March 28, 2011

Senator Brian Frosh, Chair
Judicial Proceedings Committee
Miller Senate Office Building, 2 East Wing
11 Bladen St.,
Annapolis, MD 21401

Re: HB 729-Civil Actions-Class Actions Waiver in a Written Agreement-Unenforceability
Position: Favorable

Dear Chairman Frosh and Members of the Committee:

The undersigned organizations applaud the Maryland legislature for considering legislation designed to preserve a critical consumer protection tool – class actions. We write in strong support of Maryland HB 729, a bill that would allow the legislature to correctly exercise its authority to prohibit provisions in contracts that eliminate consumers’ and employees’ ability to band together as participants in class actions.

Corporate class-action bans hidden in consumer and employee contracts are an insidious tactic that corporations use to escape widespread accountability for their wrongdoing. Many consumers and employees suffer losses from business misconduct that are smaller than the cost of litigating claims, making it impractical or impossible to pursue the cases individually. Class actions allow individuals to combine their resources and pursue their claims jointly. They are known to supplement government efforts to protect consumers from fraud and other unfair corporate practices. They also uncover institution-wide practices that affect millions of consumers across the country.

The problem of corporate class-action bans also extends well beyond consumer protection. If class-action bans are permitted, businesses will be able to evade well-established civil rights and employment laws, including the 1964 Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act and the Family and Medical Leave Act. Most individuals whose civil rights have been violated are often hesitant to pursue claims on their own out of fear of retaliation or intimidation. Class actions allow class members to benefit from the action without being forced to challenge their employers or other corporate entities directly. Further, they often provide better remedies to expose and address deep-rooted predatory or discriminatory practices.

Maryland HB 729 is especially timely and appropriate. Pending before the U.S. Supreme Court is AT&T Mobility v. Concepcion, a consumer rights case where AT&T buried a class-action ban in its customer cell phone contracts within another provision that requires binding arbitration of all disputes. In Concepcion, AT&T customers allege that the company tacked an undisclosed $30 charge for phones that it had advertised as “free.” The $30 charge would, if multiplied across millions of AT&T customers, amount to tens of millions of dollars in allegedly wrongful gains.

Consequently, the customers sought a class action on behalf of millions of AT&T customers harmed by the practice. AT&T asked the trial court to dismiss the case arguing that its contract prohibits class actions and requires individuals to bring claims to AT&T’s handpicked arbitration
firm. The trial court decided, and the appellate court agreed, that AT&T’s class-action ban was “unconscionable” under California law. Like California, other courts applying the laws of 20 states have said that class-action bans are unenforceable because they essentially exculpate companies from accountability for a wide range of misconduct.

AT&T appealed the case to the Supreme Court arguing that the class-action ban is covered under the Federal Arbitration Act (FAA), and thus preempts the state laws. It is clear that AT&T and other businesses insert class-action bans within the arbitration clauses in their contracts in a weak attempt to argue that the state laws that condemn these provisions are preempted by federal law.

Through amicus briefs, numerous distinguished organizations supported the consumers in the Concepcion case, noting AT&T Mobility’s dubious effort to ban class actions and consequently eliminate individuals’ ability to band together to pursue claims. Those organizations include but are not limited to the Lawyers’ Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, the National Partnership for Women & Families, AARP, the Legal Aid Society of D.C., Consumer Action, the Center for Science in the Public Interest, the Consumer Federation of America, the National Association of Consumer Advocates, Public Justice and the U.S. Public Interest Research Group. Public Citizen represented the Concepcions before the Supreme Court, and also strongly supports HB 729.

As we await the Court’s decision, we applaud the actions of Maryland’s lawmakers to introduce and support HB 729. If this bill is passed, Maryland would join numerous other states in asserting that class-action bans are an unconscionable practice that lets corporations off the hook for their wrongdoing. It is important to note that this bill does not address arbitration, which is covered under federal law. This bill specifically addresses class-action bans which states have found unenforceable under the same circumstances in both arbitration and non-arbitration agreements. The states, like this bill’s supporters, are concerned with their residents’ right to aggregate claims (class actions), not with arbitration.

We thank the members of the Maryland legislature and your committee for paying close attention to this issue. We urge you to vote in favor of HB 729, recognizing the importance of class actions as a critical legal tool for Maryland residents. Please contact Christine Hines at (202) 454-5135 or chines@citizen.org with questions or concerns.

Sincerely,

Alliance for Justice
American Association for Justice
Consumer Action
Consumer Federation of America
Consumers for Auto Reliability and Safety
Homeowners Against Deficient Dwellings
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
The National Consumer Voice for Quality Long-Term Care
Public Citizen
Take Back Your Rights