jury trial, and the risky consequence of permitting corporations to adopt harmful business practices without fear of being held accountable in court.

Sincerely,

Public Citizen, Congress Watch division



Lisa Gilbert
Director



Christine Hines
Consumer and Civil Justice Counsel