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Public Justice's Comments to the Federal Communications Commission Regarding the Draft #Solutions2020 Call to Action Plan

January 11, 2016

Public Justice respectfully submits these comments in response to the Commission's December 19, 2016 call for public comments on Commissioner Mignon Clyburn's draft #Solutions2020 Call to Action Plan. The comments exclusively focus on Section 4(a) of the Plan: eliminating forced arbitration in consumer contracts for telecommunications services. Public Justice strongly supports that proposal.

Statement of Interest of Public Justice

Public Justice, P.C., is a national public interest law firm that specializes in pursuing justice for the victims of corporate and government abuse through precedent-setting and socially significant civil litigation.[1] Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. To further its goal of preserving access to justice for consumers, employees, and other persons harmed by corporate misconduct, Public Justice initiated a project devoted to fighting abuses of mandatory arbitration. In connection with our project, Public Justice has litigated, investigated, researched, written and advocated about mandatory arbitration issues far more extensively than any other law firm or organization in the U.S. that represents or advocates for consumers.

Public Justice has represented consumers in a large number of cases challenging abuses of mandatory arbitration clauses, in state and federal courts,

[1] The Public Justice Foundation is a 501(c)(3) non-profit charitable public foundation that supports Public Justice, the law firm. For purposes of these comments, both organizations are referred to interchangeably as Public Justice.

for more than 15 years.[2] Most pertinent to the comments provided here, it has been counsel in a number of cases where courts struck down class action bans in arbitration clauses.[3] Many of these cases were later overturned or held to be

[2] Among the cases that Public Justice has won as lead or co-lead counsel are *Nagrampa v. Mailcoups, Inc.,* 469 F.3d 1257 (9th Cir. 2006) (en banc) (unconscionable to require California resident to arbitrate in Boston, court may consider fact that contract is adhesive even though that applies to the entire contract); *Messina v. N. Cent. Distrib.*, Inc., 821 F.3d 1047 (8th Cir. 2016) (employer waived its ability to compel arbitration by first litigating in court for eight months and trying to transfer the case to another jurisdiction before mentioning the arbitration clause); *Sgouros v. TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016) (arbitration clause struck down because online customers not given adequate notice of the agreement); *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085 (8th Cir. 2007) (finding waiver of right to compel arbitration by a lender); *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 WL 3485933 (W.D. Wash. Oct. 26, 2009) (W.D. Wash. 2009) (where selection of National Arbitration Forum was an integral term of an arbitration clause, the court struck the entire clause, rather than appoint a substitute arbitrator); *FIA Card Services, N.A. v. Weaver, FIA Card Servs., N.A.* 62 So.3d 709 (La. 2011) (arbitration clause not enforced where lender failed to prove the consumer had agreed to it); *Rivera v. American Gen. Fin. Servs., Inc.*, 150 N.M. 398 (2011) (where selection of National Arbitration Forum was an integral term of an arbitration clause, the court struck the entire clause, rather than appoint a substitute arbitrator); *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091 (Ak. 2009) (selective appeal provision unconscionable; case would only be sent to arbitration if employer would pay all substantial costs of arbitration); *Addison v. Lochearn Nursing Home LLC*, 411 Md. 251 (2009) (trial court order compelling arbitration was not an appealable final order); *Cordova v. World Fin. Corp. of NM*, 146 N.M. 256 (2009) (one-sided arbitration provision unconscionable); *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707 (Fl. 2005) (broker waived right to compel arbitration, even though investor proved no prejudice); *Toppings v. Meritech Mortg. Servs., Inc.*, 212 W. Va. 73 (2002) (where a lender's arbitration clause designates an arbitration forum that is paid through a case volume fee system, and the arbitration forum's income is dependent on continued referrals from the creditor, this so impinges on neutrality and fundamental fairness that the clause is unconscionable and unenforceable); *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232 (2001) (credit card issuer's arbitration clause not binding on consumer, FAA did not preempt state procedural law of appealability); *Betts v. Fastfunding The Co., Inc.*, 60 So.3d 1079 (Fla. Dist. Ct. App. 2011) (where National Arbitration Forum dismissed case based upon its own rules, without considering applicable substantive law, the arbitrators' decision was vacated). We have been counsel in two cases in the U.S. Supreme Court involving challenges to mandatory arbitration clauses: *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010); and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). We were counsel in at least half a dozen cases where the U.S. Supreme court denied petitions for *certiorari* where the lower court had struck down abusive arbitration clauses.

[3] *Homa v. Am. Express Co.*, 558 F.3d 225 (3d Cir. 2009); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Masters v. DirecTV, Inc.*, No. 08-55825, 2009 WL 4885132 (9th Cir. Nov. 19, 2009); *Picardi v. Dist. Ct.*, 127 Nev. 106 (2011); *Schnuerle v. Insight Commc'ns Co., L.P.*, 376 S.W.3d 561 (Ky. 2012) (class action ban later upheld on rehearing, based on *Concepcion*); *Scott v. Cingular Wireless*, 160 Wash. 2d 843 (2007); *Fiser v. Dell Computer Corp.*, 2008-NMSC-046,

at least partly abrogated as a result of the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

In addition to directly representing consumers in litigation, Public Justice has also assisted a large number of consumer attorneys, state government attorneys, and consumers with advice and input in their resistance to being forced into arbitration in their own cases. Over the past 18 years, Public Justice attorneys have responded to several thousand such requests for assistance. We have also presented on issues involving mandatory arbitration at more than 100 continuing legal education programs in over 30 states, always talking to participants about what they are seeing in their practices.

Accordingly, Public Justice attorneys have testified at a number of Congressional hearings about abuses of mandatory arbitration clauses. These include: "Examining the CFPB's Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?" Subcom. on Financial Institutions and Consumer Credit, U.S. House of Representatives Committee on Financial Services, May 18, 2016; "S.1782, The Arbitration Fairness Act of 2007," Subcom. on the Constitution of the U.S. Senate Judiciary Committee, Dec. 12, 2007; "Arbitration: Is It Fair When Forced," U.S. Senate Judiciary Committee Oct. 13, 2011; "Arbitration or 'Arbitrary': The Misuse of Arbitration to Collect Consumer Debts," Subcom. on Domestic Policy of the U.S. House Committee on Oversight and Government Reform; "Mandatory Binding Arbitration Agreements: Are They Fair to Consumers?," Subcom. on Commercial and Administrative Law of the U.S. House Judiciary Committee.

In addition, Public Justice attorneys have testified before administrative agencies at both the Federal and state level. Examples of testimony provided include: Field Hearing on Arbitration, Consumer Financial Protection Bureau,

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144 N.M. 464 (2008); *Muhammad v. Cty. Bank of Rehoboth Beach, Delaware*, 189 N.J. 1 (2006); *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *McKenzie v. Betts*, 55 So. 3d 615, 618 (Fla. Dist. Ct. App. 2011), *decision quashed sub nom. McKenzie Check Advance of Florida, LLC v. Betts*, 112 So. 3d 1176 (Fla. 2013); *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, 149 N.M. 681 (2011), *aff'd on other grounds,* No. 33,011, 2012 WL 12371462 (N.M. Aug. 23, 2012).

Newark, NJ, March 10, 2015; Public Hearing, *Arbitration Clauses in Insurance Contracts*, National Association of Insurance Commissioners Consumer Protection Working Group, New York City, June 21, 2003; Roundtable, *Debt Collection: Protecting Consumers*, Federal Trade Commission, Chicago, Aug. 6, 2009.

Introduction and Summary

As the draft #Solutions2020 Call to Action Plan noted, virtually all mobile wireless customers are forced to sign contracts with arbitration clauses when they choose a mobile phone provider, thereby giving up their day in court. Almost all of those arbitration provisions also contain a ban on class arbitration and class actions.[4] Public Justice's concern about arbitration is not simply about a forum choice between arbitration and the courts. Rather, it is about whether telecommunications companies can use these accompanying bans on class arbitration and class actions to evade liability under consumer protection laws.

Telecommunications companies are not concerned about exposure created by individual actions, regardless of whether those actions are brought in arbitration or in court: as one court noted with respect to AT&T in particular, the percentage of consumers bringing individual claims against the company is "infinitesimal."[5] Rather, telecommunications providers' goal is to impose a system that ensures consumers cannot join together in a class action, even when a provider engages in widespread misfeasance that results in millions of identical small overcharges to its customers.

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[4] *See* Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J. L. Reform 871, 884 (2008) (in 2008, 80% of consumer contracts that contain an arbitration clause also contain a class action ban); Consumer Financial Protection Bureau, *Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act* ("CFPB Study"), § 1.4.1 (In contracts for consumer financial products, "85-100% of the contracts with arbitration clauses—covering close to 100% of market share subject to arbitration in the six product markets studied—include such no-class arbitration provisions.")

[5] *Coneff v. AT & T Corp.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009), *rev'd and remanded,* 673 F.3d 1155 (9th Cir. 2012).

Telecommunication companies have repeatedly altered their arbitration clauses over based on this singular goal of preserving the class action bans they impose. For a period of years, courts repeatedly struck down these bans, holding that they were unlawful attempts to exculpate the company from liability.[6] This changed drastically in 2011, when the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion*, which held that the Federal Arbitration Act preempts a California rule holding class action waivers to be unconscionable when the party with superior bargaining power has carried out a scheme to cheat large numbers of consumers out of small amounts of money and the waiver has the effect of exempting a company from its own fraud.[7] Then in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court held that a contractual arbitration clause was enforceable under the Federal Arbitration Act even when the plaintiff's cost of individually arbitrating a federal statutory claim far exceeded the potential recovery and the clause was an absolute barrier to relief.[8] Together, these two decisions severely undermine consumers' ability to block the enforcement class action bans contained in a contractual arbitration clause, regardless of whether the claims they bring are under state law or federal law.

Though there have been a number of well-documented abuses of consumers in arbitration proceedings, of far more concern is the number of cases that have simply been erased because it is not economically viable to bring them as single-plaintiff cases in arbitration. In Public Justice's experience, the most harmful effect of the ubiquitous mandatory arbitration clauses in consumer telecommunications contracts is this suppression of consumers' viable legal claims.

Detailed factual records from cases brought before *Concepcion* was decided show that many viable consumer claims against telecommunications

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[6] *See, e.g., Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592 (D.N.J. 2009); *Coneff v. AT & T Corp.,* 620 F. Supp. 2d 1248, 1250 (W.D. Wash. 2009), rev'd and remanded, 673 F.3d 1155 (9th Cir. 2012); *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1 (2006); *McKee v. AT & T Corp.*, 164 Wash. 2d 372 (2008); *Scott v. Cingular Wireless*, 160 Wash. 2d 843 (2007).

[7] 563 U.S. 333 (2011).

[8] 133 S. Ct. 2304 (2013).

companies simply cannot be litigated in an economically viable way in individual arbitration: it is only feasible to litigate them as class arbitrations or in court as class actions. Each year, consumer class actions enable hundreds of thousands or millions of consumers to obtain injunctive relief and monetary compensation. In contrast, a New York Times investigation gathered the records from arbitration firms across the United States and determined that found that from 2010 through 2014 only 505 customers in the county went to arbitration over a dispute of $2,500 or less.[9] Verizon, which has more than 125 million subscribers, faced 65 consumer arbitrations during those five years.[10] Time Warner Cable, which has 15 million customers, faced only seven.[11] And Sprint, which has over 57 million subscribers, faced only six arbitrations during the same period.[12]

In 2015 the Consumer Financial Protection Bureau released a detailed report on arbitration clauses in consumer contracts for financial products and services. That report presents similarly low numbers: it concluded that consumers filed an average of 411 arbitrations annually with the American Arbitration Association ("AAA") regarding financial products and services from 2010 through 2012, with only around 25 of those arbitrations each year involving disputes of $1,000 or less.[13] Another study of a broader cross section of consumer arbitrations found that only 184 of 4,839 consumers, or less than 4%, arbitrated claims for $1,000 or less.[14]

The use of arbitration in consumer telecommunications contracts suppresses claims and thereby ensures that the vast majority of consumers who suffer legal wrongs will never even try to pursue their rights under federal and

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[9] Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice": New York Times, November 1, 2015. Available at http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("NYT, Arbitration Everywhere").
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] CFPB Study § 1.4.3.
[14] David Horton & Andrea Cann Chandrasekher, After the Revolution: An Empirical Study of Consumer Arbitration, 104 GEO. L.J. 57, 117 (2015).

state consumer protection laws. Available data, the dearth of consumer class actions against telecommunications companies after the Supreme Court's ruling in *AT&T v. Concepcion*, and the evidence submitted in particular cases against telecommunications companies all confirm the obvious: that when consumers are left with no option but to individually pursue small-dollar claims against telecommunications companies in arbitration, those companies are in effect immunized from liability and may violate consumer protection statutes with virtual impunity.

Commissioner Clyburn's proposed rule would re-empower consumers to defend their rights against telecom companies and would undoubtedly be in the public interest. The class action format is uniquely well-suited to handle the defining features of many disputes between consumers and telecommunications service provides: small dollar individual damages suffered by thousands or even millions of consumers, in cases that frequently have complex factual records and require expert testimony. These comments discuss how the class action and class arbitration bans that are part and parcel to the arbitration clause language in consumer telecommunications contracts are exculpatory because they leave consumers with no realistic way to assert their claims, and how this result undermines the enforcement mechanisms of state consumer protection laws. They also briefly address how government enforcement is not a viable substitute for the private right of action codified in state consumer protection laws.

Class Actions are Uniquely Suited to Address Widespread Small-Dollar Consumer Claims, and Arbitration Clauses Banning Them are Exculpatory.

Class actions improve access to the courts by establishing "an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits." [15] As the California Supreme Court concluded, "[a] company which wrongfully extracts a

[15] Charles Alan Wright, Arthur R. Miller, "Construction and Applicability of Rule 23," 7A Fed. Prac. & Proc. Civ. § 1754 (3d ed.)

dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation."[16] Over the years, many other courts have likewise found that a class-based remedy is "the only effective method to vindicate the public's rights" in cases involving small but numerous consumer claims.[17]

Without class actions, many consumers may not even realize that they have a claim.[18] The class action provides a mechanism both to alert them of their rights and an avenue to assert them.[19] Furthermore, in addition to resolving individual class members' claims, class remedies can strongly deter future similar wrongful conduct.[20] As one court succinctly framed it over 45 years ago:

> Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.[21]

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[16] *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161 (2005) abrogated by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (internal quotation marks removed).
[17] *See, e.g., Scott v. Cingular Wireless*, 160 Wash. 2d 843, 855-56 (2007) (citing cases).
[18] *See Abels v. JBC Legal Group, P. C.,* 227 F.R.D. 541, 547 (N.D.Cal.2005) (quoting *Sledge v. Sands,* 182 F.R.D. 255, 259 (N.D. Ill. 1998)).
[19] *Scott*, 160 Wash. 2d at 855-56 (2007) (citing cases).
[20] *Id.* at 852.
[21] *Vasquez v. Superior Court of San Joaquin County,* 4 Cal. 3d 800, 808 (1971).

Between 2008 and 2012, class action settlements yielded $2.7 billion in cash, in-kind relief and expenses paid by financial services companies, only 16% of which went to attorneys' fees, and at least 34 million consumers received cash relief as a result of these class action settlements.[22]

When consumers are stripped of their ability to bring a class action, the harm is readily apparent. Since the U.S. Supreme Court decided *Concepcion*, many consumer class actions have been dismissed from courts and compelled to individual arbitration (meaning that the named representative plaintiffs can proceed for themselves, but no one else, in arbitration, and that the class action portion of the case is now dismissed). One study released in April 2012 identified 76 putative class actions where this had occurred.[23] While this study includes employment and other types of class actions as well as consumer cases, it also certainly underestimates the number of cases dismissed, because it only counts cases where the court posted an opinion that showed up on the Westlaw database, and Public Justice knows of numerous consumer class actions that district courts dismissed in short, even one-line orders.

In many cases, corporate defendants offer token settlements to the named class representatives to persuade them to drop any right they might have to appeal orders dismissing the class actions. But what of the other claims in these cases, the claims of the thousands of class members who were not named class representatives in the putative class actions? The corporate advocates of mandatory arbitration talk about what a supposedly fair and accessible system it is, so that consumers will supposedly rush to pursue their claims on an individual basis. But the available data and our experience suggests that instead of pursuing their claims on an individual basis, the vast majority of consumers do not know of their claims or are unable to pursue them on an individual basis. Public Justice attorneys have been contacted by scores of lawyers who represent consumers in these cases, but we do not know of a single case where the corporation has gone on to make any kind of payment to the thousands (or in some cases, even millions) of class members who had legal

[22] CFPB Study § 8.1.
[23] Public Citizen, *Justice Denied – One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident* at 4 (April 2012).

claims. In our experience, those claims have simply disappeared, and whether the consumers' claims are valid or not, the consumers have received nothing.

Evidence presented in multiple cases litigated before the Supreme Court's decision in *Concepcion* demonstrate that class action bans contained in consumer telecommunications contracts are exculpatory. By way of example a few such cases are discussed below. Each contains viable claims against a telecommunications service provider and each involves an arbitration provision with a class action ban. Though all of the consumers share similar grievances, only those with the good fortune to resolve their cases before *Concepcion* was decided proceeded to the merits and received compensation for their legitimate claims. Those unfortunate enough to have their cases still pending at the time of *Concepcion* were left with no avenue to recover.

Coneff v. AT&T Corporation

One such case litigated by Public Justice—*Coneff v. AT&T Corporation*—was brought soon after Cingular Wireless and AT&T Wireless merged in 2004.[24] The plaintiffs alleged that once the companies had joined, Cingular deliberately degraded AT&T Wireless's network in order to induce them to transfer their plans to Cingular plans, which were more expensive and less favorable to consumers.[25] The plaintiffs asserted that this plan was designed to force all AT&T customers to "upgrade" to Cingular plans by paying an $18 transfer fee, buying an $18 SIM card, entering a new service contract with Cingular, or buying a new phone from Cingular.[26] Customers who wanted to continue without paying additional money for the supposed upgrade were left to either fulfill their contract with degraded AT&T Wireless service or pay a $175 early termination fee to cancel service.[27]

Coneff's rich factual record shows the real-world effects of AT&T's class action ban. After AT&T attempted to enforce an arbitration clause and class

[24] *Coneff v. AT & T Corp.*, 620 F. Supp. 2d 1248, 1250 (W.D. Wash. 2009), rev'd and remanded, 673 F.3d 1155 (9th Cir. 2012).
[25] *Id.*
[26] *Id.*
[27] *Id.*

action ban in its consumer contracts by moving to compel arbitration, over a dozen expert and fact witnesses submitted declarations on behalf of the plaintiffs demonstrating that class action ban would exculpate the company for widespread violations of the law. AT&T countered that the forced arbitration clause in the contract somehow worked to consumers' benefit by providing a suitable forum for them to resolve grievances. The district court considered the evidence and sided with the plaintiffs.

The data considered in *Coneff* confirmed that the vast majority of dissatisfied AT&T customers did not attempt to arbitrate their claims.[28] By the end of 2007, AT&T was the largest wireless provider in the nation, with over 70 million customers.[29] But over a five-year period—from 2003 through 2007—only 170 customers in the entire country filed arbitration actions against AT&T.[30] And between October 30, 2006 and December 31, 2007 only ten consumer arbitrations were filed against AT&T.[31] Furthermore, only 265 claims were filed in small claims court against AT&T in 2007 nationwide.[32]

The dearth of arbitrations and small claims court cases against AT&T during those years was hardly the result of overwhelming customer satisfaction with the company: the policy and action division of Consumer Reports, Consumers Union, reported that the year AT&T Wireless services and Cingular merged, the companies had the worst records of customer complaints filed with the FCC.[33] And Consumer Watchdog, a nonprofit consumer advocacy organization, received thousands of complaints from consumers like Ms. Coneff.[34] Indeed, the *Coneff* class action was brought as a result of dozens of those complaints. Within 24 hours of the press announcement that *Coneff* had been filed, 1,800 AT&T customers contacted Consumer Watchdog with the same claims. As of March 2007, the organization had received 4,700

[28] *Coneff*, 620 F. Supp. 2d at 1258.
[29] *Id.*
[30] *Coneff*, 2:06-cv-944 (W.D. Wa.), Dkt. No. 153, Bruce Simon Decl. ¶¶ 6-10.
[31] *Id.*
[32] *Coneff*, 620 F. Supp. 2d at 1258.
[33] *Coneff*, 2:06-cv-944 (W.D. Wa.), Dkt. No. 138-5, Ex. S to Coluccio Decl.
[34] *Coneff*, 2:06-cv-944 (W.D. Wa.), Dkt. No. 144, Douglas Heller Decl. ¶¶ 5-8.

complaints, the most complaints it had ever received following the announcement of a lawsuit.[35]

The *Coneff* plaintiffs submitted testimony from nine expert witnesses concerning the types of cases consumer lawyers can realistically handle on an individual basis. These experts were all extremely knowledgeable about the market for representation of individual consumers: they had represented consumers for many years, were active in professional organizations for consumer lawyers, regularly provided legal education to other consumer lawyers at conferences, and regularly both referred clients to other lawyers and received client referrals themselves. After reviewing the *Coneff* complaint, the relevant arbitration clauses, and AT&T documents produced in discovery, every expert testified that he or she would not represent the named plaintiffs in individual actions, either in court or in arbitration.[36]

Considering the evidence, the district court in *Coneff* concluded that the class action waiver in AT&T's contract would serve to protect AT&T from legal liability for any wrong where the cost of suit outweighs the amount of potential recovery.[37] The court added that that was certainly the case in *Coneff* itself, where the putative class members' damages ranged from $4.99 to $175, amounts "dwarfed by the legal complexity presented by the facts alleged"—that "Cingular, a multi-billion dollar corporation, intentionally degraded AT&T's pre-existing wireless network in order to exponentially increase their profits by assigning small fees to customers switching to the new network."[38] The court concluded that "there can be no question that the cost of pursuit

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[35] *Id.* ¶ 9.

[36] *See*, *e.g., Coneff*, 2:06-cv-944 (W.D. Wa.), Dkt. No. 149, Peter Maier Decl. ¶ 33 ("I [would] be unwilling to take on an arbitration claim against [AT&T] for an individual customer . . . [and] it is very unlikely that any other private attorney in the State of Washington would be willing to do so."); *Id.* Dkt. No. 146, Dale Irwin Decl. in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration ¶ 8 ("If I had been approached by a [plaintiff] in this case and asked to handle such a claim as made in the Complaint on an individual basis, I would not have accepted the case.").

[37] *Coneff*, 620 F. Supp. 2d at 1257.

[38] *Id.*

would be prohibitively expensive for a consumer proceeding on an individual basis."[39]

The court also found to be significant the consumer attorneys' declarations concluding that it would be uneconomical to represent the plaintiffs on an individual basis either in court or in arbitration. It found particularly compelling the statement of one North Carolina attorney who declared that "the hourly charge would . . . exceed the entire amount in controversy, and that "no lawyer concerned with ethical propriety would be comfortable charging a client by the hour for such services."[40]

The court further emphasized that "tangible evidence" demonstrated that only an "infinitesimal" percentage of AT&T's 70 million customers had brought arbitrations or small claims against AT&T.[41] It concluded that in light of the thousands of complaints that consumer advocacy groups had received about consumers' service after the AT&T-Cingular merger, the minuscule amount of customers who pursued arbitration "proves that the customers were either unaware of their right" to take advantage of the arbitration agreement, or that they had "no incentive to bring their claims . . . given the prohibitively expensive costs of individual adjudication."[42] The court concluded that either way, AT&T was using the contract provisions to "effectively exculpate [itself] from any potential liability for unfair or deceptive actions or practices in commerce," and that the court "will not condone such a broad and exculpatory practice."[43] Emphasizing that one "primary purpose of a class action lawsuit is to allow private citizens to act as private attorneys general in protecting the public interest," the court also dismissed AT&T's argument that class action settlements are worth nothing to individuals because actual individual awards are "nominal."[44]

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1258-59.
[43] *Id.* at 1259.
[44] *Id.* (internal quotations and citation omitted).

Despite the district court's findings and resulting denial of AT&T's motion to compel arbitration, on appeal the Ninth Circuit overturned the district court and compelled arbitration, finding that the Federal Arbitration Act (as the Supreme Court had recently interpreted it in *Concepcion*) required that result.[45] *Coneff*, therefore, is a detailed example of how arbitration clauses with class action bans are in effect completely exculpatory, even in cases where many thousands of identical plaintiffs have viable claims against a particular telecommunications provider.

Given the Ninth Circuit's enforcement of the arbitration provision, *Coneff* is also a clear example of the kind of malfeasance telecommunications companies can now engage in with impunity post-*Concepcion*. Now that arbitration provisions with class action bans are allowed to stand even when they are exculpatory, plaintiffs have no outlet for their grievances against these powerful companies and the companies are free to overcharge customers.

Coneff is no outlier—most disputes consumers have with telecommunications providers over the cost and quality of service have the similar characteristic of being small dollar grievances individually (even if in the aggregate they add up to tens of millions of dollars), and of requiring a level of time commitment from attorneys and experts that will almost instantaneously surpass the value of any individual claim.

Scott v. Cingular Wireless

The *Scott* plaintiffs—all customers of defendant Cingular Wireless—asserted that they were improperly billed for long distance or out of network "roaming" calls, and that individual plaintiffs were overcharged up to $45 a month for these calls.[46] Though the individual claims were not for high dollar amounts, in the aggregate, the allegations asserted that Cingular overcharged the public millions of dollars.[47] Cingular moved to compel individual arbitration of all claims based on the language of an arbitration clause with a class action

[45] *Coneff v. AT & T Corp.*, 673 F.3d 1155, 1157-58 (9th Cir. 2012).
[46] *Scott v. Cingular Wireless*, 160 Wash. 2d 843, 848 (2007).
[47] *Id.*

ban in its consumer contracts.[48] The Washington Supreme Court eventually heard the case and refused to enforce the class action waiver in the arbitration clause because it "effectively denies large numbers of consumers the protection of Washington's Consumer Protection Act . . . and because it effectively exculpates Cingular from liability for a whole class of wrongful conduct."[49] The consumers proceeded with their class action against Cingular and reached a settlement with the company.

Notably, when ruling in favor of the consumers, the Washington Supreme Court considered a declaration from attorney Sally Gustafson Garratt, who had previously served as the division chief for consumer protection in the Washington State attorney general's office.[50] Ms. Garratt stated that the attorney general's office did not have sufficient resources to respond to many individual cases and often "relied on [ ] private class action to correct the deceptive or unfair industry practice and to reimburse consumers for their losses." [51] The plaintiffs also submitted a declaration from Peter Maier, an attorney in private practice who specialized in consumer law.[52] Like the attorney experts in *Coneff*, he explained that the claims against Cingular "are too small and too complex factually and legally" to be adjudicated separately.[53] Maier declared that he would be unwilling to take on such cases and opined, "it is very unlikely that any other private practice attorney would be willing to do so."[54]

Ting v. AT&T

In *Ting*, the U.S. district court held a trial in 2001 to determine (among other things) whether it was unconscionable for AT&T's arbitration clause to ban class actions. Public Justice was counsel for a certified class of seven million consumers. The evidence in that case established that before AT&T

[48] *Id.* at 847.
[49] *Id.*
[50] *Id.* at 849.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

had adopted its arbitration clause, consumers had successfully prosecuted a number of class actions against long distance phone carriers.[55] In one case, AT&T paid 100% of the class members' damages, and in another case a class recovered $88 million from a long distance carrier.[56] The court determined that it would not have been economically feasible to pursue the claims in any of these cases on an individual basis, regardless of whether the case was brought in court or arbitration, and AT&T provided no evidence at all to counter that conclusion.[57] The court likewise found that without the class action mechanism, "the potential reward would be insufficient to motivate private counsel to assume the risks of prosecuting the case just for an individual on a contingency basis."[58] Because of these realities, "the prohibition on class action litigation functions as an effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, . . . [serves] to shield AT&T from liability even in cases where it has violated the law."[59] Accordingly, the court found the ban on class actions in AT&T's arbitration clause was exculpatory and substantively unconscionable.[60] The Ninth Circuit upheld the decision, finding that AT&T's prohibition on class actions was one-sided and non-mutual. [61]

Cruz v. Cingular

The Cruz plaintiffs alleged that AT&T imposed a monthly charge for optional "Roadside Assistance" that they never requested, in violation of Florida's consumer protection law.[62] The plaintiffs provided evidence that only an infinitesimal percentage of customers—0.000007%—had filed an arbitration claim with AT&T and multiple attorneys submitted affidavits asserting that it would not be cost-effective for them to pursue these consumer claims against

[55] *Ting v. AT&T*, 182 F. Supp. 2d 902, 918 (N.D. Cal. 2002), aff'd in part, rev'd in part sub nom. *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).
[56] *Id.*
[57] *Id.* at 918-19.
[58] *Id.* at 918.
[59] *Id.*
[60] *Id.* at 931.
[61] *Ting v. AT&T,* 319 F.3d 1126 (9th Cir.).
[62] *Cruz v. Cingular Wireless, LLC*, No. 207-CV-714, 2008 WL 4279690, at *1 (M.D. Fla. Sept. 15, 2008).

AT&T unless it was on an aggregated basis.[63] But as with the Ninth Circuit in *Coneff*, on appeal the Eleventh Circuit determined that after *Concepcion* it was of no consequence whether the arbitration clause was exculpatory, and the court upheld the order compelling arbitration on that basis.[64]

Pendergast v. Sprint

In *Pendergast*, a putative class of plaintiffs alleged that Sprint improperly charged customers roaming fees while they were physically in Sprint's coverage area. The plaintiffs asserted that Sprint's network limitations caused it to route calls placed within its geographic coverage area to cellular towers owned by other carriers, thereby causing improper roaming fees to be charged to the plaintiffs' accounts. The plaintiffs brought claims under Florida's consumer protection statutes, and sought monetary and injunctive relief. The named plaintiff estimated that his individual damages were approximately $20.[65] He also filed an affidavit asserting that he could not afford to pay a lawyer an hourly fee to assert his claims against Sprint and that, absent the benefit of a class action, he would not pursue his claims at all because the risk of non-recovery and cost of arbitration outweighed the value of any potential award.[66]

Sprint moved to compel arbitration and the district court granted its motion. The plaintiff appealed and the case was argued before the Eleventh Circuit, after which time the U.S. Supreme Court decided *Concepcion*. Applying *Concepcion*, the Eleventh Circuit ruled that it made no difference whatsoever whether Sprint's arbitration clause and accompanying class action ban were exculpatory, and whether the small value claims would go undetected and unprosecuted absent a class action—under *Concepcion*, and in spite of evidence that it would be impossible for the plaintiffs to bring individual claims, the arbitration clause and class action bar were upheld.[67]

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[63] Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1214 (11th Cir. 2011).
[64] *Id.* at 1214-16.
[65] *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1132 (11th Cir. 2010).
[66] *Id.*
[67] *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1235 (11th Cir. 2012).

These and similar cases show exactly why the FCC's proposed rule is necessary. Consumers are not bargaining for mandatory arbitration and they do not understand it: rather, the arbitration clause and its accompanying class action ban is a contract term that works to the exclusive benefit of the telecommunications companies, and to consumers' detriment. Companies are now secure in the knowledge that they will not face liability for even viable claims that they overcharged consumers by less than what it would cost the consumers to enforce their rights. And consumers are left with no meaningful recourse but to eat the cost of the overcharge or accept the frustration of poorer service than promised, and then to vote with their feet after their contract expires several months or over a year down the road—by switching to another service provider free to act with the same level of impunity.

Coneff, *Pendergast,* and *Cruz* demonstrate that consumers have no ability to seek relief for small dollar charges unilaterally imposed by telecommunications companies, even when those charges are demonstrably unwarranted. And though the consumers *did* obtain relief in *Scott*, that would not be the case if those cases had been brought after *Concepcion*: *Scott* turned on the class action ban being exculpatory, a fact that courts are no longer free to consider.

It is impossible to tell how many legitimate cases have *not* been brought against telecommunications providers in the wake of *Concepcion*, but Public Citizen's determination that over 70 pending class actions were dismissed after that case was decided makes it clear that the number is substantial. Public Justice receives repeated requests to serve as counsel in class actions brought under state consumer protection statutes against telecommunications companies, but we universally decline those requests even if it appears there is liability, because there is no viable way to litigate them without the class mechanism.

This consequence-free environment emboldens telecommunications companies to unilaterally reinvent the outer limits of acceptable behavior: one of the few consumer class actions brought against a telecommunications company after *Concepcion* alleges that soon after that Supreme Court decision

came down, AT&T—presumably confident that it would face no liability for doing so—intentionally began to throttle thousands of customers' data connections to the point that they were unable to use various data services such as music streaming and web browsing, despite having promised those customers "unlimited" data.[68] In that case—which asserted a legal theory not raised in *Concepcion* —the court granted the defendant's motion to compel arbitration.[69] The plaintiffs' appeal is pending.

Class Action Bans Contained in Consumer Arbitration Agreements Permit the Widespread Violation of State Law and Leave Consumers with no Recourse.

As the factual records in the above cases demonstrate, bans on class arbitration and class actions that go hand-in-hand with arbitration provisions in consumer telecommunications contracts exculpate corporations from liability to the vast majority of their customers. Many of the claims at issue are for amounts of money that cannot be economically recovered in an individual action, no matter what the forum: as Judge Richard Posner noted, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[70] But despite being individually small in many cases, the sums are significant for people working to make ends meet, especially in cases concerning improper recurring changes. And the huge sums raised when these fees are gathered from hundreds of thousands or millions of consumers provides companies with a strong incentive to disregard legal restraints.

State consumer protections laws were enacted not just to ensure that a handful of highly motivated individuals can get their money back. Rather they exist to protect the public at large and to both deter and remedy *widespread* unlawful conduct. Without the ability for consumers to band together, the

[68] *See Roberts v. AT&T Mobility LLC*, No:3:15-cv3418-EMC (N.D. Cal.), Dkt. No. 11, Amend. Compl. ¶ 21.
[69] *Roberts v. AT&T Mobility LLC*, No. 15-CV-03418-EMC, 2016 WL 1660049, at *1 (N.D. Cal. Apr. 27, 2016), *motion to certify appeal granted,* No. 15-CV-03418-EMC, 2016 WL 3476099 (N.D. Cal. June 27, 2016).
[70] *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

protections codified in these laws become a dead letter. For decades, states have relied on consumer protection statutes as their principal means of protecting consumers from deception, cheating, and other abuses. These state laws were designed to create a private right of action and to stop widespread wrongful conduct—goals that have nothing to do with arbitration.

The ubiquitous arbitration clause and class action ban found in consumer telecommunications contracts reverses decades of progress states have made in widespread abuses by powerful business. When Congress passed the Federal Trade Commission ("FTC") Act in 1914, it ushered in the first federal regulation of certain deleterious corporate practices.[71] But one major shortcoming sharply limited the statute's effectiveness—it had no private right of action.[72] The FTC itself repeatedly argued that a private right of action would ensure meaningful enforcement of the Act by "encourage[ing] consumers to act as 'private attorneys general' to police business practices," but no private right of action was ever added.[73] The States filled this enforcement gap in "one of the most successful law reform efforts of its kind."[74] During the 1960s and 1970s, almost every State passed a statute outlawing unfair or deceptive practices.[75] Because of the enforcement problems that plagued federal regulation and the inability of attorneys general to pursue every case involving an unfair or deceptive act or practice, state laws expressly provided a private right of action.[76]

As state legislatures and courts have made clear, the private right of action created by state consumer protection laws is intended to stop widespread abuses, not merely to enable individual redress. For example, in

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[71] *See* FTC Act, Pub. L. No. 63-203, 38 Stat. 717, 719 (1914), codified as amended at 15 U.S.C. § 41-58 (2000).
[72] *See, e.g., Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974).
[73] G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 N.W. L. Rev. 1198, 1213-14 (1988)
[74] *Id.*
[75] *See* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724 (1972); Mary Dee Pridgen, Consumer Protection and the Law § 3:2 (2007).
[76] *See, e.g., Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 699 (1975) (state attorney general's inability to handle all complaints was primary motivation for enacting private right of action).

Scott, the Washington Supreme Court emphasized that consumers bringing actions under the state's Consumer Protection Act "do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests."[77] Likewise, the Oregon Supreme Court has held that the Oregon Unlawful Trade Practices Act is "designed to encourage private enforcement" of the Act's standards of trade and public policies "as much as to provide relief to the injured party."[78] Florida courts have repeatedly emphasized that Florida's consumer protection law "does not exist solely for the benefit of the individual parties, [but] is instead designed to afford a broader protection to the citizens of Florida."[79] In California, the high court has held that California's Unfair Competition Law "focus[es] on the defendant's conduct, rather than the plaintiff 's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices."[80]

The Colorado Supreme Court likewise recognized that the state's consumer protection law "serves more than a merely restitutionary function" for injured customers—instead, its "primary purpose" is "deter[ring] and punish[ing] deceptive trade practices."[81] Similarly, Ohio courts "safeguard the [Ohio Consumer Sales Practices Act]'s remedial and deterrent functions" by exposing and discouraging deceptive trade practices, and New Jersey law seeks "not only to make whole the victim's loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices."[82]

Arbitration clauses and the class action bans they contain are a radical incursion into state consumer protection law. By creating a rule prohibiting the insertion of such arbitration clauses into consumer telecommunication contracts, the FCC would ensure that state consumer protection laws and the private right of action fulfill their intended purpose.

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[77] *Scott*, 160 Wash. 2d at 853.
[78] *Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or. 127, 134 (1984).
[79] *Am. Online, Inc. v. Pasieka*, 870 So. 2d 170, 171-72 (Fla. Dist. Ct. App. 2004).
[80] *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009).
[81] *Hall v. Walter*, 969 P.2d 224, 231 (Colo. 1998).
[82] *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1170 (Ohio Ct. App. 2004); *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 12 (2004).

Government Enforcement of Consumer Protection Laws is no Substitute for a Private Right of Action.

Telecommunications companies frequently argue that it is acceptable to strip consumers of the right to seek redress for their injuries in a class action or class arbitration because government agencies like state attorneys general offices, the FCC, and the FTC can protect consumers through public enforcement actions. This argument is baseless. First, the consumer protection acts of every state in the country and a host of federal consumer protection statutes expressly include a private right of action. To argue that public enforcement can wholly substitute for private enforcement of these statues is essentially to argue for the abrogation of the statutes as enacted.

Furthermore, as the FCC is probably well aware, public agencies do not have the resources to fully enforce the nation's consumer protection laws: federal and state agencies recognize that private rights of action are indispensable to effective consumer protection.[83] And as mentioned above, Sally Gustafson Garratt, former Division Chief for Consumer Protection, testified in *Scott* that the Washington State Attorney General's office did not have sufficient resources to respond to many individual and relied on private class action plaintiffs "to correct the deceptive or unfair industry practice and to reimburse consumers for their losses."[84]

In its study of arbitration clauses in consumer financial contracts, the CFPB reviewed nearly 1200 public enforcement actions brought by state and federal regulatory agencies over a five-year period and concluded in its Report that public enforcement actions rarely overlapped with private class actions, and that when there was overlap, the public enforcement more often followed the private class action than the other way around.[85] A letter to the CFPB from

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[83] *See* Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices,* 56 Antitrust L.J. 125,126 (1987) (FTC encouraged adoption of state consumer protection statutes because of "the unavailability of private enforcement of the Federal Trade Commission Act").
[84] *Scott*, 160 Wash. 2d at 849.
[85] CFPB Study § 1.4.8.

the attorneys general of seventeen states and the District of Columbia dated August 11, 2016 reiterated this theme, pointing out that their jurisdictions' consumer protection statutes contain private rights of action that were intended to "complement and extend" public enforcement efforts and supplement the finite resources of enforcement agencies.[86] The Attorney General Letter concluded that a proposed CFPB rule seeking to prohibit the application of pre-dispute arbitration clauses in consumer financial contracts to bar class action litigation in court is in the public interest and for the protection of consumers because "class action settlements provide monetary relief to consumers, act as a deterrent to the specific defendant as well as to the industry, and lead to the reform of otherwise unchecked unlawful, unfair or deceptive business practices."[87]

Our nation's consumer protection laws were drafted to rely on private enforcement, and to allow for consumer class actions. These consumer class actions are necessary in order to fill the void in consumer protection created by the inherent limitations of government action. The FCC's proposed elimination of forced arbitration would help ensure that they can do so once again with respect to consumer contracts under the Commission's purview.

Conclusion

For the many reasons discussed above, Public Justice wholeheartedly supports Commissioner Clyburn's proposal for the FCC to enhance consumer

[86] Letter from 17 State Attorneys General to Richard Cordray, Director, CFPB, at 2, August 11, 2016, available online at http://www.mass.gov/ago/docs/consumer/cfpb-multistate-letter.pdf (last visited January 9, 2016).
[87] *Id.* at 4.

protections by eliminating forced arbitration from all consumer contracts for telecommunications services.

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/s/

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