**Statement of**

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**"Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior"**

**Hearing Before the Committee on the Judiciary, United States Senate**

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Mr. Chairman, Ranking Member Grassley, and members of the Committee.

My name is Andrew Pincus, and I am a partner in the law firm Mayer Brown LLP. I am honored to appear before the Committee today to discuss the Supreme Court's recent decisions in cases addressing claims involving businesses.

A significant part of my law practice focuses on the Supreme Court. In addition, I am co-director of the Yale Law School Supreme Court Clinic, which provides pro bono representation to parties in approximately a dozen cases each year. I was privileged to argue three cases before the Court in the just-concluded October 2010 Term; over the past 26 years, I have argued 22 cases in the Supreme Court and filed briefs in numerous other cases.[1]

My testimony makes four basic points:

- The logical way to assess the impact upon corporate behavior of the Court's recent decisions is to examine the outcomes in *all* of the cases involving private plaintiffs seeking damages from businesses. Business parties lost just as many times as they won such cases. Indeed, in the cases involving substantive interpretations of employment law, business parties lost *every* case decided by the Court. There simply is no basis for concluding that the Court's decisions, taken as a whole, favored business defendants over plaintiffs seeking damages.

- A review of the Court's decisions in which business parties prevailed reveals that the positions of the plaintiffs in those cases departed very substantially from existing law. It is not at all surprising that the Court refused to embark on the radical courses urged by the plaintiffs and instead adhered to the principles recognized in the Court's prior precedents.

[1] My firm and I represented clients in a number of the cases discussed in my testimony and continue to represent clients with respect to the issues addressed in this testimony. However, my testimony today is not on behalf of any client or on behalf of my firm.

- The scope of the Court's rulings will be debated in dozens, if not hundreds, of cases before the federal district courts and courts of appeals, and it will take several years for the lower courts to render a sufficient number of decisions to determine what the impact of the rulings will be. One thing is certain, however: predictions made today about the reach of the Court's decisions are highly likely to be incorrect. Two years ago, many asserted that the Court's ruling in *Ashcroft* v. *Iqbal*[2]—which addressed the standard for motions to dismiss in federal court—would dramatically restrict plaintiffs' access to court and that Congressional action was needed to overturn that decision. That speculation has been proven wrong: an independent study of the effects of the *Iqbal* ruling commissioned by the Federal Judicial Center—released just three months ago—found "no increase" in the rate at which motions to dismiss terminate a case and that "[t]here was, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases."[3]

- The Court's decisions will have significant positive effects on corporate behavior, avoiding an increase in the drain on companies' resources from unjustified litigation and leaving funds available for business expansion and job creation; preventing new disincentives to foreign investment in the United States; and preserving the availability of arbitration as a fair, efficient dispute resolution system that provides the only avenue of relief for the small injuries suffered by the vast majority of consumers and employees. Moreover, the Court's rulings leave undisturbed the principal deterrent of wrongdoing—the threat of government enforcement action.

**Businesses Lost As Frequently As They Won In Cases Decided By The Court This Term**

The impact of the decisions rendered by the Supreme Court cannot be assessed be examining only a subset of the relevant decisions. **A review of *all* the Supreme Court's cases involving disputes between businesses on the one hand and private plaintiffs seeking damages from businesses on the other, reveals that business parties lost just as many times as they won this year**:

- Employees prevailed in all three of the labor cases decided by the Court this Term—in *Kasten* v. *Saint-Gobain Performance Plastic Corp.*, the Court held that complaints under the Fair Labor Standards Act's anti-retaliation provision may be asserted either orally or in writing; in *Thompson* v. *North American Stainless, L.P.*, the Court held that Title VII's ban on retaliation against an employee who challenges discrimination extends to third parties and that those third parties have standing to sue under Title VII; and in *Staub* v. *Proctor Hospital*, it held that the bias of a supervisor can support a discrimination claim even if the adverse employment action is taken by another company official (thereby permitting discrimination claims on what has been termed the "cat's paw" theory).

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[2] 129 S. Ct. 1937 (2009).

[3] Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, *Motions to Dismiss for Failure to State a Claim After* Iqbal at vii (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

- Plaintiffs prevailed in two of the three securities cases decided by the Court—in *Matrixx Initiatives, Inc.* v. *Siracusano*, the Court refused to adopt bright-line rules for proving materiality and scienter (two of the elements of a cause of action for securities fraud); and in *Erica P. John Fund, Inc.* v. *Halliburton Co*., it held that plaintiffs need not prove loss causation in order to obtain class certification. The business party won in *Janus Capital Group, Inc.* v. *First Derivative Traders* (discussed below).

- The results in tort preemption cases were also divided, with plaintiffs winning one case and defendants winning two. The Court rejected the claim of preemption in *Williamson* v. *Mazda Motor of America, Inc.*, holding that the plaintiffs there could bring a product liability suit claiming that a motor vehicle manufacturer should have installed lap-and-shoulder belts instead of lap belts; but it upheld the claims of preemption in *Pliva, Inc.* v. *Mensing*, concluding that generic drug manufacturers could not be held liable in failure-to-warn cases premised on a duty to alter the federally-required label, and in *Bruesewitz* v. *Wyeth*, a case involving the scope of the Vaccine Act's no-fault compensation regime.

- The results in cases involving class action rules were evenly divided—the Court ruled in favor of the defendant in *Wal-Mart Stores, Inc.* v. *Dukes* (discussed below), but in favor of the plaintiffs in *Smith* v. *Bayer Corp.*, which held that a federal court decision refusing to certify a class action could not be invoked to bar an attempt to obtain certification of the same class in an action in state court.

- The remaining business cases were also divided. Plaintiffs prevailed in *CSX Transportation Inc.* v. *McBride* (causation requirement in Federal Employers' Liability Act) and in *CIGNA Corp.* v. *Amara*, (relief available to ERISA plan beneficiaries and participants in a private action under the statute may include reformation of an ERISA plan); and business parties prevailed in *AT&T Mobility LLC* v. *Concepcion* (discussed below), *Chase Bank USA* v. *McCoy*, (addressing a since-superseded credit card regulation), *Schindler Elevator Corp.* v. *United States ex rel. Kirk* (scope of the public disclosure bar applicable to actions under the False Claims Act), and *J. McIntrye Machinery, Ltd.* v. *Nicastro* and *Goodyear Dunlop Tires Operations, S.A.* v. *Brown* (discussed below).

In total, plaintiffs prevailed in 9 cases and business parties prevailed in 9 cases.[4]

[4] The Court's rulings in disputes between business and government divided almost evenly, with four rulings for government and five for business parties. Business party losses: *Chamber of Commerce* v. *Whiting* (preemption of state employment regulations); *Mayo Foundation for Medical Education and Research* v. *United States* (definition of employee for purposes of payment of payroll taxes); *Federal Communications Commission* v. *AT&T* (scope of exemption under Freedom of Information Act); *United States* v. *Tohono O'Odham Nation* (scope of Claims Court jurisdiction). Business party wins: *CSX Transportation, Inc.* v. *Alabama Department of Revenue* (preemption challenge to state taxes); *General Dynamics Corp.* v. *United States* (impact of state secrets privilege on contract claim); *Astra USA, Inc.* v. *Santa Clara County* (right of public hospitals to sue drug manufacturers under federal statute); *Sorrell* v. *IMS Health Inc.* (First Amendment challenge to Vermont law restricting access to prescription information); *American Electric Power Co*. v. *Connecticut* (federal common law claims brought by States to stop emissions on public nuisance theory).

And it simply is not credible to argue that the cases in which plaintiffs prevailed were less significant than those in which business parties prevailed. As the Court explained in *Staub*, a ruling for the defendant in that case would have enabled employers to insulate themselves from liability by separating supervisory personnel from those responsible for personnel decisions.[5] Similarly, rulings for the defendants in *Kasten* and *Thompson* would have significantly curtailed protections against retaliation. And if the business parties had prevailed in *Matrixx* and *Halliburton*—the two securities cases that plaintiffs won—plaintiffs would have faced new hurdles in asserting such claims. Finally, a different outcome in *Smith* would have meant that a decision by a federal court not to certify a class action would have precluded any attempt to bring the same claim in state court; under the Court's decision in *Smith*, by contrast, plaintiffs are able to take a second bite at the class action apple.

**The Supreme Court's Rulings In *Walmart, Concepcion, Janus Fund, McIntyre Machinery,* and *Goodyear* Overturned Lower Court Decisions That—If Upheld—Would Have Radically Changed The Law**

Some observers contend that several of the Court's decisions this Term effected a dramatic change from prior precedent and have significantly changed the law so as to favor business defendants. In fact, **it was the positions of the plaintiffs in these cases that departed very substantially from existing law. It is not at all surprising that the Court refused to embark on the radical courses urged by the plaintiffs in these cases.**

*Wal-Mart Stores, Inc.* v. *Dukes*

The *Wal-Mart* case involved an attempt to certify under Federal Rule of Civil Procedure 23 a class action that was literally unprecedented in its size and in the nature and diversity of claims sought to be asserted—and very far from what the drafters of that Rule had in mind when it was promulgated in 1966 as well as beyond the contemplation of those who drafted the amendments to the Rule in subsequent years. The Court refused to endorse this broad expansion of the class action rule.

The class certified by the lower courts consisted of 1.5 million present and former Wal-Mart female employees who worked in 3,400 stores across the country—every woman who worked at a Wal-Mart store since December 26, 1998—who allegedly were subject to discrimination in pay or promotion decisions on the basis of their gender. This claim did not rest on any allegation of an express corporate policy discriminating against women. Rather, as the Court explained, the plaintiffs "claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. And, [the plaintiffs] say, because Wal-Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment."[6] Thus, the plaintiffs' contention was that every female Wal-Mart employee was subject to discrimination, and they sought to

[5] Slip op. 8.

[6] Slip op. 4 (citation omitted).

"litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action."[7]

The Court addressed two legal issues related to the lower courts' decisions that the case could proceed as a class action. First, it held—unanimously—that the claims for backpay could not be litigated on a class-wide basis under Rule 23(b)(2), which allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The Justices all agreed that the district court violated the plain language of Rule 23(b)(2) by certifying the class, because the monetary relief sought by the plaintiffs was based on "individualized" claims,[8] and was "not merely incidental to any injunctive or declaratory relief that might be available."[9] They explained that the scope of this part of Rule 23 is appropriately narrow because it authorizes "mandatory classes" that permit "no opportunity for . . . class members to opt out, and does not even oblige the District Court to afford them notice of the action."[10] The lower courts' expansion of the scope of Rule 23(b)(2), the Court found, "creates perverse incentives for class representatives to place at risk [the absent class members'] potentially valid claims for monetary relief."[11] Thus,

> "[i]n this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims . . . . created the possibility . . . that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have."[12]

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[7] *Id*.

[8] *Id*. at 20.

[9] *Id*. at 1 (Ginsberg, J., dissenting).

[10] *Id*. at 22.

[11] *Id*. at 24.

[12] *Id*. (emphasis in original).

The Court also rejected the Ninth Circuit's proposed **"**Trial by Formula," which would have involved extrapolation of the results of a handful of sample trials to create a class-wide damages fund. This **"**novel project**"** would have precluded the company from raising its individual defenses to the claims of each class member—a basic right under Title VII and due process principles. As the Court explained, Wal-Mart was entitled "to individualized determinations of each employee's eligibility for backpay."[13]

The second issue considered by the Court was whether the lower courts correctly applied Rule 23's requirement that in order to be certified as a class action, the plaintiff must show that "there are questions of law or fact common to the class." Rule 23(a)(2). Quoting an opinion for the Court authored by Justice Stevens nearly thirty years ago, also in a case involving alleged employment discrimination, the Court stated that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[14]

Again quoting from Justice Stevens' opinion, the Court stated that in order to establish the requisite commonality in the employment discrimination context, the parties seeking to become class representatives must bridge the "'wide gap'" between those individuals' claims of discrimination and "'the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims.'"[15] In the absence of an allegedly biased testing procedure, "'[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class . . . if the discrimination manifested itself in hiring and promotion practices in the same general fashion.'"[16]

Here, the Court said, the necessary "significant proof" was lacking. To begin with, "[t]he only evidence of a 'general policy of discrimination' respondents produced was the testimony of Dr. William Bielby, their sociological expert." He testified

> "that Wal-Mart has a 'strong corporate culture,' that makes it '"vulnerable"' to 'gender bias.' He could not, however, 'determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.'"[17]

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[13] *Id.* at 26-27.

[14] *Id*. at 9 (quoting *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 157 (1982)).

[15] *Id*. at 12 (quoting *Falcon*, 457 U.S. at 157).

[16] *Id*. at 12-13 (quoting *Falcon*, 457 U.S. at 159 n.15).

[17] *Id*. at 13 (citation omitted).

That wide range, the Court stated, "is worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[18]

Next, the Court recognized that Wal-Mart's delegation of discretion to its store managers could provide the basis for a disparate impact claim under Title VII—"since 'an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.'"[19] But the plaintiffs could not satisfy the commonality requirement on this basis because they did not identify "a common mode of exercising discretion that pervades the entire company."[20]

The plaintiffs' statistical evidence was flawed because "'[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.' A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[21] "Other than the bare existence of delegated discretion, [plaintiffs] have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[22]

The Court also found that the plaintiffs' anecdotal evidence was far weaker than that introduced in prior cases finding company-wide discrimination.[23] It concerned only 1 out of every 12,500 class members, and related to only some 235 out of Wal-Mart's 3,400 stores.[24] Moreover, as the Washington Post explained in an editorial supporting the Court's decision, the Court found that "[o]f the 120 or so affidavits submitted by women alleging to have been wronged, more than half came from six states; there were no claims of wrongdoing in 14 states where employees would nevertheless be included in the class action."[25]

Justice Ginsburg's dissenting opinion disagreed with the majority's assessment of the weight of the evidence of a policy of discrimination, and seemed to argue that Wal-Mart's system of permitting managers to exercise discretion was by itself sufficient to permit the case to move

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[18] *Id*. at 14.

[19] *Id*. at 15.

[20] *Id*.

[21] *Id*. at 16.

[22] *Id*. at 17.

[23] *Id*. at 17-18.

[24] *Id*.

[25] *A Sensible Call on the Wal-Mart Class Action Suit*, Wash. Post, June 21, 2011, at A16.

forward.[26] If that were true, however, any company that delegates employment decisions to its local managers could be subjected to a class action on behalf of all present and former employees in a protected class as long as a disparate impact on a nationwide basis can be shown.

That would open the door to nationwide class actions against numerous employers without any evidence showing that individual managers are in fact exercising their discretion in a discriminatory manner. Some evidence establishing that discrimination is widespread, and related in some way at the corporate level, also must be required. And the Supreme Court majority was surely correct in concluding that the very slim body of evidence adduced by the plaintiffs simply was not sufficient to permit this gargantuan class action to move forward. As the *Oregonian* concluded in its editorial:

> "Precedent-setting court cases can't be decided based on loose impressions of discrimination, multiple anecdotes about sexist managers, or even statistical samples that suggest bias. Judges and juries need to have 'the goods' on a company, or courts of law devolve into courts of public opinion. In *Wal-Mart v. Dukes*, the plaintiffs' lawyers aimed for the largest possible payout from the nation's biggest retailer for the largest pool of sympathetic workers. Quite simply, the lawyers overreached and fell short."[27]

*AT&T Mobility LLC* v. *Concepcion*

*Concepcion* involved the enforceability of the arbitration provision in the contract between AT&T and its cell phone customers.

Arbitration has long been recognized as a fair, speedy, and efficient means of resolving disputes. Although the roots of arbitration lie in the resolution of disputes between businesses, the use of arbitration to resolve employment disputes has a long history as well. More recently, arbitration has been utilized as an effective and less costly means of resolving disputes between businesses and their customers.

Congress enacted the Federal Arbitration Act (FAA) in 1925 to addressthe courts' hostility to enforcing arbitration clauses. The statute permits the States to apply general contract principles to determine whether an arbitration agreement is valid and enforceable, but invalidates state law rules that target arbitration agreements for invalidation or special burdens or that otherwise conflict with the federal statute.

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[26] *See* slip op. 11 (Ginsburg, J., dissenting).

[27] *Wal-mart, the Supreme Court, and fair play*, Oregonian, June 21, 2011 (emphasis added). The *Chicago Tribune* reached the same conclusion: "The Supreme Court said, not so fast: Combining the disparate claims into one case would not do justice, either for the company or the allegedly wronged employees. The court ruled that a class-action case requires more evidence of systemic conduct that harmed a broad group of people. Moreover, a class-action judgment in this case would improperly lead to a one-size-fits-all remedy. If some women were seriously wronged, they might deserve significantly more compensation than others, the court said. For the sake of expediency — and for a massive payday? — plaintiff's attorneys gave short shrift to those differences and pursued this mass class action." *Class-action sanity Wal-Mart wins — and workers do, too* (June 24, 2011).

State courts have used the authority permitted under the FAA to apply general contract principles—in particular the general principle invalidating unconscionable provisions in contracts of adhesion—to ensure that consumers and employees are not subjected to unfair arbitration clauses. There are literally hundreds of decisions invalidating on unfairness grounds arbitration provisions that, for example, subject customers or employees to high costs or burdensome travel requirements in order to pursue arbitration; limit punitive damages or other remedies to which an individual is entitled; or specify procedures for selecting the arbitrator or conditions that might create a biased decisionmaking process.[28]

The arbitration provision at issue in *Concepcion* was specially designed to provide AT&T's consumers with an efficient, fair, and low-cost dispute-resolution system. A federal district judge described AT&T's arbitration agreement as containing "perhaps the most fair and consumer-friendly provisions this Court has ever seen."[29] Under AT&T's provision,

- The customer pays no arbitration costs as long as the claim is not frivolous.
- Regardless of amount of the customer's claim, AT&T must pay the customer a minimum of $7,500 (now $10,000) plus double attorneys' fees if the arbitrator awards the customer more than AT&T's final settlement offer.
- The arbitrator may award the customer any form of individual relief (including punitive damages, statutory damages, attorneys' fees, and injunctions) that the customer could obtain in court. AT&T waives any right to obtain its own attorneys' fees if it wins the arbitration, even if it could have done so in court.
- The customer has the option of filing suit in small claims court rather than pursuing arbitration.
- Arbitration takes place in the customer's home county, and for claims under $10,000 the customer may choose whether the arbitration will be in person, by telephone, or by mail.
- Proceedings (including the process for selecting the arbitrator) are governed by consumer arbitration rules of the independent, non-profit American Arbitration Association—which has been recognized as a neutral and fair arbitration administrator.
- Consumers and their attorneys are not required to keep arbitration results confidential, and may bring issues to the attention of federal, state or local enforcement agencies or to other similarly-situated AT&T customers.

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[28] *See, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Carll v. Terminix Int'l Co.*, 793 A.2d 921 (Pa. Super. Ct. 2002); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (1997); *Philyaw v. Platinum Enters.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001); *Pinedo v. Premium Tobacco, Inc.*, 102 Cal. Rptr. 2d 435 (Cal. Ct. App. 2000); *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); *Missouri ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006); *Murphy v. MidWest Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003); *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); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Anderson v. Ashby*, 873 So. 2d 168 (Ala. 2003).

[29] *Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661 (C.D. Cal. June 18, 2009).

The AT&T clause requires consumers to proceed individually, and prohibits class actions.

The enforceability of this arbitration provision has been recognized in court decisions applying the laws of at least 22 States—Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, Missouri, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, and West Virginia—and the District of Columbia.[30] Courts in most of the other States have not addressed the question.

The *Concepcion* case arose in California, and the lower federal courts there held the arbitration provision unenforceable, despite its unique features, because of a California Supreme Court ruling barring the enforceability of arbitration provisions that do not permit class actions—one of the very few state courts to reach that result.

The Supreme Court held that this California rule declaring the AT&T clause unenforceable is preempted by the FAA. It rested its decision on a principle set forth in a 24-year-old decision written for the Court by Justice Thurgood Marshall, which stated that a State may not "'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'"[31]

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[30] AT&T's arbitration clause has been enforced under the laws of seven States. **Alabama:** *Powell v. AT&T Mobility*, 742 F. Supp. 2d 1285 (N.D. Ala. 2010). **Arkansas:** *Davidson v. Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007). **Florida:** *Cruz* v. *Cingular Wireless, LLC*, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), *appeal pending*, No. 08-16080-C (11th Cir.). **Michigan:** *Francis v. AT&T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009). **Missouri:** *Fay v. New Cingular, Wireless, PCS, LLC*, 2010 WL 4905698 (E.D. Mo. Nov. 24, 2010), *appeal pending*, No. 10-3814 (8th Cir.). **Texas:** *Johnson v. AT&T Mobility, L.L.C.*, 2010 WL 5342825 (S.D. Tex. Dec. 21, 2010). **West Virginia**: *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679 (N.D. W. Va. 2010); *Strawn v. Cingular Wireless LLC*, 593 F. Supp. 2d 894 (S.D. W. Va. 2009); *see also State ex rel. AT&T Mobility, LLC v. Shorts*, 703 S.E.2d 543 (W. Va. 2010) (holding that AT&T's arbitration agreement cannot be deemed unenforceable under West Virginia law simply because it requires arbitration on an individual basis).

Courts applying the laws of 15 States and the District of Columbia have upheld class waivers in the context of arbitration provisions that lack some or all of the pro-consumer features of AT&T's provision. **Colorado:** *Ornelas v. Sonic Denver T, Inc.*, 2007 WL 274738 (D. Colo. Jan. 29, 2007). **Delaware:** *Edelist* v. *MBNA Am. Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001). **District of Columbia:** *Szymkowicz v. DirecTV, Inc.*, 2007 WL 1424652 (D.D.C. May 9, 2007). **Georgia:** *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118 (11th Cir. 2010); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005). **Illinois:** *Crandall v. AT&T Mobility LLC*, 2008 WL 2796752 (S.D. Ill. July 11, 2008). **Louisiana:** *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004). **Maryland:** *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005). **Mississippi**: *Anglin v. Tower Loan of Mississippi, Inc.*, 635 F. Supp. 2d 523 (S.D. Miss. 2009). **New York:** *Reid v. Supershuttle Int'l, Inc.*, 2010 WL 1049613 (E.D.N.Y. Mar. 22, 2010); *Hayes v. County Bank*, 811 N.Y.S.2d 741 (N.Y. App. Div. 2006). **South Dakota:** *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918 (N.D. 2005). **Ohio:** *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758 (N.D. Ohio 2009). **Oklahoma:** *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305 (E.D. Okla. 2005). **Pennsylvania:** *Cronin v. CitiFinancial Servs., Inc.*, 352 F. App'x 630, 635-36 (3d Cir. 2009). **Tennessee:** *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001). **Utah:** *Miller v. Corinthian Colleges, Inc.*, 2011 WL 652478 (D. Utah Feb. 15, 2011). **Virginia:** *Halprin v. Verizon Wireless Servs., LLC*, 2008 U.S. Dist. LEXIS 28840 (D.N.J. Apr. 8, 2008) (applying Virginia law).

[31] Slip op. 7 (quoting *Perry* v. *Thomas*, 482 U.S. 483, 493 n.9 (1987)).

The Court cited several examples of state laws or judicial decisions that would impermissibly frustrate the federal goal of permitting arbitration agreements by imposing procedural requirements incompatible with the unique nature of arbitration:

- "a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery";

- "a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence";

- a rule invalidating arbitration clauses unless they permit "an ultimate disposition by a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)."[32]

"Such examples are not fanciful," the Court said, "since the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy."[33]

The Court concluded that a state-law rule that "interferes with the fundamental attributes of arbitration . . . creates a scheme inconsistent with the FAA."[34] Significantly, the plaintiffs in *Concepcion* endorsed this conclusion in their brief, stating that a state law requiring "'procedures incompatible with arbitration . . . would be preempted by the FAA.'"[35]

The whole question in the case, therefore, was whether requiring class-action procedures is "incompatible with arbitration." The Court found that it was, for three basic reasons. *First*, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than finality. *Second*, class arbitration *requires* procedural formality, while the entire purpose of arbitration is to permit parties to dispense with formality, subject to supervision pursuant to legitimate application of state unconscionability law. *Third*, class arbitration greatly increases risks to defendants, and would lead to the elimination of arbitration as a means of redress for individual consumers.

The Court rejected the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."[36] It said: "States cannot

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[32] *Id.* at 8.

[33] *Id.*

[34] *Id*. at 9.

[35] *Id*. at 8 (quoting Respondents' Brief at 32).

[36] *Id*. at 17.

require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[37] Moreover, the Court pointed out,

> "the ***claim here was most unlikely to go unresolved***. . . . [T]he arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and ***the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole***. Indeed, the District Court concluded that the Concepcions were ***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.'"[38]

The Court's ruling thus invoked federal law to preclude California—which already had established itself as an outlier by invalidating an arbitration clause that more than 20 States would uphold—from fundamentally changing the nature of arbitration. And it made that decision in the context of an arbitration clause that the lower courts had determined (in this very case) would provide a better means of compensating aggrieved customers than the class action system. Far from a radical ruling by the Supreme Court, the decision in *Concepcion* rejected an erroneous interpretation of the Federal Arbitration Act that deviated significantly from the Court's precedents and would have had the practical effect of eliminating arbitration as a fair and economical alternative to the litigation system.

*Janus Capital Group, Inc.* v. *First Derivative Traders*

The Supreme Court's decision in *Janus Capital Group v. First Derivative Traders* reaffirms longstanding limits on the scope of the private action that courts have implied under Section 10(b) of the Securities Exchange Act of 1934. In a series of decisions stretching back to 1994, the Supreme Court has made clear that liability in these private actions is limited to persons who make a false statement to investors (or who omit a material fact necessary to make a statement made not misleading) and those who are liable under section 20(a) of the Act—the "control person" standard—for statements that are made by others.[39] In *Janus Capital Group*, the Court confirmed that this well-settled limitation cannot be circumvented by allegations that a defendant "caused" or "created"—but did not itself make—false statements by a third party.

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[37] *Id.*

[38] Slip op. 17-18 (emphasis added).

[39] Section 20(a) of the Act establishes liability for "[e]very person who, directly or indirectly, controls any person liable" for violations of the securities laws. 15 U.S.C.A. § 78t(a).

The Court's first ruling in this line of cases came in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.*, which held that Section 10(b)'s private right of action does not authorize suits against aiders and abettors.[40] The Court reaffirmed this principle in 2008 in *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, upholding dismissal of a suit alleging that "entities who, acting both as customers and suppliers, agreed to arrangements that allowed the investors' company to mislead its auditor and issue a misleading financial statement."[41] The Court held that dismissal of the complaint was proper because the public could not have relied on the entities' undisclosed deceptive acts.[42]

*Janus Capital Group* presented a similar question. The plaintiffs, investors in a mutual fund holding company, sued the company and its subsidiary, the funds' investment advisor, alleging that they had "caused" the funds to issue allegedly misleading prospectuses. The prospectuses represented that the funds were not suitable for "market timing," a trading strategy that is legal but harms other fund investors, and that the adviser would curb the practice. The investors claimed that these representations were untrue and that they lost money when the existence of market timing became public.

As it did in *Central Bank* and *Stoneridge*, the Court adhered closely to the text of the statute and SEC rule in deciding the case. The SEC rule provides that a person is liable if he "makes" a false statement, and the Court observed that, as a grammatical matter, "[o]ne 'makes' a statement by stating it."[43] The "maker of a statement" is therefore "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."[44] The Court illustrated this common-sense approach by analogy to a speaker's control over, and responsibility for, the content of a speech—even a speech that someone else has drafted. Because the holding company and the adviser did not have "ultimate authority" over the statements in the funds' prospectuses (rather, the funds did), the Court ruled that they were not subject to private suit for the statements.

The practical effect of a contrary ruling would have been to eviscerate the clear line established in *Central Bank* and *Stoneridge*. Because a plaintiff would be able to assert a claim against an aider and abettor simply by changing the language used to describe his conduct—characterizing him not as an aider and abettor but as someone who "caused" the issuance of a false statement—acceptance of the plaintiffs' argument would have "substantially undermin[ed]" the Court's precedents rejecting such suits.[45]

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[40] 511 U.S. 164 (1994),

[41] 552 U.S. 148, 152-53 (2008).

[42] *Id.* at 165.

[43] Slip Op. at 6.

[44] *Id.*

[45] *Id.* at 7.

That would have led to a flurry of litigation against companies for their ordinary business transactions, on the theory that a third party made a false statement incorporating information about the transaction, and against accountants and attorneys whose clients misuse their services. Plaintiffs would argue that the extent of these defendants' involvement in the allegedly false statement is a factual question that could only be resolved at trial. That is the precise result that the Court sought to preclude in *Stoneridge* and *Central Bank*, a vague liability standard that would allow plaintiffs to sweep innocent third parties into this expensive class action litigation.

*Janus* is a narrow decision. It does not affect the ability of investors to sue those who make false statements; nor does it necessarily foreclose suits under section 20(a) alleging that a defendant legally controlled a speaker. Rather, the Court adhered to its prior precedent refusing to expand liability beyond the actual maker of a false statement.

*J. McIntyre Machinery, Ltd. v. Nicastro* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*

In this pair of decisions, the Supreme Court applied bedrock principles of personal jurisdiction and constitutional due process that are at least as old as its landmark ruling in *International Shoe Co. v. Washington* over half a century ago.[46]

Jurisdiction over foreign defendants can come in two forms: specific and general.[47] "A court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[48] "Specific jurisdiction, on the other hand, is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'"[49] *Goodyear* addresses the standard for general jurisdiction and *McIntyre* concerns specific jurisdiction.

In *Goodyear*, two children from North Carolina were killed in a bus accident that occurred near Paris, France. The children's parents filed suit in North Carolina state court against Goodyear and three of its foreign subsidiaries, claiming that defective tires manufactured by the subsidiaries had caused the accident. The U.S. parent did not contest jurisdiction, but the foreign subsidiaries did.[50]

Because the bus accident occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, there was no dispute that "North Carolina courts lacked specific

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[46] 326 U.S. 310 (1945).

[47] *Goodyear* slip op. at 2.

[48] *Id.* at 2 (quoting *International Shoe Co. v. Washington*, 326 U. S. 310, 317 (1945)).

[49] *Id.* (quoting von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136 (1966)).

[50] *Goodyear* slip op. at 4.

jurisdiction to adjudicate the controversy."[51] Moreover, the Supreme Court emphasized the lack of connections between the subsidiaries and the United States: they "are not registered to do business in North Carolina"; "have no place of business, employees, or bank accounts in North Carolina"; "do not design, manufacture, or advertise their products in North Carolina"; and "do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers."[52] Nonetheless, the North Carolina Court of Appeals concluded that general jurisdiction existed because other Goodyear affiliates had distributed a small percentage of the subsidiaries' tires—but not the type of tire involved in the accident—within North Carolina. The state court reasoned that jurisdiction therefore was permissible because "petitioners placed their tires 'in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina.'"[53]

Justice Ginsburg, writing for a unanimous Court, rejected this reasoning, holding that a "connection so limited between the forum and the foreign corporation" is "an inadequate basis for the exercise of general jurisdiction."[54] In particular, the Court explained, the "stream-of-commerce" doctrine relied on by the state court, while potentially relevant to the exercise of specific jurisdiction, cannot alone establish the type of "'continuous and systematic' affiliation" necessary to empower state courts "to entertain claims unrelated to the foreign corporation's contacts with the State."[55]

The Court rested this ruling on a straightforward application of its "textbook" 1952 decision in *Perkins v. Benguet Consolidated Mining Co.*,[56] and its equally well-established decision in *Helicopteros Nacionales de Colombia, S. A. v. Hall*.[57] All the Justices agreed that, "[m]easured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction."[58] The Court thus sensibly rejected "the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals," which would have rendered "any substantial manufacturer or seller of goods . . . amenable to suit, on any claim for relief, wherever its products are distributed."[59]

In *McIntyre*, the plaintiff had seriously injured his hand in New Jersey while operating a machine manufactured in England by the defendant, a corporation that was incorporated and had its

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[51] *Id.* at 2-3.

[52] *Id.* at 4.

[53] *Id.* at 5.

[54] *Id.* at 3.

[55] *Id.* at 3, 10-11.

[56] 342 U. S. 437 (1952).

[57] 466 U. S. 408, 414 nn. 8, 9 (1984).

[58] *Goodyear* slip op. at 13.

[59] *Id.* at 12-13.

operations in England. Although the defendant had not "advertised in, sent goods to, or in any relevant sense targeted the State," the Supreme Court of New Jersey nonetheless deemed the defendant subject to the jurisdiction of the New Jersey courts because it "knew or reasonably should have known 'that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states'" and because it "failed to 'take some reasonable step to prevent the distribution of its products in this State.'"[60]

Six justices voted to reverse that decision. Because the votes of Justices Breyer and Alito were critical to the Court's determination—and because their rationale is narrower than that of the four-Justice plurality (which joined an opinion written by Justice Kennedy)—Justice Breyer's opinion for himself and Justice Alito is the controlling ruling in the case.[61]

Justice Breyer explained that the Supreme Court of New Jersey had relied on three facts: that the defendant's American distributor had sold and shipped one machine to a New Jersey customer; that the defendant wanted to sell its machines in the United States; and that the defendant's representatives had attended trade shows in various U.S. cities. He pointed out that "none of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient" to permit an assertion of jurisdiction.[62] To emphasize the point, Justice Breyer pointed to separate opinions by Justices Brennan, Stevens, and O'Connor "strongly suggest[ing] that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place."[63]

The plaintiff might have been able to adduce other facts in support of jurisdiction, Justice Breyer stated, and he noted that Justice Ginsburg's dissent "considers some of those facts."[64] But Justice Breyer noted that "the plaintiff bears the burden of establishing jurisdiction" and "t[ook] the facts precisely as the New Jersey Supreme Court stated them."[65] He concluded that "on the record present here, resolving this case requires no more than adhering to our precedents."[66]

The four-Justice plurality took the view that the "principal inquiry" for establishing personal jurisdiction "is whether the defendant's activities manifest an intention to submit to the power of

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[60] *McIntyre* slip op. 2-4.

[61] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

[62] Slip op. 2 (Breyer, J., concurring in the judgment).

[63] *Id.*

[64] *Id. at 3.*

[65] *Id. at 3-4.*

[66] *Id. at 4.*

a sovereign."[67] As a "general rule," the plurality elaborated, quoting a 1958 precedent, this standard "requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum state.'"[68]

In rejecting the "foreseeability" rule that some justices had favored in a past case, the plurality noted the possible "undesirable consequences" of its adoption for small businesses: "The owner of a small Florida farm might sell crops to a large nearby distributor . . . who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town."[69]

Justice Ginsburg, writing on behalf of herself and Justices Sotomayor and Kagan, rejected the plurality's approach, stating that "reason and fairness"—not the defendant's consent to a sovereign's assertion of jurisdiction—are the critical factors for purposes of the due process inquiry.[70] In her view, the assertion of jurisdiction over the defendant complied with those principles.

But this debate between the plurality and dissent remains to be resolved by the Court in a future case, however. For now, it is Justice Breyer's ruling—which rests squarely on longstanding precedent—that must be applied by the lower courts.

**The Committee Should Be Extremely Skeptical Of Speculation Concerning The Breadth Of *Walmart*, *Concepcion*, *Janus Fund*, *McIntyre Machinery*, and *Goodyear***

The breadth of these rulings will be debated in dozens, if not hundreds, of cases before the federal district courts and courts of appeals, and it will take several years for the lower courts to render a sufficient number of decisions to determine what the impact of the rulings will be. One thing is certain, however: predictions that the Court's decisions will dramatically narrow the ability of plaintiffs with legitimate claims to seek judicial redress are unlikely to be correct.

The example of the Court's decision two years ago in *Ashcroft* v. *Iqbal* demonstrates why. That case involved an interpretation of Federal Rule of Civil Procedure 8, which governs the specificity required for a complaint to withstand a motion to dismiss. The Supreme Court stated that a court assessing the sufficiency of a motion to dismiss should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported

[67] *Id.* at 7.

[68] *Id.* at 7 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

[69] *Id.* at 10.

[70] Slip op. at 11 (Ginsburg, J., dissenting).

by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[71]

Although the principles set forth in *Iqbal* rested on longstanding precedent of the Supreme Court and courts of appeals, the Supreme Court's decision was characterized by some observers as a dramatic change in the law that would significantly increase the burden on plaintiffs and lead to a much greater rate of dismissal for cases filed in federal court. Indeed, legislation was introduced to overturn the Court's decision and hearings were held in both the Senate and House, but the legislation was not enacted.

The Federal Judicial Center commissioned an independent study of the question (examining decisions during the period beginning three years before the decision and ending eighteen months after the ruling). That study concluded—notwithstanding the predictions at the time of the Court's decision—that *Iqbal* has had little if any impact on the rate at which motions to dismiss are granted. The Federal Judicial Center report summarized its findings as follows:

- "There was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim";

- "In general, there was no increase in the rate of grants of motions to dismiss without leave to amend. There was, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases";

- "Only in cases challenging mortgage loans on both federal and state law grounds did we find an increase in the rate of grants of motions to dismiss without leave to amend. Many of these cases were removed from state to federal court. This category of cases tripled in number during the relevant period in response to events in the housing market . . . There is no reason to believe that the rate of dismissals without leave to amend would have been lower in 2006 had such cases existed then."

- "There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case." [72]

Today's predictions about the impact of this Term's decisions are as unreliable as those regarding the effect of *Iqbal*. The plain fact is that no one knows how the lower courts will resolve the disputes between plaintiffs and defendants regarding these issues. Certainly, there is no consensus that the Court's decisions will dramatically alter pre-existing legal standards in a manner that will prevent vindication of legitimate claims. The reactions to the *Wal-Mart* and *Concepcion* decisions demonstrate the uncertainty about the ultimate impact of the rulings.

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[71] 129 S. Ct. 1937, 1950 (2009).

[72] Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, *Motions to Dismiss for Failure to State a Claim After* Iqbal at vii (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

*Wal-Mart Stores, Inc.* v. *Dukes*

Much of the early commentary on the *Wal-Mart* decision has taken the view that the Court's ruling will not affect traditional class actions, but rather is linked directly to the unprecedented size and scope of the class and the plaintiffs' failure to supply plausible evidence of a policy of discrimination:

- Professor John C. Coffee observed that *Wal-Mart* involves "an unusual set of facts"—alleged discrimination across almost 3500 stores based on the delegation of "subjective discretion over both employment and promotion decisions" to "the administrator of each."[73]

- According to one plaintiffs' class action lawyer, the Court's decision "is really a reflection of the fact that this case was several steps beyond what was possible under Rule 23. . . . I think in a lot of ways this is a unique situation. I don't know that you are going to see this referred to a lot, frankly, in other cases."[74]

- Another prominent class action litigator stated that the ruling's reach may "be limited to the facts in the . . . case," and it should not affect "cases arising in the normal business context."[75]

The attorneys representing the *Wal-Mart* plaintiffs have stated that the Court's decision will not preclude them from vindicating the interests of their clients. One of the plaintiffs' lawyers said that, "[t]his case is not over. Wal-Mart is not off the hook," because the plaintiffs plan to bring more focused class-action claims and seek intervention by government regulators.[76] Another explained, "[i]nstead of one case, this case will be splintered into many pieces"—"we could end up with some cases framed store by store or region by region."[77] As the *Washington Post* concluded in its editorial supporting the Court's ruling, the decision is "likely to lead to some welcome developments, including smaller (although not necessarily small) and more cohesive class-action suits."[78]

*AT&T* v. *Concepcion*

Although the Court's ruling in *Concepcion* was greeted initially by concerns that it would "end class actions," more sober analysis has led to a rejection of that hyperbolic conclusion.

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[73] *See* BNA, *Discrimination Suit Against Wal-Mart Not Appropriate for Class Certification* (June 20, 2011).

[74] *Id*.

[75] Tony Mauro, *Justices hand Wal-Mart big win in class action battle*, Nat'l L. J., June 20, 2011.

[76] *Id*.

[77] Stephanie Clifford, *Despite Setback, Plaintiffs Vow To Continue Pursuing Cases*, N.Y. Times, June 21, 2011, B1, B1, B4.

[78] Wash. Post, *supra*, at A16 (emphasis added).

To begin with, most class actions do not arise in a context in which there is a contractual relationship between the plaintiff and defendant—for example, the myriad class actions filed against BP following the Gulf oil spill and virtually all class actions invoking the federal securities laws. In the absence of a contractual relationship, there cannot be an arbitration clause and *Concepcion* therefore cannot apply. Paul Bland—a lawyer at Public Justice (formerly Trial Lawyers for Public Justice) who is one of the leaders of the effort to invalidate arbitration clauses—wrote a memorandum to "class action attorneys" stating that "there are quite a few class actions where there is no written contract," such as "when a defective product is sold over-the-counter at a pharmacy," and that "[c]lass actions can certainly proceed in that kind of circumstance, notwithstanding *AT&T Mobility* [*v. Concepcion*]."[79]

Next, state courts retain authority to apply general principles of contract fairness to invalidate unjust arbitration provisions. In particular, nothing in the Supreme Court's ruling disturbs its prior cases holding that States may refuse to enforce arbitration provisions that run afoul of a state law principle that unconscionable contract provisions are invalid (so long as that principle is applied generally to a broad range of contract provisions). For example, the Court's decision would not preclude state courts from refusing to enforce arbitration clauses that impose high costs on consumers, require them to travel to inconvenient locations, or prohibit consumers from recovering punitive damages or attorneys' fees.

Plaintiffs' lawyers argue that there are other grounds for limiting *Concepcion*. Arthur Bryant, another lawyer at Public Justice, contends that the *Concepcion* ruling "has lots of limitations," and that "the reports of class actions' death are greatly exaggerated."[80]

- Bryant argues that *Concepcion*'s holding is limited to agreements to arbitrate on an individual basis that, like AT&T's clause, have affirmative incentives for consumers and their attorneys to arbitrate small claims. Thus, he contends, less consumer-friendly arbitration clauses may still be invalidated under state law, and restrictions under federal law remain valid. Public Justice also asserts that states may refuse to enforce an arbitration clause if the consumer were provided insufficient notice of the clause or was defrauded or coerced into or mistakenly agreed to it.

- Another attorney asserts in a recent article that the Supreme Court "was not presented with — and the five-justice majority did not reach — the issue of most importance to litigants throughout the country: whether state unconscionability laws can void an arbitration clause that allegedly works as a de facto exculpation clause because it makes individual arbitration too costly to incentivize small-dollar claimants to sue, thereby effectively preventing consumers from enforcing their contractual or statutory rights." He explained that the Court did not have to reach the issue because "because AT&T

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[79] Paul Bland, *The* AT&T Mobility v. Concepcion *Decision: Now What?* available at http://www.publicjustice.net/Repository/Files/ATTMobilityvConcepcionDecision-NowWhat.pdf.

[80] Arthur H. Bryant, *Class actions are not dead yet*, National Law Journal, June 20, 2011, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202497707930&src=EMC-Email&et=editorial&bu=National%20Law%20Journal&pt=NLJ.com-%20Daily%20Headlines&cn=20110620NLJ&kw=Class%20actions%20are%20not%20dead%20yet&slreturn=1&hbxlogin=1.

> Mobility's arbitration procedures gave the plaintiffs a viable arbitration option," but that "[t]here are good grounds under the decision to believe [that arbitration clauses that lack the characteristics of the AT&T provision] are still voidable under state law."[81]

To be sure, lawyers representing defendants will likely argue that the decision is not subject to these limitations. As with the *Wal-Mart* decision, there is simply no certainty about the scope of the Court's ruling in *Concepcion*. That question must await the outcome of the debate in the lower courts.

**The Court's Decisions Will Benefit Employees, Consumers, Businesses, Investors, And The Entire Economy**

The Court's reaffirmation of prior precedent in the five decisions that I have discussed in detail—*Walmart*, *Concepcion*, *Janus Fund*, *McIntyre Machinery*, and *Goodyear*—will have significant positive effects:

- Avoiding an increase in the drain on corporate resources from unjustified litigation, leaving funds available to expand businesses and create jobs;

- Preventing new disincentives to foreign investment in the U.S. and foreign company participation in U.S. capital markets due to the fear of unjustified litigation exposure; and

- Preserving the availability of arbitration as a fair, efficient dispute resolution system for the vast majority of injuries suffered by ordinary consumers and employees—which are too individualized to vindicate in a class action and too small to attract the services of a lawyer, and that therefore would go unremedied in the absence of an arbitration system.

Critics of these decisions, by contrast, are likely to argue that the Court's rulings will "leave corporations unaccountable" and "prevent injured parties from obtaining compensation." I disagree with those assertions.

*First*, businesses that engage in wrongdoing will remain fully accountable for their actions. Indeed, government enforcement, not private litigation, is the principal deterrent of wrongful conduct. And government authorities have broad power to take enforcement action:

- The plaintiffs' lawyers in *Wal-Mart* have already announced that they are filing numerous claims with the Equal Employment Opportunity Commission, which has authority to bring actions to remedy employment discrimination. State and local governments also have enforcement powers in this area.

- Most consumer-oriented companies are regulated by at least the FTC and/or one other federal agency, as well as by all 50 state attorneys general and a myriad of state agencies and commissions. These agencies routinely pursue allegations of corporate misconduct affecting consumers, especially the use of unfair and deceptive practices.

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[81] Alexander H. Schmidt, *AT&T Mobility Case May Have Limited Application*, Law360, New York (June 21, 2011).

- The SEC has broad power under Section 20(e) of the Securities Exchange Act to proceed against persons and entities that aid and abet violations of Section 10(b) and other provisions of federal securities law, and that power was expanded by Dodd-Frank Act, which lowered the mental state standard the SEC must show to prove an aiding-and-abetting violation from knowledge to recklessness[82] and enhanced the Commission's ability to obtain civil penalties by making them available in administrative actions, thus relieving the Commission of the need to go to court.[83] The Commission has been vigorous in exercising its enforcement authority. In FY2010, the SEC brought 681 enforcement actions in total—a substantial increase over the number in FY2009—involving some $2.8 billion in penalties and disgorgement, and obtained 45 emergency restraining orders and 56 orders to freeze assets.[84] In the *Janus* case itself, government enforcement efforts caused the defendants to reduce their fees by $125 million and to pay investors $100 million.[85] And a spokesperson for the SEC emphasized that the Court's ruling in *Janus* "makes clear that the SEC has tools to pursue such cases."[86]

Moreover, the Court's decisions do not come anywhere close to eliminating all private liability for businesses in the position of the defendants in these cases. For example:

- The *Wal-Mart* lawyers have acknowledged that they plan to bring smaller, more focused class actions.

- AT&T remains subject to liability for claims asserted in arbitration, and nothing prevents an enterprising lawyer from advertising for clients and then using the incentives created by the AT&T clause to obtain settlements well in excess of the value of each client's claim.[87]

*Second*, although private lawsuits—and especially class actions—have been justified historically on the ground that they supplement the deterrent effect of government enforcement, there is little empirical evidence to support that belief. To the contrary, because virtually all class actions settle with no determination of liability, defendants typically view them as a "cost of doing business," not as a badge of wrongdoing. Most of those settlements, moreover, are a product of

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[82] *See* Pub. L. No. 111-203, § 929O.

[83] *See id.* § 929P.

[84] GAO, *Securities and Exchange Commission's Financial Statements for Fiscal Years 2010 and 2009*, GAO-11-202, at 17 (Nov. 15, 2010); *see also* Jan Larsen *et al.*, NERA Econ. Consulting, *SEC Settlement Trends: 2H10 Update* (Dec. 7, 2010).

[85] *See* Slip Op. at 3 n.2.

[86] Greg Stohr, *Mutual Fund Shareholder Suits Curbed by U.S. Supreme Court*, Bloomberg/Businessweek, June 27, 2011.

[87] One group of amici in *Concepcion* noted that after issuing a press release announcing a lawsuit against AT&T, they were contacted by 4,700 customers with similar complaints. See Coneff Amicus Brief at 10. They easily could have initiated arbitration proceedings for each of these 4,700 customers and either obtained acceptable settlements or had the opportunity to pursue the premiums in serial arbitrations.

a business judgment that the costs of litigation and the downside risk of an erroneous verdict favor settlement even when a company believes that it has done nothing wrong.

As a result, the threat that a company might be faced with a class action does not deter any corporate behavior, because such lawsuits are perceived to be unrelated to the propriety of the company's actions. That perception is enhanced by the broad recognition that most class actions are driven by lawyers, rather than by the allegedly-injured class members.

*Third*, expanded liability in private litigation is not always—or even mostly—beneficial to the economy or even to private plaintiffs. Perhaps increased liability in private lawsuits could be justified if the private litigation system were perfectly efficient—so that only wrongdoers were sued, or at least only wrongdoers had to bear the costs associated with litigation. But the reality is that our litigation system imposes very significant transaction costs on innocent defendants—in the form of litigation costs, especially attorneys' fees and discovery costs, which in the era of electronic information can amount to millions of dollars in even routine cases.[88]

In addition, the litigation system is extremely costly and inefficient. Even when suit is brought against an actual wrongdoer, the transaction costs borne by both plaintiff and defendant may be very large in comparison to the benefits obtained by the injured party.

As a result, a decision whether to expand the scope of litigation must consider the costs—in terms of the burdens borne by innocent defendants and the transaction costs borne by all participants—as well as the benefits. And the extraordinary costs associated with class actions mean that the costs and benefits must be weighed especially carefully in that context—an assessment that must take into account the well-documented flaws of the class action system.[89]

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[88] Characterizing electronic discovery as "a nightmare and a morass," one recent report stated that electronic discovery is "enormously expensive and burdensome" and " has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense." American College of Trial Lawyers & Institute for the Advancement of the American Legal System, *Final Report on Joint Project* at 14, 16 (2009).

[89] For example, few class members ever qualify to receive money from a class settlement, either because they don't know about them, fill out complicated claims forms incorrectly, or fail to fill out the forms at all. When the amount that a consumer can expect to receive is small, the percentage of class members who submit claim forms is very low, and many more claims forms are rejected as insufficient. *See, e.g.*, Francis E. McGovern, *Distribution of Funds in Class Actions—Claims Administration*, 35 J. Corp. L. 123 (2009); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 103 ("in many situations individual plaintiffs are able to recover their awards only upon the filing of complex claim forms"); *See, e.g.*, Deborah R. Hensler, *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 184 (RAND Inst. for Civ. Justice 2000), *available at* http://www.rand.org/pubs/monograph_reports/MR969/ (noting that more than 40 percent of claims for one settlement were rejected for insufficient documentation or proof of loss).

Securities class actions are infected by a pervasive pay-to-play culture. As the late Judge Edward Becker of the U.S. Court of Appeals for the Third Circuit explained: "[P]ublic pension funds are in many cases controlled by politicians, and politicians get campaign contributions. The question arises then as to whether the lead plaintiff, a huge public pension fund, will select lead counsel on the basis of political contributions made by law firms to the public officers who control the pension funds and who, therefore, have a lot of say in selecting who counsel is." Edward R. Becker et al., *The Private Securities Law Reform Act: Is It Working?*, 71 Fordham L. Rev. 2363, 2369 (2003). The problem is well documented. See Drew T. Johnson-Skinner, Note, *Paying-to-Play in Securities Class*

These problems are compounded in the case of securities class actions by the basic economic irrationality of the current system for awarding damages in suits involving after-market trading. In the traditional non-securities fraud situation, the wrongdoer is the person who profits from the victim's loss; thus, a successful fraud claim against the wrongdoer leads to a return of those illicit profits to the victim.

Securities class actions, by contrast, usually entail situations in which the "gains" from fraud are received not by the company officials who allegedly committed the fraud (except in insider trading cases), but rather by innocent investors who allegedly sold securities in the secondary market at inflated prices. Thus, "each loser—the buyer or seller disadvantaged by the fraud—is balanced by another winner: the person on the other side of the trade. . . . Yet for obvious reasons, the law makes no effort to force the winners to disgorge their profits in order to fund the losers' recovery."[90]

The consequence of authorizing private claims in this situation is "systematic overcompensation over time to many investors."[91] In particular, diversified, active traders—such as large institutional investors that engage in the lion's share of securities trades—who "lose" on one transaction (*i.e.*, from buying a security at what is alleged to be an artificially inflated price) are eligible to recover damages in a class action while they are, at the same time, permitted to keep gains received from separate "winning" transactions (*i.e.*, from selling a security at what is alleged to be an artificially inflated price).[92] In view of this fundamental flaw, it is difficult to imagine any justification for *expanding* the scope of securities class actions.

The Supreme Court's decisions of course turned on the specifics of the relevant legal principles, not on these policy considerations. But any criticism of those rulings on the ground that they may foreclose private lawsuits must take into account the costs and benefits of those new types

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*Actions: A Look at Lawyers' Campaign Contributions*, 84 N.Y.U. L. Rev. 1725, 1735-37, 1750-51 (2009); Brian C. Mooney, *Campaigns Funded by Firms Politicians Oversee*, Boston Globe, June 8, 2010; Review & Outlook, *Progress on Pay to Play*, Wall St. J., Feb. 12, 2010; Mark Maremont, Tom McGinty, & Nathan Koppel, *Trial Lawyers Contribute, Shareholder Suits Follow*, Wall. St. J., Feb. 3, 2010; Sydney P. Freedberg & Connie Humburg, *Law Firms Jockey for Plum State Board of Administration Job in Florida*, St. Petersburg Times, Dec. 13, 2009; Kenneth Lovett, *Pension Pay-to-Play: Law Firms Give Controllers Big Bucks, Then Got $518M in Fees from State Fund*, N.Y. Daily News, Oct. 8, 2009; Robert Iafolla, *SEC Skips Lawyers in Review of Pay-to-Play Pension Cases*, L.A. Daily J., July 21, 2009. As Professor John Coffee has observed, it is "the equivalent of hanging a 'for-rent' sign out over the pension fund." Joseph Tanfani & Craig R. McCoy, *Lawyers Find Gold Mine in Philadelphia Pension Cases*, Phila. Inquirer, Mar. 16, 2003 (quoting Professor Coffee). This means that lawyers, not clients are once again in charge of securities class actions—the very problem that Congress sought to remedy when it enacted the Private Securities Litigation Reform Act—which means that the filing of a class action may be in the lawyers' self-interest rather than in the interest of the putative plaintiffs. Also, a recent empirical study found that this type of pay-to-play "imposes a real cost on investors" in the form of "greater attorneys' fees." Stephen J. Choi, Drew T. Johnson-Skinner, & A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, Univ. of Mich. L. Sch., John M. Olin Center for Law and Econ. Working Paper No. 09-025, at 37 (January 21, 2010 draft).

[90] Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 Ariz. L. Rev. 639, 646 (1996) (hereinafter "*Capping Damages*").

[91] *Id.*

[92] *See* Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 1, U.S. Chamber Inst. For Legal Reform (2005).

of litigation. There simply is no indication that the expansion of liability principles sought in the cases decided by the Court this Term could be justified by benefits that would exceed the certain costs that increased private litigation would produce.

*Fourth*, private lawsuits—and especially class actions—are not necessarily the best way to compensate injured parties.

The claims that potentially may be asserted by consumers and employees can be grouped in three general categories:

- Relatively small, individualized claims—a $200 overcharge on a bill, for example;
- Larger individualized claims; and
- Claims susceptible to assertion in a class action.

One of the virtues of arbitration is that it provides an easily-accessible and fair dispute resolution system that enables consumers, employees and others to seek redress for small, individualized claims, which is by far the largest category of potential disputes. Without arbitration, those claims simply could not be asserted—hiring a lawyer could not be justified economically, no lawyer would take such a case on a contingent-fee basis, and, because the claims turn on individual facts, they could not be asserted in a class action.[93]

Permitting arbitration agreements only if the parties were permitted to bring class claims—whether in arbitration or litigation—would be the death knell of arbitration programs. The American Arbitration Association requires businesses to pay all but $125 of the $1,700 cost of consumer arbitrations. Businesses would have little incentive to subsidize arbitration—much less provide the affirmative inducements contained in AT&T's arbitration provision—if, at the end of the day, they still would be required to litigate in court every claim pleaded as a class action. Instead, companies would give up on arbitration entirely, burdening the courts with additional cases and leaving customers and employees without any means of vindicating small, individualized claims.[94]

Moreover, studies demonstrate that consumers and employees fare well in arbitration—often much better than they would have done in court:

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[93] One analysis recently concluded that "only about 5% of the individuals with an employment claim who seek help from the private bar are able to obtain counsel," meaning that for 95% of employees seeking to remedy possible wrongdoing, "it looks like arbitration—or nothing." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008) (emphasis added).

[94] Indeed, there is no example of a voluntary arbitration program that permits the assertion of class claims. Critics of arbitration sometimes point to the securities industry arbitration program as a counter-example, but securities firms are forced by regulations to maintain an arbitration program and at the same time permitting the assertion of class actions. See FINRA Rules 12200 (requiring firms to arbitrate individual claims upon customer's request), 12204(d) (forbidding arbitration of claims pleaded as a class actions).

- For example, the National Workrights Institute found that employees were almost 20 percent more likely to win employment cases in arbitration than those litigated in court.[95] Studies of consumer arbitration have also demonstrated positive outcomes for consumers.[96]

- Consumers frequently settle their arbitrations to their satisfaction. The NASD (now FINRA) reports that 62 percent of customers pursuing arbitration settled their arbitrations in 2010, and over 45 percent of the consumers who proceeded to an award received damages. That translates to over 70 percent of consumer-initiated securities arbitrations resolved with at least some recovery for consumers.[97] The most recent statistics provided by the American Arbitration Association show that approximately 60 percent of its consumer arbitrations settle or are withdrawn from administration, and consumers prevail in almost half (48 percent) of the remaining consumer-initiated arbitrations.[98]

Finally, as I have discussed, state courts use their authority to refuse to enforce arbitration clauses that are unconscionable under general principles of contract law. That authority ensures the fairness of arbitration procedures.

The effect of the Supreme Court's decision in *Concepcion* will be to maintain the availability of this important dispute-resolution alternative.

*Fifth*, numerous studies—including one conducted under the auspices of Senator Schumer and Mayor Bloomberg—have found that the risk of unjustified litigation is a key reason why foreign business shy away from the United States.[99] Expanding liability would increase this perception—and drive away the foreign investment and foreign participation in U.S. capital

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[95] National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004). Another recent study confirmed this stark differential, finding that plaintiffs who pursue employment arbitration in the securities industry were 12% more likely to wintheir disputes than employees litigating in federal court in the Southern District of New York. Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J. (Nov. 2003 - Jan. 2004); *see also* 23-9 INSURANCE TIMES (Apr. 29, 2003).

[96] *See* Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG. 34 (Fall 2008). *See also* Searle Center on Law, Regulation, and Economic Growth, *Consumer Arbitration Before the American Arbitration Association Preliminary Report* (finding that consumers win relief in 53% of the cases they file in arbitrations before the American Arbitration Association).

[97] NASD, Dispute Resolution Statistics, available at http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/.

[98] AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, available at http://www.adr.org/si.asp?id=5027.

[99] McKinsey & Co., Report Commissioned by Mayor Michael R. Bloomberg and Senator Charles E. Schumer, *Sustaining New York's and the U.S.' Global Financial Services Leadership* at ii, 75 (2007); Comm. on Capital Mkts. Regulation, *Interim Report* at ix, 2-3,11, 29-34, 71 (Nov. 2006); *see also* Financial Services Forum, *2007 Capital Markets Survey* at 6-8 (2007).

markets that is essential to expand our economy and create jobs. The Court's rulings rejecting dramatically expanded liability will avoid this result.

Thank you again for the opportunity to testify before the Committee today. I look forward to answering your questions.