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Cases That Would Have Been

Three Years After *AT&T Mobility v. Concepcion,* Claims of Corporate Wrongdoing Continue to Pile Up

Acknowledgments

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Introduction

An "unappetizing" result. It was the label used recently by a federal court in a decision to describe its own opinion and order enforcing terms in an employment contract that required an employee to resolve disputes against his employer in private individual arbitration instead of in court and prohibited his participation in class actions.

In April 2013, the employee Charles Walton, a server at a Pennsylvania Applebee's restaurant, sought a class action against Rose Group, an operator of 39 Applebee's eateries in Pennsylvania. He alleged that Rose Group had a practice of requiring "tipped employees," including servers and bartenders, to spend significant time performing untipped work such as cleaning and stocking food, but paid those employees "subminimum wages," in apparent violation of the Fair Labor Standards Act and Pennsylvania Minimum Wage Act."[1]

To obtain employment, Walton signed documents that required disputes with the Rose Group to be resolved in arbitration and barred his participation in class actions. Walton said that he signed the take-it-or-leave-it terms, "because they were put in front of me and if I wanted the job I had to sign these documents and I needed the job."[2] In December 2013, the court granted the company's motion to force Walton to settle his claims in private arbitration, and commented that "(a)s unappetizing as the result may be, the state of the law compel(led)" it to do so.[3] The "state of the law" which the court also called "lamentable,"[4] refers to the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*[5] and related court decisions that followed in its wake.

Concepcion, decided exactly three years ago, effectively permitted companies to insert bans on participating in class actions within clauses in standard form contracts that require disputes to be settled in private arbitration. The Court held that a federal law, the Federal Arbitration Act, preempted California law, and concluded that non-negotiable contract terms can not only require consumers and employees to resolve disputes in arbitration, but that the arbitration clauses can also prohibit class actions.

"The "Applebee's" employment case is one of many across the country over the last three years in which courts have cited *Concepcion* in enforcing contract terms barring consumers

[1] *Porreca v. Rose Grp*., CIV.A. 13-1674, 2013 WL 6498392 (E.D. Pa. Dec. 11, 2013).
[2] *Porreca*, at 5.
[3] Id. at 1.
[4] Id. at 15.
[5] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

or employees with identical claims from banding together in class actions. Using Westlaw's online database, we have identified 140 such cases.[6]

Two years after *Concepcion* was decided, the Supreme Court further expanded its interpretation of the Federal Arbitration Act in *American Express (Amex) v. Italian Colors* (2013).[7] Italian Colors Restaurant and other small businesses sought a class action against Amex for alleged violations of federal antitrust laws, including the Sherman Act. The Supreme Court held that the arbitration clause with class action ban in Amex contracts with the merchants were enforceable even if the costs of an individual arbitration and the costs required to prove their claims would have far exceeded the possible maximum amount of damages that each would recover.[8] Consequently, the merchants could not, as a practical matter, vindicate their rights under federal antitrust law.[9]

Concepcion and *Italian Colors* have made the Supreme Court's view very clear, and there is apparently little room remaining to challenge the legality of arbitration clauses in the lower courts. And since *Concepcion,* companies from a growing number of industries, including a failed recent attempt by a food packaging company which deleted the terms from its website after a public firestorm,[10] are increasingly adding arbitration clauses with class action bans in their consumer and employment contracts.[11] Further, the preliminary findings of a federal agency's study on the use of binding mandatory arbitration in consumer financial services contracts demonstrated that the fine print is quashing consumers' valid legal claims against companies.[12]

Consequently, consumer lawyers have indicated that in many instances they are inclined to turn down potential cases at the outset even before they file a legal complaint, if they encounter an arbitration clause and class action ban in the paperwork related to the consumer or employee's contract with the prospective defendant. Others push to get their clients' claims heard in court, but the Supreme Court-inspired obstacles make the uphill climb increasingly difficult.

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[6] See, Appendix and Christine Hines, et al., *Justice Denied, One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident*, at 32, April 2012, http://bit.ly/L43EWQ.

[7] *Am. Exp. Co. v. Italian Colors Rest*., 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).

[8] Id.

[9] Id. at 2312.

[10] Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue,* The New York Times, April 20, 2014, http://nyti.ms/1heDMAg.

[11] See, e.g. Forced Arbitration Rogues Gallery, http://bit.ly/1lAlIpj.

[12] See, generally, Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results, Section 1028(a) Study Results To Date*, Dec. 12, 2013, http://1.usa.gov/1iJqReg.

> "We're one of those probably unusual firms that still takes cases with arbitration provisions in order to try to defeat them," said Boston, Ma.-based employment lawyer Shannon Liss-Riordan. "But it's getting harder and harder to do that."[13]

Indeed, Liss-Riordan has observed an extreme use of arbitration clauses and class action bans in her work representing drivers for on-demand car service company, Uber Technologies Inc. In the ongoing litigation, the Uber drivers claim that the company is not returning the "full amount of gratuity it receives from customers to the drivers."[14] The drivers sued Uber, in Massachusetts, Illinois, and then California seeking a class action to recover the full amount of the allegedly owed gratuity.[15]

While the Massachusetts and Illinois cases were pending, Uber issued an electronic notice to its drivers containing new contracts with the company that included an arbitration clause and a ban on class actions.[16] In California, the drivers asked the court to strike down the arbitration clause, asserting that the drivers who received the notice may not have been informed of the pending class action against Uber, which could affect their rights.[17] The California district court declined to rule on the California drivers' request finding that the issue was premature, but noted that "Uber's efforts to seek approval of the arbitration provision in the [new contract] during the pendency of this class action is potentially misleading, coercive, and threatens to interfere with the rights of class members."[18] The question remains whether the court will enforce the arbitration clause against the drivers.

This is the landscape that consumers and employees are contending with in order to seek redress against companies. Arbitration clauses are being used as shields to suppress claims, and allow corporations to evade taking responsibility for misconduct. This report takes another look at *Concepcion*'s effect, three years after the decision came down. The report describes three stories to provide a snapshot of the reality for consumers and employees with valid legal disputes against corporations, particularly those who seek to unite their claims with others in class actions.

I. A potential class action against auto financing companies, CitiFinancial Auto Corp. (CitiFinancial) and Santander Consumer USA, to pursue alleged claims of unlawful add-on charges to auto loans could not occur.

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[13] Email received from Shannon Liss-Riordan, March 24, 2014 and Interview Notes, April 9, 2014.

[14] *O'Connor v. Uber Technologies, Inc.*, C-13-3826 EMC, 2013 WL 6407583 (N.D. Cal. Dec. 6, 2013).

[15] Id.

[16] Id.

[17] Id. at 2.

[18] Id. at 2, 7.

II. A potential class action against CarMax by former employees for allegedly failing to pay them earned wages for the full amount of time they worked in violation of Section 16(b) of the Fair Labor Standards Act could not occur.

III. A potential class action on behalf of a Missouri customer and other consumers against broadband service provider CenturyLink, seeking to challenge the legality of CenturyLink's "Internet Cost Recovery Fee," could not occur.

I. Claims Against Auto Financing Company for "Convenience" Charges Could Not Be Pursued As a Class Action.

Synopsis: Several states, including Pennsylvania, require that all finance charges for a car loan must be specified in a single contract.[19] A number of car finance companies appear to have flouted this law by imposing, "convenience" charges for making a loan payment by phone or on-line, despite the fact that their contracts did not specify any charge for such a payment. Worse, some finance companies solicited and encouraged borrowers to make telephonic or on-line payments without disclosing the additional "convenience" charges.

This was the case with CitiFinancial Auto Corp. (CitiFinancial) and Santander Consumer USA (Santander) that allegedly charged additional fees ranging from $10 to $15 for each telephonic or on-line payment without any prior disclosure of the charges in the car finance contract.[20] In March 2013, Leyna Novak, a Pennsylvania auto buyer, attempted to pursue a class action lawsuit against CitiFinancial and Santander alleging they violated the Pennsylvania Motor Vehicle Sales Finance Act (MVSFA) by imposing the added unauthorized fees.[21] Unfortunately, Novak did not know that an amended agreement of her auto loan, which she signed in 2009 to modify her payment terms, contained an arbitration clause and class action ban. The terms of the arbitration clause prevented Ms. Novak from pursuing a private action for an alleged wrong doing in a court of law and serving as a class member in a class action.[22]

> "Given *Concepcion*, once we discovered there was an arbitration clause in Ms. Novak's amended contract, my hands were tied. I simply could not pursue the claims individually in arbitration because it was not economically feasible to do so," said

[19] Class Action Complaint at 4, *Leyna Novak v. Santander Consumer USA and CitiFinancial Auto Corp*., Civ. Action No. 2:13-cv-1240-RBS (E.D. Pa. March 7, 2013).
[20] Id. at 8.
[21] Id. at 1.
[22] The Amendment Agreement on September 4, 2009 of CitiFinancial Auto Corp. and Leyna Novak amends the installment contract or promissory note and security agreement dated September 6, 2005, at 4.

Michael Donovan, Novak's attorney.[23] Ultimately, Ms. Novak had to voluntarily dismiss her claims against CitiFinancial and Santander with no class action being certified.

Details: In 2005, Leyna Novak purchased a Mercury Mountaineer from a local auto dealer, Murphy Ford Company, in Chester, Pa.[24] To purchase the car, Novak obtained a six-year auto loan, with monthly payments of $358.66.[25] As typically occurs with this type of contract, after its execution, the auto dealer assigned the rights of the contract to an auto financing company, CitiFinancial. For four years, Novak paid her loan payments by mail. Beginning in 2009, CitiFinancial representatives started calling Ms. Novak requesting that she make payments for her auto loan over the phone.[26] From December 2009 through April 2011, Novak made 28 separate auto payments to CitiFinancial over the phone and was charged a $14.95 fee for each transaction.[27] In 2010, CitiFinancial assigned its rights to Novak's installment sale contract to the auto financing company, Santander Consumer USA. [28]

In November 2010, Santander started calling Novak to obtain payments over the phone.[29] Novak was charged $10.95 for each of her nine telephonic payment to Santander made from November 2010 to August 2011.[30] Novak's 2005 installment sale contract[31] and her amended 2009 contract[32] did not authorize any charges for telephonic payments in connection with the collection of installment payments. CitiFinancial and Santander allegedly violated the MVSFA by imposing transaction fees not expressly disclosed in or authorized by the installment sales contracts.[33] Novak's attorney, Michael Donovan, estimated there were thousands of consumers being similarly harmed by these extra-contractual fees.[34] Without Novak's ability to pursue her class action, the CitiFinancial and Santander were able to evade accountability for alleged claims that they violated Pennsylvania law.

[23] Telephone interview with Michael Donovan, Donovan Axler, LLC (April 12, 2014).
[24] Class Action Complaint at 7, *Leyna Novak v. Santander Consumer USA and CitiFinancial Auto Corp*., Civ. Action No. 2:13-cv-1240-RBS (E.D. Pa. March 7, 2013).
[25] Id.
[26] Id.
[27] Id. at 8.
[28] Id.
[29] Id.
[30] Id.
[31] Id. at 8, 24.
[32] Amendment Agreement on September 4, 2009 of CitiFinancial Auto Corp. and Leyna Novak, at 2-4.
[33] Class Action Complaint at 2.
[34] Telephone interview with Michael Donovan, Donovan Axler, LLC (April 2, 2014).

II. Workers Claiming That They Were Denied Earned Wages Unable to Seek Redress Due to Class Action Ban.

Synopsis: For the past several years, CarMax, the largest used vehicle retailer in the United States, has touted on its website that it has been named one of *Fortune's* "100 Best Companies to Work For."[35] Kenneth Johnson and Cerone McTavous, former CarMax employees located in Texas and Florida, may disagree with that characterization. Johnson and McTavous allege that CarMax failed to pay them earned wages for the full amount of time they worked in violation of Section 16(b) of the Fair Labor Standards Act ("FLSA").[36] In 2010, they filed a complaint against CarMax as a collective action on behalf of at least 200 persons who are or were formerly employed by CarMax who did not receive compensation for all hours and overtime worked by the company.[37]

Johnson and McTavous did not realize that when they accepted their jobs at CarMax, their employment contracts contained a forced arbitration clause mandating that claims, disputes or controversies arising out of the employment must be resolved by final and binding arbitration and that must be pursued on an individual (not class) basis.[38] After Johnson and McTavous brought their lawsuit against CarMax, the company immediately moved to arbitrate. Seth Lesser, an attorney representing Johnson and McTavous, felt compelled to drop the case after the court granted the motion to arbitrate, including the prohibition on pursing cases as a class, meaning that Johnson and McTavous would need to pursue their claims in arbitration and individually.

> "While there are some Fair Labor Standards Act cases that could proceed on an individual basis, here, the value of the claims in the case and the inability to proceed collectively with others in order to share costs—the very reason Congress provided for, by statute, the collective action mechanism in the Fair Labor Standards Act—made the case too risky and uneconomical to proceed with individually," Lesser said.[39]

Details: CarMax operates more than 100 used car "superstores" across the country.[40] In connection with its purchases and sales operations, it also repairs used cars.[41] In July 2007, Kenneth Johnson was hired to work as a detailer at a CarMax superstore located in Irving,

[35] CarMax, *About Carmax*, April 22, 2014, http://bit.ly/1iJrYuw.
[36] Collective Action Complaint at 1, *Johnson v. CarMax Auto Superstores, Inc.*, No. 3:10-cv-00213 (E.D. Va.).
[37] Id. at 4.
[38] Memorandum Opinion at 7, *Johnson v. CarMax Auto Superstores, Inc.*, No. 3:10-cv-00213 (E.D. Va.).
[39] Telephone interview with Seth Lesser, Klafter Olsen & Lesser, LLP (April 2, 2014).
[40] "About Carmax." *CarMax Website*. April 22, 2014, http://www.carmax.com/enus/company-info/about-us.html. Also Collective Action Complaint at 6, *Johnson v. CarMax Auto Superstores, Inc.*, No. 3:10-cv-00213 (E.D. Va.).
[41] Collective Action Complaint at 6, *Johnson v. CarMax Auto Superstores, Inc.*, No. 3:10-cv-00213 (E.D. Va.).

Texas.[42] Cerone McTavous was also hired to work as a detailer at a CarMax superstore in Orlando, Fla., in 2003.[43] The CarMax detailer position is described identically in CarMax's nationwide job offerings: "Detailer responsibilities include washing, waxing, & buffing vehicles, as well as overall the reconditioning of our vast inventory of vehicles. Applicants must be dependable, detail oriented, and have the ability to work in a fast paced environment."[44]

The detailer in a CarMax superstore handles the overall work needed to prepare a car for sale.[45] CarMax used a uniform practice and national corporate policy in the way in which it paid Johnson and McTavous, as detailers, as well as other similarly situated employees, based on the condition of the car needing detailing.[46] According to their complaint, each car had differing pay levels and CarMax compensated the detailers with a flat amount depending on the grade of the vehicle work needed.[47]

CarMax allegedly regularly required Johnson and McTavous to work more than 40 hours in a workweek yet they were treated as "exempt" employees and not paid for any overtime hours.[48] Johnson and McTavous allege in their claim that it was a normal course of business by CarMax to willfully under pay its employees for work performed in excess of 40 hours per week that should have required additional wages and overtime compensation of one-and-one-half times their regular rate of pay, as mandated under the FLSA.[49]

In addition, Johnson and McTavous claim that CarMax failed to maintain accurate and sufficient time records for its employees and failed to post notice explaining the wage and overtime pay rights required under the FLSA.[50] Both Johnson and McTavous allege that CarMax's conduct has caused significant damages to them and that they are entitled to compensation.[51] Their attorney, Seth Lesser, believed this case would have been a certain victory for Johnson and McTavous due to the evidence they brought forth that CarMax had violated the FLSA.[52] However, due to the forced arbitration clause and class action ban in the fine print of their employment contract, Lesser did not find his clients' cases to be

[42] Collective Action Complaint at 2, *Johnson v. CarMax Auto Superstores, Inc*., No. 3:10-cv-00213 (E.D. Va.).
[43] Id. at 3.
[44] Id. at 6. Also, CarMax, *Detailer: Job Description*, April 22, 2014, http://bit.ly/1iDYQ2T.
[45] Collective Action Complaint at 6.
[46] Id. at 7.
[47] Id.
[48] Id.
[49] Id.
[50] Id. at 8.
[51] Id. at 9.
[52] Telephone interview with Seth Lesser, Klafter Olsen & Lesser, LLP (April 2, 2014). Also NACA & Public Citizen 2014 Class Action Attorneys Forced Arbitration Survey, March 17, 2014, Completed Response by Seth Lesser, Page 2.

financially justifiable to pursue individually. Potentially hundreds of CarMax employees are left without any recourse because their only option is to pursue their claims individually in a private arbitration.

III. Legality of CenturyLink's "Internet Cost Recovery Fee" Cannot Be Challenged In Court.

Synopsis: In mid-2013, telecommunications company CenturyLink Corp. began charging many of its broadband service customers a $0.99 fee separate from its advertised service rates.[53] Monroe, La.-based CenturyLink said that the charge, which it called an "Internet Cost Recovery Fee," would help to defray costs for building, maintaining, and expanding the network.[54] The company admits that the $0.99 fee is not a government tax or a required charge.[55]

Meanwhile, customers and industry observers contended that the fee was a "sneaky" way to tack on additional charges to increase revenue without raising the advertised and set price of the service.[56] They alleged that the surcharge was added solely to increase the company's bottom line. CenturyLink Corp.'s customer contracts prohibited actions in court and banned class actions.[57] Consequently, the attorneys who consulted with a prospective client over the circumstances declined to pursue claims against CenturyLink.[58]

Details: Mr. Kays (first name withheld), a Missouri consumer, receives high-speed internet service from CenturyLink. In June 2013, Kays also received notice of the tacked-on monthly $0.99 charge, which was added to the set price that he agreed to when he first signed up for service.[59] His attorneys determined that he (and other CenturyLink customers) had claims for breach of contract against CenturyLink.[60] Further, they asserted that the add-on surcharge violated the Missouri Merchandising Practices Act, a state law that protects consumers from certain unfair, deceptive and unlawful business practices.[61]

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[53] Andy Vuong, *CenturyLink broadband customers hit with new monthly "Internet Cost Recovery Fee," DENVER POST blog,* June 26, 2013, http://bit.ly/1n3pvex.
[54] CenturyLink, Internet Cost Recovery Fee, http://bit.ly/1hTnjFF.
[55] CenturyLink, High-Speed Internet Offer Details, http://bit.ly/1ip86ux.
[56] Sean Buckley, *CenturyLink slaps $1 Internet cost recovery fee on DSL users,* FIERCETELECOM, June 17, 2013, http://bit.ly/1kpwVGp.
[57] Copy of CenturyLink contract, *CenturyLink High-Speed Internet and Internet Access Services Residential Terms and Conditions*, provided by Varnell & Warwick, P.A . in an email dated April 9, 2014.
[58] Letter from Steven T. Simmons, Varnell & Warwick, P.A ., to Kelvin Chen, Consumer Financial Protection Bureau, April 2, 2014.
[59] Id. Letter from Steven T. Simmons.
[60] Id.
[61] Id.

Kays' claims for damages against CenturyLink likely would not have totaled more than a few dollars, but the potential earnings for the company were more significant. "While $1 may not seem like much, you just have to multiply that times (the millions of) broadband customers each and every month to see how lucrative these kinds of junk fees are," wrote a blogger on an industry monitoring website, Broadband dslreports.com.[62]

Given the low-dollar amount of the potential damages against each individual and the number of customers potentially affected, the claims against CenturyLink may have been suitable for a class action. However, CenturyLink's contractual terms with Kays required all disputes between the customer and the company to be settled in individual arbitration, and also banned him from participating in class actions against it.[63] Kays' attorneys said that they would not take the case due to the arbitration terms.[64] The case was never filed.

> "(W)e have seen a dramatic increase in small illegal fees that are routinely charged to consumers that never were charged before…car dealers charging for preparing legal documents, credit unions requiring customers to purchase additional products when they purchase a vehicle, banks charging excessive late fees, or over limit fees, etc.," said Brian Warwick of Varnell & Warwick, P.A. "With an arbitration clause, the worst that can happen to the company is…that (a consumer) claim can be cheaply and easily paid off while the company continues to charge the illegal fee to all future customers. In essence, the arbitration clause simply allows the company to violate the law with impunity."[65]

"Below-the-line fees"—fees such as CenturyLink's Internet Cost Recovery Fee and other so-called administrative, recovery, and service charges are called—have also attracted the attention of members of Congress.[66] In February 2014, Reps. Anna Eshoo (D-Calif.), Howard Coble (R-N.C.), Mike Doyle (D-Pa.), and Ben Ray Luján (D-N.M.) asserted in a letter to the Federal Communications Commission (FCC) that these fees and charges "can add as much as 42 percent to a consumer's monthly bill letter."[67] They expressed concern that the add-on charges would help to hide the full price that consumers would have to pay for services.[68]

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[62] Karl Bode, *CenturyLink Tacks On New Nonsensical Fee New $1 'Internet Cost Recovery Fee*, BROADBAND DSLREPORTS.COM, June 14, 2013, http://bit.ly/1mewnJf.
[63] CenturyLink High-Speed Internet and Internet Access Services Residential Terms and Conditions, at 14.
[64] Id. Letter from Steven T. Simmons.
[65] Email received from Brian Warwick, Varnell &Warwick, P.A., April 30, 2014.
[66] Press Release, Office of Congresswoman Anna G. Eshoo, July 18, 2013, http://1.usa.gov/1me8OMb.
[67] Kate Tummarello, *Congress to FCC: Investigate sneaky phone fees*, THE HILL, Feb.27, 2014, http://1.usa.gov/1me8OMb.
[68] Press Release, Office of Congresswoman Anna G. Eshoo, July 18, 2013.

As early as 2013, members had called on the FCC to thoroughly examine the billing practices of telecommunications companies "to ensure consumers can more accurately assess the true cost of fulfilling a multi-year service contract."[69] However, the FCC has not acted, and CenturyLink customers likely are effectively unable to pursue private legal actions in court to seek accountability for potentially wrongful charges.

IV. MORE Arbitration Clauses with Class Action Bans Enforced Under *Concepcion*.

The Appendix to this report contains a comprehensive list of identified cases in which the court cited *Concepcion* and enforced the arbitration clause with the class action ban in the consumer or employment contract. The claims could not be heard in court as a collective (or class) action. Some of the cases include claims by:

- An employee in California who filed a complaint seeking a class action against her employer Apartment Investment And Management Company (Aimco), alleging failure to pay overtime and minimum wages. *Ybarra v. Apartment Investment and Management Company*. Appendix #4.

- Pennsylvania employees, who were current and former non-exempt, hourly employees of Nabors Drilling USA, sought to represent themselves and others in a class action against Nabors, alleging that "they were not paid for time spent attending safety meetings and donning and doffing safety equipment, and were denied overtime pay due to Nabors' manipulation of the beginning and ending days of their workweek." They also alleged that "they were required to perform "off the clock" work and "to remain 'on call,' skip meals and breaks" without compensation." *Williams v. Nabors Drilling USA*. Appendix #5.

- Consumers in North Carolina who brought a class-action lawsuit against lenders of short-term, single-disbursement, single-repayment loans, alleging violations of the North Carolina Consumer Finance Act, the unfair trade practices statute and usury laws. *Knox v. First Southern Cash Advance*. Appendix #6.

- A consumer in Illinois who sought to represent himself and other consumers in a class action, alleging that Advance America, Cash Advance Centers of Illinois, Inc., violated the Illinois Wage Assignment Act when it demanded that his employer assign some of his wages to recover unpaid loan amounts pursuant to a "Wage Assignment Agreement," without first serving him with notice that it was going to

[69] Kate Tummarello, *Congress to FCC: Investigate sneaky phone fees*, THE HILL, Feb.27, 2014.

make the demand. *Lewis v. Advance America, Cash Advance Centers of Illinois, Inc*. Appendix #11.

- Consumers in Texas who brought an action against online travel companies Travelocity.com LP and Sabre Holdings Corporation, alleging a price-fixing conspiracy with hotel companies, in violation of federal antitrust laws. The consumers claimed that the companies conspired to set hotel room resale prices and that online travel websites agreed not to resell hotel rooms below this fixed price. They contended that the alleged price-fixing scheme allowed online travel websites to deceive customers by advertising the "best" or "lowest" prices, when the companies were offering the same price. *In re Online Travel Co*. Appendix #26.

Conclusion

When the U.S. Supreme Court first issued the *AT&T Mobility v. Concepcion* decision three years ago, the authors of this report predicted devastating consequences for American consumers and workers. Together with *American Express Co. v. Italian Colors Restaurant*, the evidence is now unmistakable. *Concepcion, American Express* and other recent decisions have slammed a wrecking ball through the landscape of consumers' and employees' right to seek redress when they are harmed by corporations.

Due to *Concepcion*, companies are increasingly using arbitration clauses to deny consumers their right to join together in class actions and hold corporations accountable for their wrongful behavior. Preliminary data released by the Consumer Financial Protection Bureau (the Bureau or CFPB) data from the Bureau's preliminary findings confirmed a high prevalence of arbitration clauses in the terms of credit cards, checking accounts and prepaid cards. Additionally, nearly all of the arbitration clauses (about 90 percent) contained terms denying their customers the ability to participate in class actions.

The CFPB data also confirmed that consumers rarely go to arbitration for small-dollar disputes, which highlights the importance of class actions that often involved claims seeking recovery for small-dollar claims. When an individual arbitration is the only path available for consumers and workers, thousands of valid claims likely go unheard in *any* forum, whether in court or arbitration, as the CFPB data indicates.

The CFPB's preliminary data supports what we already know to be true; forced arbitration blocks opportunities for consumers and employees to seek redress in court. The presence of forced arbitration clauses in contracts means that many serious violations of law will go undetected, either because cases will never be brought or because the evidence presented and decisions rendered in private arbitration proceedings are not made public. This lack of transparency means that abusive practices will go undeterred. Companies will continue to

make unauthorized charges on payments, deny workers fair compensation, and impose hidden broadband service fees, to name a few.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress granted the Bureau the authority to ban forced arbitration clauses in certain types of consumer financial contracts. Last year, the CFPB banned forced arbitration in consumer mortgage and home equity loan contracts as mandated by law.[70] The evidence supports creating a strong rule to eliminate forced arbitration clauses from all consumer financial service contracts under the Bureau's jurisdiction.

In addition, to address all other industries that use the contract terms against consumer and employees, consumers and employees need a legislative solution. Congress must pass the Arbitration Fairness Act (AFA) (S. 878 and H.R. 1844), which would restore the original intent of the Federal Arbitration Act (FAA), as a tool for business-to-business disputes that take place on a level playing field. The bill would amend the FAA to prevent the enforcement of pre-dispute binding mandatory arbitration clauses in civil rights, employment, antitrust, and consumer disputes. The legislation would not prohibit voluntary arbitration that occurs after a dispute arises.

[70] 79 Fed. Reg. 10712 (Feb. 15, 2013).

Appendix

MORE Cases in Which Courts Have Cited *Concepcion* and Held Class Action Bans in Arbitration Clauses Enforceable

	Case Name
1	Appelbaum v. AutoNation Inc., SACV 13-01927 JVS, 2014 WL 1396585 (C.D. Cal. Apr. 8, 2014)
2	Clements v. DIRECTV, LLC, 4:13-CV-4048, 2014 WL 1266834 (W.D. Ark. Mar. 26, 2014)
3	Green v. Zachry Indus., Inc., 7:11CV00405, 2014 WL 1232413 (W.D. Va. Mar. 25, 2014)
4	Ybarra v. Apartment Inv. & Mgmt. Co., B245901, 2014 WL 985644 (Cal. Ct. App. Mar. 13, 2014)
5	Williams v. Nabors Drilling USA, LP, CIV.A. 13-1013, 2014 WL 710078 (W.D. Pa. Feb. 25, 2014)
6	Knox v. First S. Cash Advance, 753 S.E.2d 819 (N.C. Ct. App. Feb. 4, 2014)
7	Torrence v. Nationwide Budget Fin., COA12-453, 2014 WL 418798 (N.C. Ct. App. Feb. 4, 2014)
8	Rowe v. AT & T, Inc., 6:13-CV-01206-GRA, 2014 WL 172510 (D.S.C. Jan. 15, 2014)
9	Zabelny v. CashCall, Inc., 2:13-CV-00853-PAL, 2014 WL 67638 (D. Nev. Jan. 8, 2014)
10	Siy v. CashCall, Inc., 2:13-CV-00953-PAL, 2014 WL 37879 (D. Nev. Jan. 6, 2014)
11	Lewis v. Advance Am., Cash Advance Centers of Illinois, Inc., 13-CV-942-JPG-SCW, 2014 WL 47125 (S.D. Ill. Jan. 6, 2014)
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50	Baldwin v. Regions Financial Corp. --- So.3d ----+ , [98 So.3d 1210] Fla.App. 3 Dist., Sep. 19, 2012)
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63	Morvant v. P.F. Chang's China Bistro, Inc., 2012 WL 1604851 (N.D.Cal.,May 07, 2012) (partial)
64	Karp v. CIGNA Healthcare, Inc., 2012 WL 1358652 (D.Mass., Apr. 18, 2012)

**This list was generated using Westlaw's KeyCite service. Generally, this list does not include Stolt-Nielsen v. Animal Feeds Int'l Corp., 130 S.Ct. 1758 (2010)-related cases, where the arbitration clause was silent on class actions but the court enforced the arbitration clause and did not permit the consumers/employees to pursue their claims as a class.*