

## INJURY OR DETERRENCE: THE END OF CLASS-ACTION LITIGATION AND ITS BENEFIT TO CONSUMERS

*Jason Sherman*\*

On November 8, *The Wall Street Journal* asked, “Is D-Day Approaching For Class-Actions Lawsuits?” The next day, the Supreme Court heard oral arguments for *AT&T Mobility v. Concepcion*. The lower courts held AT&T Mobility’s (“ATTM”) adhesion contract’s arbitration clause unconscionable because it prevented class actions through either litigation or arbitration. However, the Federal Arbitration Act, as argued by ATTM, may preempt the finding by the lower courts, ultimately allowing corporations to use “no class action” clauses to shield themselves from class action litigation or arbitration. The media has mostly predicted that the case will be resolved in favor of ATTM, and as Professor Brian Fitzpatrick said, “it could end class-action litigation in American as we know it.” Many believe this lack of access to class action will “have harmful public policy consequences”<sup>1</sup> that “would cut off the only meaningful method to redress widespread discrimination, fraud, or other violations of the law.”<sup>2</sup>

But Justice Alito asks the hinging question, “Why are these people better off with class rights than not?” Class-action rights are an important tool for deterring corporate exploitation, but a ruling for ATTM effectively destroys arbitration—an important tool for consumers to efficiently recover for their injuries without costly litigation expenses.

ATTM argued that without the class action waiver in contracts, companies would likely stop using arbitration altogether. The Chamber of Commerce similarly argues that businesses will stop opting for arbitration without the class action waiver because class arbitration doesn’t share the advantages of individual arbitration. Instead, a single class arbitrator deals with sometimes thousands of disputes leading to time-consuming, procedurally complex, and expensive suits—even more so than the traditional class litigation due to the lack of access to appellate review and complex class arbitration rules.

Despite the focus on the advantages of class actions, consumers individually benefit more from the one-on-one non-aggregated arbitration. While a simplification of the class arbitration rules by Congress is ultimately advantageous, that is arguably a slow process. In the meantime, preserving the bilateral arbitration as alternative means of dispute resolution provides consumers

---

\* J.D. Candidate, 2013, Harvard Law School.

<sup>1</sup> Brief of Civil Procedure and Complex Litigation Processors as Amici Curiae in Support of Respondents at 3, *AT&T Mobility LLC v. Vincent and Liza Concepcion*, 584 F.3d 849 (2010) (No. 09-893).

<sup>2</sup> Public Citizen’s Consumer Justice Project, *AT&T Mobility LLC v. Vincent and Liza Concepcion* *Enforceability of Class-Action Bans in Arbitration Agreements*, CONSUMER L. & POL’Y BLOG (Feb. 11, 2011, 1:49 PM), <http://pubcit.typepad.com/clpblog/concepcion/>.

access to a neater, cleaner, cheaper, and faster way of solving disputes.<sup>3</sup> Studies have also shown that consumers prevail against businesses more often in arbitration<sup>4</sup> and the average duration of the claim is only 8.6 months compared to 2.5 years in litigation.<sup>5</sup> Arbitration allows consumers to bring claims for significantly smaller damage amounts into court because of the decreased costs of resolution. Additionally, 82% of people would choose arbitration over litigation to sue a corporation,<sup>6</sup> and many individual-to-individual contracts including property and second-hand car sales almost always require arbitration. Thus, consumers not only benefit from arbitration, but prefer it to resolve their legal disputes.

Admittedly, truly small claims are still expensive to resolve through basic arbitration, but a private competitive marketplace forces most corporations to make adjustments to contracts that make arbitration more attractive to consumers with smaller monetary claims. ATTM's contract, for instance, includes many consumer friendly features to encourage consumer arbitration of even small amounts including a \$7,500 minimum recovery if the arbitral award is greater than ATTM's last settlement offer and double attorney fees and expenses which ATTM states it similarly will not seek for itself.<sup>7</sup> These provisions allow consumers, such as the Concepcion's, to use arbitration for almost any monetary claim. The district court (which held against ATTM) even agreed that these provisions "sufficiently incentivize consumers" to pursue "small dollar" claims and "prompts" ATTM to make favorable offers "even for claims of questionable merit." Also, Professor Robert Mnookin of Harvard Law School states, "The question to ask is why an individual AT&T customer would not be better, should she have a dispute . . . with the waiver and the provision with the \$7,500 kicker."<sup>8</sup> In a competitive market, such as mobile phone coverage, companies will respond to the consumer pressure to litigate small claims through the inclusion of consumer friendly contractual provisions.

In summation, if the primary goal of dispute resolution is injury recovery for consumers and not private deterrence, arbitration clauses with provisional incentives for small monetary claims benefit the individual even with the class-action waiver. Without discussing the merits of class-action lawsuits, legal theorists mostly agree that the monetary receivers of class action litigation are normally the plaintiffs' attorneys and rarely do consumers receive any of the injury compensation. While this private deterrence mechanism may be seen as important, the individual seeking recovery for injuries inflicted on *them* will benefit from a ruling for ATTM by the

---

<sup>3</sup> U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION* (survey conducted by Harris Interactive, Inc. Apr. 2005), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf>.

<sup>4</sup> ERNST & YOUNG LLP, *OUTCOMES OF ARBITRATION* (2004), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf>; *see also Arbitration Better than Court for Consumer Debtors, Study Shows*. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Feb. 11, 2011, 4:02 PM), [http://www.instituteforlegalreform.com/component/ilr\\_media/30/pressrelease/2008/422.html](http://www.instituteforlegalreform.com/component/ilr_media/30/pressrelease/2008/422.html).

<sup>5</sup> Mark Fellows, *The Same Result As in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32, available at <http://www.adrforum.com/rcontrol/documents/ArticlesByFORUMStaff/200607FellowsMCC.pdf>.

<sup>6</sup> U.S. INSTITUTE FOR LEGAL REFORM, *KEY FINDINGS FROM A NATIONAL SURVEY OF LIKELY VOTERS* (Apr. 2008), <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1092>.

<sup>7</sup> Philip J. Loree Jr., *AT&T Mobility LLC v. Concepcion: What is the Scope of Federal Preemption in Class Waiver Cases?*, LOREE REINSURANCE & ARB. L.F. (Feb. 11, 2011, 4:15 PM), <http://loreelawfirm.com/blog/atm-mobility-llc-v-concepcion-what-is-the-scope-of-federal-preemption-in-class-waiver-cases>.

<sup>8</sup> Email from Robert H. Mnookin, Samuel Williston Professor of Law, Harvard Law School, to Jason Sherman, J.D. Candidate, 2013, Harvard Law School (Nov. 22, 2011, 19:10 EST) (on file with author)

Supreme Court in the spring.