

Statement of

The Honorable Patrick Leahy

United States Senator

June 29, 2011

**Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Barriers to Justice and Accountability:
How the Supreme Courts Recent Rulings Will Affect Corporate Behavior."
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This morning, we will highlight several recent Supreme Court decisions to examine the impact on the lives of hardworking Americans. Each of these decisions give corporations additional power to act in their own self-interest, and each limits the ability of Americans to have their day in court. This hearing is a continuation of previous hearings about how Supreme Court rulings affect Americans' access to their courts. Especially in these tough economic times, American consumers and employees rely on the law to protect them from fraud and discrimination. They rely on the courts to enforce those laws intended to protect them. Unfortunately, these protections are being eroded by what appears to be the most business-friendly Supreme Court in the last 75 years.

Last week, in Wal-Mart v. Dukes, five men on the Supreme Court disqualified the claims of 1.5 million women who had spent nearly a decade seeking justice for sex discrimination by their employer, Wal-Mart. They ruled that the women did not share enough in common to support bringing a class action. Perhaps more troubling, they told those women that Wal-Mart could not have had a discriminatory policy against all of them, because it left its payment decisions to the local branches of its stores.

The case gives Wal-Mart, and the rest of corporate America, a clear path to avoid company-wide sex discrimination suits: Have your lawyers write a non-discrimination policy, then allow your local branches to implement compensation decisions, and you can hide behind your policy regardless of what really happened to your employees across America. Through this decision, a narrow majority of five justices have, again, made it harder to hold corporations accountable under our historic civil rights laws.

Earlier this month, in Janus Capital v. First Derivative Traders, the same five justices gave corporations another victory by shielding them from accountability even when they knowingly lie to their investors. In that case, the Court held that investors have no remedy when a corporation knowingly issues false statements from a shell entity it created to "make" the false statement. Some have said that the Janus decision provides Wall Street companies with a "license to lie." Others have called the opinion "a roadmap for fraud." Whichever phrase you use, the decision allows Wall Street companies to design new ways to evade accountability from the

harm inflicted on hardworking Americans who have seen their life savings ravaged over the past few years by fraudulent investment schemes and corporate misconduct.

This term, the Supreme Court also issued a devastating decision that will harm the ability of consumers to band together when their phone company or other corporations falsely charge them small, unjustified, and unfair fees. Two months ago, in *AT&T v. Concepcion*, the Supreme Court, in another 5-4 opinion, held that companies can take advantage of the fine print on telephone bills and other contracts to bar customers from bringing class action lawsuits. What's more, the Court held that states cannot prohibit such "mandatory arbitration clauses" -- even if the state legislatures vote to do so -- because such a law would be preempted by the Federal Arbitration Act. Justice Scalia and the four fellow conservatives on the Court, once again, misinterpreted Congress' intent; they favored corporations and further weakened protections for consumers. Binding mandatory arbitration makes a farce of the American people's constitutional right to a jury trial and the due process our Constitution guarantees to all Americans.. In arbitration, there is no transparency. There are no juries. There is no appellate review.

Like the *Wal-Mart* case, the *AT&T* case also denies consumers the right to bring their lawsuit as part of a class action. Class actions serve an important function in our justice system. If I have a claim for \$50 or \$100 against a company, the potential recovery is too small for me to hire a lawyer and seek redress. If I combine my claim with those of other people who also have a small claim, that would allow us to attain adequate representation and seek accountability. When consumers can band together, then corporations can be forced to account for their misconduct, even if the harm to each individual consumer is relatively small. Class actions are an essential way for everyday Americans to gain access to our courts.

The cases we are discussing today are just a few examples of how the Supreme Court's recent decisions will hurt individual Americans and benefit large corporations who engage in misconduct. A study by Lee Epstein, William Landes and Richard Posner, entitled "Is the Roberts Court Pro-Business?" illustrates this phenomenon. It found that the Supreme Court ruled in a pro-business fashion in 29 percent of cases under Chief Justice Earl Warren. Under Warren Burger the figure was 47 percent. Under Chief Justice Rehnquist, it was 51 percent. Now, under Chief Justice Roberts it has risen to 61 percent. The point of today's hearing is to put these statistics in context by examining some of the most troubling pro-business rulings from the Supreme Court's term and to consider the lasting effect of these divisive rulings.

Over the past few years, the American people have grown frustrated with the notion that regardless of their conduct some corporations are too big to fail. The Supreme Court's recent decisions may make some wonder whether the Supreme Court has now decided that some corporations are too big to be held accountable. You get the unfortunate feeling that many of the Justices view plaintiffs as a mere nuisance to corporations. We cannot ignore that sex discrimination in the workplace continues, that corporations continue to deceive consumers and that fraud continues on Wall Street. I believe that the ability of Americans to band together to hold corporations accountable when these things occur has been seriously undermined by the Supreme Court. These decisions have been praised on Wall Street, but will no doubt hurt hardworking Americans on Main Street.

I thank all of the witnesses for being with us today and look forward to their testimony.

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