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July 21, 2011

The Honorable Herb Kohl
Senate Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

Thank you for your questions following my testimony at the June 29, 2011 hearing: "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

Your questions centered on the case of *AT&T Mobility LLC v. Concepcion*. You asked, "How is an individual consumer with a $30 complaint, like the plaintiff in *Concepcion*, going to find justice, let alone a lawyer to represent him?" The details of the *Concepcion* case suggest not only that plaintiffs like the Concepcions will find justice outside of the class action system, but, as both the District Court and the Supreme Court emphasized, they were in fact "*better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1753 (2011) (internal citations and quotations omitted) (emphasis in original).

First, plaintiffs like the Concepcions would be unlikely to even need a lawyer to raise their claim—they could do so via a one-page form on AT&T's web site. *Id.* at 1744. This is far simpler than the filing necessary to begin litigation, let alone class action litigation.

Second, the terms of the agreement are sufficiently generous to encourage attorneys to represent potentially meritorious claims even if they are of de minimus value. As the Supreme Court noted, AT&T is required to pay a $10,000 minimum recovery and *double* the claimant's attorney's fees if the customer receives an arbitration award greater than AT&T's last written settlement offer. *Id.* at 1744 & 1753. Accordingly, AT&T has a very strong incentive to provide reasonable (perhaps even generous) settlements, and attorneys have incentives to bring even small claims that are meritorious.

Given these factors, the question is not how plaintiffs like the Concepcions will find justice absent class actions—the facts of the case suggest that they are not denied justice. Rather, the question is why plaintiffs would pursue their claims through the inferior vehicle of a class action lawsuit, where their claims are likely to languish for years, where they are likely to see only a small percentage of the few dollars of their respective claims, and where the majority of any settlement or award frequently redounds not to the individual plaintiffs, but to the trial lawyers.

You asked two questions about *Concepcion* relative to the Class Action Fairness Act (CAFA), namely: "Does *Concepcion* create an end-run around the balance that the Class Action Fairness Act sought to achieve?", and "In light of *Concepcion*, what can Congress do to restore the balance that the Class Action Fairness Act achieved between individual plaintiffs and businesses, and maintain a viable path for class actions?"

The ends that the CAFA sought to achieve related to class action *litigation*, not arbitration. As such, the Court's decision in *Concepcion* is fully consistent with CAFA, and does not upset the balance struck regarding litigated claims. More importantly, it is also fully consistent with the Federal Arbitration Act (FAA), which reflects Congress's "liberal federal policy favoring arbitration . . . ." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The purpose of the FAA is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S.Ct. at 1748. As such, the Supreme Court correctly noted that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* There is no indication that in balancing the interests of plaintiffs and defendants in CAFA, that Congress sought to functionally eviscerate the streamlined proceedings of arbitration that Congress has vigorously defended in the FAA. Indeed given the lack of multilayer review inherent in arbitration, imposing class action procedures into the arbitration context would not create the balance sought in CAFA, but would tilt the tables significantly in favor of plaintiffs, because defendants would face the risk that an error involving tens of thousands of claims could go uncorrected. This would not be consistent with the balance that Congress sought in CAFA.

Finally, you asked whether *Concepcion* marks "the end of class actions." Rumors of the death of class actions are premature. But even if the case has a substantial impact on the number of class action suits, the fundamental question asked by this hearing is whether that would impose a barrier to justice. While some companies may avail themselves of arbitration agreements following this opinion, the facts of the *Concepcion* case suggest that this could in fact benefit consumers, who will be able to easier recoup small losses through simpler complaint mechanisms than those provided by litigation. Far from serving as barriers to justice, the streamlined procedures make justice more accessible—which explains why Congress has established strong federal policies supporting arbitration.

Thank you again for your questions, and for the opportunity to testify.

Very truly yours,

Robert Alt