The American Antitrust Institute

December 24, 2013

The Honorable Al Franken
309 Hart Senate Office Building
2nd & C Streets, NE
Washington, DC 20510

Re: Statement of the American Antitrust Institute, *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing on S. 878 Before the Senate Committee on the Judiciary*, 113th Cong. (2013)

Dear Senator Franken:

The American Antitrust Institute ("AAI")[1] commends you and your co-sponsors for introducing the Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013) ("AFA"), and Chairman Leahy, Ranking Member Grassley, and other members of the Senate Judiciary Committee for convening this hearing. AAI supports S. 878 because it would restore consumers' ability to effectively vindicate their Sherman and Clayton Act rights. Section 3 of the AFA would amend the Federal Arbitration Act ("FAA") to invalidate certain agreements that mandate individual arbitration of antitrust disputes. This Section would remedy the negative consequences of recent Supreme Court decisions that prevent effective private enforcement of the antitrust laws by eliminating class actions in a large and important category of consumer cases. Specifically, Section 3 of the AFA would prevent class action waivers inserted into arbitration agreements from acting as de facto exculpatory clauses that eliminate the only procedural mechanisms able to convert certain consumer antitrust claims into financially rational pursuits.

The class action device is essential to consumer antitrust enforcement because it is essential to private enforcement. Because of limitations on government antitrust enforcement,[2] private antitrust enforcement sometimes is the only available means of redressing antitrust violations.[3] Moreover, even when government and private enforcement work in tandem, private enforcement remains the primary means of compensating victims and the principal deterrent against future anticompetitive behavior. Empirical research supported by AAI has shown that (1) conservatively, private enforcement has led to the recovery of at least $33.8 billion in damages over the previous two decades, s*ee* Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of*

[1] The AAI is an independent and non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org.
[2] *See* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879, 906 (2008) (citing budgetary constraints, institutional incentives to pursue certain types of cases, lack of awareness about industry conditions, institutional suspicion of competitor complaints, higher turnover among government attorneys, and political realities).
[3] *See id.*; Spencer Weber Waller, *Symposium: Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 Chi.-Kent. L. Rev. 207, 211 (2003).

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Private Antitrust Enforcement, 36 Seattle U. L. Rev. 1269, 1272 (2013), and (2) the deterrent effect of private enforcement likely outweighs the deterrent effect of even criminal enforcement by the Department of Justice, *see* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. 315, 347 (2011).

Without a procedural mechanism for aggregating claims, antitrust violations often will go uncompensated, under-deterred, or altogether un-remedied. Worse, private victims can be forced to forego their rights and remedies unknowingly and involuntarily when class action waivers are surreptitiously inserted into mandatory arbitration clauses in standard form "adhesion" contracts. In the Internet era, where pages-long terms and conditions demand instant acceptance in the click of a mouse, such waivers will only grow increasingly pervasive.[4] As Professor Gilles suggested in her testimony, a corporate attorney arguably would commit malpractice if she failed to advise a client to employ such a waiver in a consumer contract.

Without legislative action, the proliferation of class action waivers in mandatory arbitration clauses likely will destroy a wide swath of private antitrust rights. Antitrust violations very often involve high-volume, low-dollar frauds and price fixing in which perpetrators "deliberately cheat large numbers of consumers out of individually small sums of money."[5] Consequently, individual victims' claims often are small in absolute value or small in relation to the significant expenses of developing and prosecuting an antitrust case. Because such claims pose a negative value proposition for an individual claimant, they cannot feasibly be pursued in any forum absent class procedures, which allow for aggregation of claims and pooling of resources. While it may be literally true, as the divided Supreme Court recently declared, that the "antitrust laws do not guarantee an affordable procedural path,"[6] an affordable procedural path to aggregation is essential to an effective antitrust law regime and thus to the maintenance of a competitive free market economy.

The new status quo engendered by the Supreme Court's recent arbitration decisions, including *Italian Colors, Concepcion*, and *Stolt-Nielsen*,[7] is not only problematic as antitrust policy, but as contract policy and arbitration policy. Courts enforce standard form "adhesion" contracts by employing the legal fiction that a consumer has assented to something she almost certainly has not even read, much less understood for its legal implications. Courts employ this fiction on the premise that procedural and substantive unconscionability doctrine will encourage businesses to incorporate only efficiency enhancing terms and not exploitative terms in their standard form contracts.[8] Yet contract terms that exculpate a party for harm caused intentionally, as compared to negligently, are widely recognized as unconscionable.[9] If standard form contract terms that

[4] As the Consumer Financial Protection Bureau has recognized, class action waivers in mandatory arbitration clauses are already nearly ubiquitous in the consumer financial services industry. *See* Consumer Financial Protection Bureau, Arbitration Study Preliminary Results (Dec. 12, 2013), *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. Moreover, as more and more small business make purchases online, they too will experience this problem.

[5] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (internal quotation and alteration omitted).

[6] *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

[7] 130 S. Ct. 1758 (2010).

[8] *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429 (2002).

[9] *See, e.g., American Express*, 133 S. Ct. at 2313-2314 (2013) (Kagan, J., dissenting) ("courts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, whether in an arbitration agreement or any other contract") (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 637 (1985).; *cf.* Restatement (Second) of Contracts § 195(1)b ("A term exempting a party from tort liability for harm caused intentionally . . . is unenforceable on grounds of public policy.").

exculpate defendants for intentional antitrust violations are enforceable simply because they are embedded in arbitration clauses, then unconscionable contracts are not only permitted but encouraged, a result that is both illogical and undesirable.[10]

With respect to sound arbitration policy, the Court has described the goal of the FAA as "encouragement of efficient and speedy dispute resolution."[11] Yet, perversely, when an arbitration agreement is permitted to act as a de facto exculpatory clause, claims are not resolved *at all*. Rather, they are nullified, sometimes with plaintiffs left to incur unjustified losses and defendants left to enjoy ill-gotten gains. The Court's interpretation actually precludes rather than promotes dispute resolution in any form, however efficient or speedy.

For all of these reasons, AAI urges the Committee and other members of Congress to pass S. 878.

Thank you for receiving AAI's input on this subject. We would be pleased to provide additional perspectives and any other assistance that may be requested.

Sincerely,

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[10] *See* David Horton, *Unconscionability Wars*, 106 Northwestern Univ. L. Rev. 387, 408 (2012).
[11] *Concepcion*, 131 S. Ct. at 1749 (emphasis added).