Questions from Senator Kohl

"Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior" 06/29/11

My colleagues and I worked for many years on reform of the class action system, culminating in the passage of the Class Action Fairness Act in 2005. That law was a balanced approach to address the worst abuses in the class action system. It enabled individuals to collectively and efficiently seek redress for harm and ensuring them fair compensation when their claims had merit, while protecting businesses from being hauled into courts on frivolous claims and where the rules are stacked against them.

But the Supreme Court seems to have turned this careful balance on its head in its recent decision in *AT&T Mobility v. Concepcion*. Does *Concepcion* create an end-run around the balance that the Class Action Fairness Act sought to achieve?

As Supreme Court advocate Tom Goldstein said, "It's almost malpractice for a lawyer of a company now not to put an arbitration clause in any kind of document, whether it's a consumer contract or an employment agreement. All of those agreements will be enforced and the company [will] no longer face the prospect [of class action liability], if they write the agreement correctly." Is this the end of class actions?

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?

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?

Response from Melissa Hart

The Supreme Court's decision certainly shows a hostility to class action dispute resolution that is inconsistent with legislative efforts to maintain a balance of interests in the Class Action Fairness Act. The *Concepcion* holding gives unchecked power to companies to require arbitration of disputes and to require that the arbitration be individual rather than collective. According to the Court, even a state's contrary common law cannot override that power. The incentives for companies to include such provisions in contracts are substantial, particularly in cases like that of the Concepcions, where the low-dollar value of the claim makes individual arbitration extremely unlikely. Since individuals will not regularly choose to pursue their own small claims, and they are barred from joining together to do so, a company will avoid most liability, even for clear violations of its contractual or other obligations.

The Court rested its decision in *Concepcion* on an assertion that the 1925 Congress that enacted the Federal Arbitration Act intended this result. Because the

Court's decision was so focused on congressional intent, a legislative response may be appropriate. Such a response could come in a number of forms. One possibility would be an amendment to the Federal Arbitration Act to make it clear was kinds of arbitration agreements Congress wants to privilege. For example, contracts of adhesion—the typical consumer contract—or employment contracts, could be explicitly excluded from the FAA. I am sure there are other options, but that is the one that would most directly answer the concerns created by the *Concepcion* decision.