ROBERTS COURT STICKS ANOTHER DAGGER IN THE BACK OF CONSUMERS

The Supreme Court today handed down its decision in *AT&T v. Concepcion*. From Reuters:

> By a 5-4 vote, the high court ruled that AT&T Mobility could enforce a provision in its customer contracts requiring individual arbitration and preventing the pooling together of claims into a class-action lawsuit or classwide arbitration.
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> The plaintiffs, Vincent and Liza Concepcion, filed their class-action lawsuit in 2006, claiming they were improperly charged about $30 in sales taxes on cellphones that the AT&T wireless unit had advertised as free.
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> AT&T, the No. 2 U.S. mobile service, was backed in the case by a number of other companies and by the U.S. Chamber of Commerce business group, while consumer and civil rights groups supported the California couple.
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> Companies generally prefer arbitration as a less expensive way of settling consumer disputes, as opposed to costly class actions, which allow customers to band together and can result in large monetary awards.

Well, yes, of course this was the decision of the Roberts Court; it was as predictable as the sun rising in the east. The conservative block in the Roberts Court – Roberts, Scalia, Alito, Thomas and Kennedy rarely miss an opportunity to buck up big business and screw individuals and consumers when it comes to any issue involving

class action law and/or standing. It is simply what they do, and they have no problem doing by politicized 5-4 majority opinion, which is exactly what occurred here.

The full opinion, including the dissent from Breyer, is here.

The dissent pointed out, correctly, that California law (the case was brought in California), known as the Discover Bank Rule for the main case setting it out, forbade such clauses and rendered them unenforceable as adhesion clauses that were forced down consumer's throats. The majority simply dismissed the California provision as being inconsistent with the Federal Arbitration Act. The Roberts block sure don't care much for state's rights if said rights conflict with their pet causes, such as bucking up big business.

Irrespective of the California Discover Bank Rule, however, Breyer and the other dissenting judges pointed out an even bigger consideration: By forcing each individual to sue for a small sum (in Concepcion, it was $30), the majority was effectively denying consumers a viable remedy:

> In general agreements that forbid the consolidation of claims can lead small dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT&T can avoid the $7,500 payout (the payout that supposedly makes the Concepcions' arbitration worthwhile) simply by paying the claim's face value, such that "the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22."
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> What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? In

> California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require techni cal legal knowledge or waiting at great length while a call is placed on hold). Discover Bank sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement's author from liability for its own frauds by "deliberately cheat[ing] large numbers of consumers out of individually small sums of money." Why is this kind of deci sion—weighing the pros and cons of all class proceedings alike—not California's to make? (citations omitted)

Exactly right. Scalia and the others in the majority have effectively deemed big businesses – and any that do not yet have these clauses in their service and sales agreements will certainly incorporate them now – immune from accountability on systemic small dollar fraud. Which is a HUGE gift to companies with thousands to millions of customers. Now all we are waiting for is for the Supreme Court to finish gutting class action litigation altogether in the *Wal-Mart v. Dukes* case argued March 29th.

In a late breaking development, Representative Hank Johnson, and Senators Franken and Blumenthal have announced legislation to overcome the Supreme Court's decision today in the *AT&T v. Concepcion* case:

> After consumers were dealt a blow today when the Supreme Court ruled that companies can ban class action suits in contracts, U.S. Sens. Al Franken (D-Minn.) and Richard Blumenthal (D-Conn.) and Rep. Hank Johnson (D-Ga.) said today they plan to introduce legislation next

> week that would restore consumers' rights to seek justice in the courts.
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> Their bill, called the Arbitration Fairness Act, would eliminate forced arbitration clauses in employment, consumer, and civil rights cases, and would allow consumers and workers to choose arbitration after a dispute occurred.
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> Many businesses rely on mandatory and binding pre-dispute arbitration agreements that force consumers and employees to settle any dispute with a company providing products or services without the benefit of legal recourse.
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> "This ruling is another example of the Supreme Court favoring corporations over consumers," said Sen. Franken. "The Arbitration Fairness Act would help rectify the Court's most recent wrong by restoring consumer rights. Consumers play an important role in holding corporations accountable, and this legislation will ensure that consumers in Minnesota and nationwide can continue to play this crucial role."

This sounds wonderful but, of course, stands about zero chance of making it through the Republican controlled House of Representatives that serve as the daily lackey water carriers for big business.