

**QUESTIONS FOR THE RECORD**  
**FROM SENATOR JOHN CORNYN TO VICTOR E. SCHWARTZ**  
**FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:**  
**“ARBITRATION: IS IT FAIR WHEN FORCED?”**  
**OCTOBER 13, 2011**

1. Some argue that, if arbitration of disputes involving relatively small claims is eliminated, individuals will not be disadvantaged because they will be able to pool most small claims into a class action in court. What percentage of consumer and employee claims are likely to be eligible for class treatment? In your view, are class actions an adequate substitution for arbitration?

An extremely small percentage of consumer and employer claims are likely to be eligible for class treatment. As the Supreme Court of the United States reiterated in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), “[t]he class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Id.* at 2550 (quoting *Califano v. Yamasaki*, 442 U. S. 682, 700-01 (1979)). Under Federal Rule of Civil Procedure 23, which governs class actions in federal court, facts and legal issues common to a class must predominate over facts and legal issues not in common. The plaintiff who seeks to represent a class must be an adequate representative and must possess claims that are typical of other proposed members’ claims. These hurdles are hard to overcome. In most cases, consumer and employee disputes involve highly individualized fact patterns, for example, a consumer had a unique charge on his or her cable bill or an employee was discriminated against in a particular way by specific individuals. The class action system, in contrast, is set up for people with claims that are almost identical, for example, people who have been killed in a plane crash. Thus, in most instances, class action treatment would not be available as a substitute for contractual pre-dispute arbitration. The data bear this out. Even of the subset of lawsuits actually pleaded as class actions, nearly four-fifths are never certified.<sup>1</sup>

If a class action does proceed, there are many instances where the plaintiff’s lawyers who bring the case garner substantial fees and the individual consumers are left with little or no recovery. In some cases, as I indicated in my testimony, a charity selected by the plaintiff’s lawyers may end up receiving more than the injured consumer. In addition, because “successful” consumers may only be entitled to collect a paltry sum in a class action, many consumers do not even bother to try to collect. Thus, the class action device often does not work to the benefit of consumers.

For each of these reasons, class action are, in general, not an adequate substitution for contractual pre-dispute arbitration.

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<sup>1</sup> See Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 635-36, 638 (2006).

2. I want to be sure that consumers and employees have realistic opportunities to obtain redress for legal violations. Please explain how we can secure the most justice for the most people and why.

Pre-dispute arbitration agreements provide a vehicle for both consumers and employees to obtain redress for legal violations. In many instances, these agreements provide parties with the only realistic opportunity to obtain relief, particularly in light of the significant shortcomings of class actions (discussed above) and the difficulty of finding a lawyer willing to take on a case involving a relatively small sum of money.

Arbitration offers user-friendly procedures that allow individuals to make their case even without an attorney. And the flexibility that arbitration offers is vastly underappreciated. Individuals may have a hearing scheduled for a convenient time and place; as alternatives, the parties (if they prefer), may be able to resolve the dispute by conference call or on the papers alone. We are even starting to see online claims resolution. When individuals in the real world weigh the costs and benefits of pursuing a claim, the ability to get resolution through a simplified, easy-to-use process—one that often does not require taking time away from work or home duties—can make a difference.

Naturally, to ensure that the greatest number of people receive justice, it is important that arbitration agreements are fair and that decisions are made by neutral arbitrators. But it is also important to recognize that existing law includes multiple layers of protection on this front. Through an evenhanded application of the unconscionability doctrine, judges are able to determine whether an arbitration agreement is “unconscionable” to an individual consumer or employee and therefore invalid. There are literally hundreds of such decisions striking down arbitration agreements when those agreements are unfair. For instance, procedures that would be unduly burdensome to the individual, such as an inconvenient location<sup>2</sup> or unreasonable costs,<sup>3</sup> will not be upheld. Nor will agreements that limit individualized damages or remedies that would be available to a customer or employee,<sup>4</sup> or unfairly curtail the window of time in which to bring a claim.<sup>5</sup> Further,

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<sup>2</sup> See, e.g., *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007); *Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688 (W.D. Tex. 2006); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001); *Pinedo v. Premium Tobacco Stores, Inc.*, 102 Cal. Rptr. 2d 435 (Ct. App. 2000).

<sup>3</sup> The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if that agreement would force the individual to pay excessive costs to access the arbitral forum. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); see also, e.g., *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840 (N.D. Ill. 2001); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001); *Brunke v. Ohio State Home Servs., Inc.*, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008); *Liebrand v. Brinker Rest. Corp.*, 2008 WL 2445544 (Cal. Ct. App. June 18, 2008); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003).

<sup>4</sup> See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Mortgage Elec. Registration Sys., Inc. v. Abner*, 260 S.W.3d 351 (Ky. Ct. App. 2008); *Woebse v. Health Care & Retirement Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008); *Carll v. Terminix Int'l Co.*, 793 A.2d 921 (Pa. Super. Ct. 2002); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997).

<sup>5</sup> See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (1997).

any agreement that lets the business “pick the judge” would certainly be struck down by our courts.<sup>6</sup> Some critics of arbitration repeat the mantra that companies “pick their own judges” in arbitration. That is false. Ordinarily, the drafter of an arbitration agreement designates an arbitration organization to administer the arbitration, but that organization itself selects a neutral arbitrator, with both parties typically participating in the process and possessing the right to object to an arbitrator.

Leading arbitration service providers have also developed rigorous standards to help assure fair results, such as the consumer due process protocol of the not-for-profit American Arbitration Association (AAA). And with judges enforcing the unconscionability doctrine, business have a strong incentive to provide for the AAA and other reputable forums like JAMS to administer arbitrations.

3. Arbitration arose as an alternative to the complex, expensive and time-consuming procedures of our litigation system. In our courts today, what obstacles does an individual consumer or employee face when he or she seeks to bring a claim for relief?

An individual consumer or employee has many obstacles to overcome if he or she seeks redress with the litigation system. The first major obstacle for the consumer or employee is to obtain a lawyer who will represent the individual. In that regard, litigation is expensive and plaintiffs’ lawyers typically do not bill by the hour. Most plaintiffs’ lawyers are very selective in their cases; they will only take cases where they are reasonably certain that they will win. Otherwise, the plaintiff’s lawyer could devote hours to litigation and never be compensated. While it is true that the “bottom feeder class” of plaintiffs’ lawyers bring frivolous claims and relief is needed to stop them from doing so (*see, e.g.*, S. 533, the Lawsuit Abuse Reduction Act), most plaintiffs’ lawyers do play by the rules of economics and only pursue claims where they have a high probability of winning (or securing a lucrative settlement

Even if an individual’s claim has merit, there must be sufficient damages to warrant a plaintiff’s lawyers’ time to pursue the claim. Good data suggest that many plaintiff’s lawyers are reluctant to take a claim under \$60,000.<sup>7</sup> Data also suggest that employees who allege discrimination after being terminated can only find lawyers to represent them in about five percent of cases.<sup>8</sup> As a National Law Journal editorial just this week

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<sup>6</sup> *See, e.g., Murray v. United Food & Commercial Workers Int’l Union*, 289 F.3d 297 (4th Cir. 2002); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Roberts v. Time Plus Payroll Servs., Inc.*, 2008 WL 376288 (E.D. Pa. Feb. 7, 2008); *Missouri ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006).

<sup>7</sup> *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 783 (2003).

<sup>8</sup> Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008).

concluded, “[i]ncreasing numbers of litigants have no access to the system at all, because the ante is too high.”<sup>9</sup>

Further, assuming an individual can find an attorney to take on his consumer or employee claim, there are substantial delays in the litigation system. In some metropolitan areas it may be two or three years until a final result.<sup>10</sup> Even then, the case may be appealed to a higher court. Also, in terms of results, they may appear random. Some plaintiffs “hit the jackpot” and receive very substantial awards, but others receive little or nothing. Each of these obstacles demonstrate that, in many cases, arbitration provides a welcome alternative to litigation.

4. Some have argued that the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion* will “immunize” corporations from the consequences of their alleged wrongdoing by providing an alternative in the place of class actions. What do you believe will be the impact of *Concepcion*?

The *Concepcion* case will not immunize corporations for the consequences of their wrongdoing. Arbitration provides a fair means for an employee or consumer with a legitimate claim to pursue that matter individually, even if the amount of the claim is modest. Class actions, in comparison, are not necessary to achieve individual justice, and, as explained in greater detail above, often do not serve consumers’ best interests. Hence, whether class actions are available or not does not mean a defendant corporation may act with impunity; if corporations engage in wrongdoing, they are accountable to every single individual harmed, and could be liable for additional punitive damages as well. In addition, businesses that sell to consumers are regulated by multiple state and federal agencies. I do not think state officials such as my fellow witness Minnesota Attorney General Lori Swanson would be likely to agree that corporations are now immune from her oversight. National businesses are subject to oversight by 51 attorneys general and the FTC, as well as numerous industry-specific regulators.

With regard to the *Concepcion* case specifically, the effects are still uncertain. The Supreme Court paid close attention to the particular arbitration agreement that was involved in the case itself and deemed it to be a fair and just one. It is unclear whether class actions would be prohibited if a pre-dispute arbitration agreement was not fair and did not secure appropriate checks and balances to protect the rights of an individual. Many courts are addressing these arguments now, and we do not know what the consensus result will be. Regardless, class actions are, again, not some panacea to prevent corporate wrongdoing, nor does their absence insulate wrongdoers for any unlawful acts.

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<sup>9</sup> Rebecca Love Kourlis, *Overhaul Civil Litigation*, Nat’l L.J. Oct. 31, 2011.

<sup>10</sup> See *Threadbare American Justice*, N.Y. Times, Aug. 17, 2011 (“Swamped by this huge docket, no state court system now delivers justice as it needs to.”).

5. Your prepared statement noted that: “The argument that consumers lack bargaining power is a fallacy; consumers gain more bargaining power everyday through increased competition and more avenues, such as on the Internet, to rate products and services.” Can you elaborate?

In my prepared statement, I indicated that the argument that “consumers lack bargaining power is a fallacy” for several reasons. First, we live in a highly competitive world where consumers have many choices with regard to products and services. If enough consumers complain about a product or service, a savvy and well-informed public will simply choose to do business with someone else. In today’s marketplace, these shifts occur very quickly. Companies such as Blockbuster Video and Borders bookstores are a recent testament to this fact. Consumers have at their fingertips considerable information to guide their choices. There are, for example, numerous websites dedicated to consumer product and service ratings which millions of Americans view daily. Moreover, at no other point in history has a society had such choice and consumer bargaining power. With technology and other innovations, this bargaining power will likely only increase with time.

Second, because our marketplace is driven by consumer demand, if consumers demand that a particular product or service be available, and accompanying that product or service include the right to sue the defendant and not be subject to pre-dispute arbitration, entities will arise to provide that product or service. The product or service may cost more, the same way automobiles with extraordinary features cost more than those that do not have them, but enterprising businesses will fill this demand. Also, if enough people no longer want pre-dispute arbitration agreements, similar to the way consumers no longer wanted to travel to a local video store to obtain a movie, the practice of not including pre-dispute arbitration clauses in consumer agreements would become the norm. Thus far, there does not appear to be broad scale consumer demand for products and services that have no pre-dispute arbitration agreements.

Third, it is a fallacy that consumers lack bargaining power because even though there is no broad based demand for no pre-dispute arbitration agreements, there is so much consumer choice that virtually any product or service can be obtained without a pre-dispute arbitration agreement. One can, for instance, readily use a search engine such as Google to determine such providers if this represents a significant preference when deciding to purchase a product or service. Somewhat ironically, the proposed legislation would virtually eliminate a consumer’s choice to use arbitration. As the evidence abundantly demonstrates, the option of post-dispute arbitration is little more than an illusion.