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Class Actions Defend Against Systemic Civil Rights and Employment Violations

AT&T v. Concepcion is a consumer rights case pending before the Supreme Court that threatens to undermine an invaluable tool for combating civil rights and employment law violations—class actions. In *Concepcion*, AT&T customers allege that the company charged an undisclosed \$30 for phones that it advertised as “free.” The customers sought a class action on behalf of millions of AT&T customers who accepted the deal believing the phone was free. AT&T tried to keep the lawsuit out of court by arguing that the forced arbitration clause in the fine print of the contract contained a class action ban. The Court rejected AT&T’s ban, finding it unconscionable under California law. Courts applying the law of at least 20 states have struck down bans on class actions as unconscionable because they effectively exculpate companies from accountability for a wide range of misconduct such as discrimination, fraud, and negligence. AT&T is now asking the U.S. Supreme Court to invalidate all of these state laws.

This problem extends well beyond consumer protection. Employers are increasingly inserting arbitration clauses with class action bans into employment contracts, presenting them to employees on a take-it-or-leave-it basis. If the Court agrees with AT&T, it could eliminate an important means for enforcing longstanding civil rights and employee protections.

Much is at stake.

If permitted, corporate class action bans will allow businesses to evade well-established civil rights and employment laws. Laws at risk include the 1964 Civil Rights Act, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Employee Retirement Income Security Act (ERISA), the Equal Pay Act Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Older Workers Benefit Protection Act, and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

It is in the public interest to ensure accountability and compliance with civil rights and employment laws. A number of landmark class actions took the lead in resolving deep-seated societal prejudices, including *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which outlawed racial segregation in public education, and discriminatory hiring practices under Title VII of the Civil Rights Act, respectively. These and other class actions fought discrimination against minorities, women, and other groups in schools, at the workplace, and at private facilities that served the public.

Some individuals do not know that their rights have been violated. Most individuals are unaware of many of the employment and civil rights laws that exist to protect them. In addition, corporations deliberately hide their violations from consumers, employees, and the public. Class actions provide notice to individuals who might not know that they were victims of discriminatory or unlawful behavior. Class actions also generate public awareness of the wrongs committed.

Most individuals cannot afford the cost of litigating complex claims, such as those involving statutory or constitutional law violations. Some claims, including many wage and hour cases, involve amounts of damages for each employee that are smaller than the cost of litigating the claim, making it impractical or impossible to pursue cases individually. In addition, employment and civil rights plaintiffs often need significant resources to unearth facts that would reveal a pervasive pattern of unfair treatment or widespread misconduct. Class actions enable attorneys and class members to combine their resources and spread the costs.

Individual claims are inadequate to eliminate persistent employment and civil rights violations. An individual claim may address one person's grievance, but fail to expose or remedy a pattern of violations that harms other victims. Class actions expose patterns and practices, and often result in not just individual justice, but changed policies.

Most individuals will not pursue claims on their own out of fear of retaliation or intimidation. Workers and consumers may fear that their employers or other corporate entities will retaliate against them (by firing and industry blacklisting, for example) or intimidate them. Because each class proceeding is led by a small group of individuals, most class members can benefit from the action without being forced to challenge their employers or other relevant corporate entities openly and directly. Class actions thus reduce retaliation and intimidation against individual participants.

Class actions uncover institution-wide practices. Class proceedings ensure that claims can go forward to expose wrongful institutional practices even when the corporate defendant can refute or eliminate one participant's claim. Class actions have uncovered and disrupted widespread discrimination in employment, fair housing, mortgage lending, automobile financing, insurance, and other areas. They also have compensated workers deprived of statutory rights such as overtime pay required by wage and hour laws.

Businesses lack the incentive to comply with statutory and constitutional protections without class actions. Businesses are ruled by the bottom line. Without class actions, they will determine that it is more economical to ignore widespread civil rights and employment law violations than to correct them. A successful employment or civil rights class action can significantly affect a business's finances, either from the payment of remedies or financial losses due to public awareness and disapproval of unlawful activities.

Public agencies cannot adequately address most employment and civil rights violations. Government agencies lack the resources to pursue most cases brought before them. For example, the Equal Employment Opportunity Commission has long lacked adequate staffing and resources to handle more than a fraction of discrimination cases it receives at a time, resulting in a continuous backlog at the agency. The Department of Labor also suffers from severe delays in investigating wage and hour violations. Private class actions provide strong enforcement.

Private class actions supplement government's enforcement efforts. Federal antidiscrimination statutes recognize that private class actions provide strong enforcement. Fair housing laws, for example, encourage private lawsuits. Congress also has increased the remedies for class actions in amendments to the Equal Credit Opportunity Act to encourage private claims.

For more information on class actions' impact on civil rights and employment law, please review the amicus briefs supporting respondents in AT&T v. Concepcion, including the submissions of the NAACP Legal Defense & Educational Fund, Inc., the Lawyers' Committee for Civil Rights Under Law et al., and the National Workrights Institute, available at <http://pubcit.typepad.com/clpblog/concepcion/>.