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Subcommittee on the Constitution
Of the Committee on the Judiciary
United States House of Representatives

Hearing: “Class Actions Seven Years After the Class Action Fairness Act”

June 1, 2012

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I. Introduction

If the proponents of the Class Action Fairness Act of 2005 ("CAFA") made one promise about the new statute, it was this: CAFA "does not change substantive law—it is, in effect, a procedural provision only."[2] Judged by these terms, CAFA is an abysmal failure. True, in the seven years since its passage, CAFA has changed where cases get filed and reduced the possibility of the rare reverse-auction settlement that does not fully address the injury imposed by a company's conduct on the class. But CAFA's biggest impact has been to deny consumers access to the substantive state laws that protect consumers, including that governing unfair and deceptive trade practices, warranties, antitrust, unjust enrichment, negligence, and other common law torts.

CAFA usurped from state courts the ability to interpret their own laws and protect their own citizens. It vested the federal judiciary with virtually sole authority over nationwide or multistate class actions. But CAFA did not provide any instruction as to how the federal judiciary was to handle these numerous, largely state law based consumer protection class actions. It did not explain how a single federal judge was to handle what previously had been the work of numerous state court judges addressing many separate state class actions involving state law. By failing to do so, CAFA presented the federal judiciary with a problem for which there was no immediate solution. As a result, federal courts routinely deny certification of multistate classes when multiple states' laws are at play. The denial of access to justice is not based on the merits of the case but on a technical procedural issue under the Federal Rules of Civil Procedure – manageability. These denials leave consumers with no recourse.

The federal courts' denials are not surprising; proponents of CAFA expected the Act would reduce the power of class actions and, with it, American citizens' abilities to combat unfair and deceptive practices. Only America's consumers and workers have suffered. Every day, the public continues to be harmed by the corporate wrongdoing. Every day, the refusal of the federal courts to allow class actions challenging such behavior under state laws makes it easier and

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[2] S. Rep. No. 109-14, at 61 (2005) (accompanying passage of the Act in February 2005). *See also id*. at 56 ("[CAFA] is court reform—not tort reform. It would simply allow federal courts to handle more interstate class actions. It makes no changes in substantive law whatsoever.")

easier for companies to shirk corporate accountability and avoid any legal consequences for their misconduct.

II. CAFA – Provisions of the Law

As the Committee knows, CAFA has two primary components. First, the Act includes a "consumer class action bill of rights"[3] requiring court scrutiny of proposed class settlements awarding coupons to class members to ensure the settlement is "fair, reasonable, and adequate," provides for alternative measures of attorney fees in such cases, and compels notice of class action settlements be sent to appropriate state and federal officials to provide them an opportunity to voice opposition.[4] Arguably, this first component was mere window dressing for the Act as it did little to change the existing practice; Rule 23(e) of the Federal Rules of Civil Procedure already required that a court "may approve [a proposed settlement] only after a hearing and on finding that it is fair, reasonable, and adequate."[5] Other portions of the rule governed the procedures to be used in determining and awarding attorney's fees.[6]

Second, and of far more significance, CAFA expands federal court jurisdiction over class actions by amending the diversity jurisdiction statute (28 U.S.C. §1332) and modifying the class action removal statute (28 U.S.C. §1453).[7] With limited exceptions, any class action in which a member of the proposed class is a citizen of a different state than any defendant – in other words, where *any* diversity, rather than the traditional requirement of *complete* diversity, exists – shall be heard in federal court. I focus my remarks here on this expansion of federal court jurisdiction and concurrent contraction of states' rights to interpret and enforce their own state and common law causes of action.

III. Consumer Protection Is a State Law Issue

Congress passed the Federal Trade Commission Act in 1914, creating the Federal Trade Commission ("FTC"), in an attempt to police unfair methods of competition.[8] In 1938, the Wheeler-Lea Amendment added a broad prohibition on "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," declaring them unlawful.[9] The FTC Act allows the federal government to prosecute deceptive trade practices on behalf of the public but it contains no private right of action allowing consumers to bring their own claims.

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[3] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) ("CAFA").

[4] *Id*. at 119 Stat. 6-7.

[5] Fed.R.Civ.P. 23(e)(2).

[6] *Id*. at 23(h) (added in 2003).

[7] CAFA, *supra* note 3, at 119 Stat. 9-13.

[8] 15 U.S.C. §41 et seq. (2012).

[9] Wheeler-Lea Amendment of 1938, ch. 49, §3, 52 Stat. 111 (codified at 15 U.S.C. §45(a) (1)).

Between and 1961 and 1981, every state enacted consumer protection statutes, sometimes referred to as "little FTC Acts,"[10] prohibiting unfair and/or deceptive trade practices.[11] As one would expect given fifty-one laboratories, some differences in the statutes exist. But the fundamental commonalities among them cannot be ignored. When all is said and done, state consumer protection laws are based on a simple proposition: don't lie, don't steal, and don't cheat. Most big and small businesses have no trouble complying with this simple proposition. It is only the rare and unethical of businesses or business persons who become defendants in significant consumer protection matters. On this, there should be no partisan view and no belief that businesses need to be free to lie, steal, or cheat.

Contrary to the FTC Act and most of the statutes and regulations the FTC is charged with overseeing, every state's consumer protection statute provides for both public and private enforcement.[12] While many early versions of state consumer protection statutes lacked recourse for private consumer redress, instead vesting sole enforcement ability in public entities, "[i]t quickly became apparent… that the state could not alone handle the quantity of consumer complaints, and states that did not already provide for a private right of action created one by amending their statutes."[13] Over the years, state courts gained significant experience and expertise interpreting and applying these laws on behalf of their citizens.

The predominance of state action in this area is consistent with tradition: even the Supreme Court has long recognized "the historic primacy of state regulation of matters of health and safety."[14] State common law has traditionally provided some consumer protection remedies in the forms of actions for deceit, strict liability, and warranty violations. The introduction of state consumer protection statutes "made it considerably easier for consumers to obtain legal redress."[15]

With the advent of multistate (and multinational) corporations, an extensive transportation infrastructure, the internet, and billions of dollars spent each year on advertising and marketing, rare is the good or service that cannot be learned about and obtained across state lines. In this world, the vast majority of fraud perpetrated against consumers, workers, and purchasers is

[10] Indeed, more than half of these statutes explicitly reference the Federal Trade Commission Act.

[11] *See* 1 Dee Pridgen & Richard M. Alderman, Consumer Protection and the Law 167-73 (2011-2012 ed. 2011). At least three states had consumer protection laws on the books prior to 1961: Delaware (1953), Minnesota (1943), and Wisconsin (1921).

[12] *Id*. at 420-21.

[13] *Id*. at 421.

[14] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (noting the existence of a "presumption against the preemption of state police power regulations" in areas such as health and safety and concluding that federal manufacturing and labeling requirements applicable to medical devices did not preempt common law claims of negligence and strict liability). *See also Altria Group, Inc. v. Good*, 555 U.S. 70, 80 (U.S. 2008) (discussing the federal Labeling Act, 79 Stat. 282, 15 U.S.C. § 1331, and observing "Nothing in the clause suggests that Congress meant to proscribe the States' historic regulation of deceptive advertising practices. The FTC has long depended on cooperative state regulation to achieve its mission because, although one of the smallest administrative agencies, it is charged with policing an enormous amount of activity.").

[15] Pridgen & Alderman, *supra* note 11, at 16.

carried out nationwide; swindlers have no respect for zip codes and do not stop at state boundaries. Private remedies for policing this fraud lay almost exclusively with the enforcement of state – and perhaps many states' – consumer protection acts and common law policies.

Then Congress enacted CAFA, brandishing a machete where a scalpel would have sufficed to address complaints about the class action vehicle. In wielding this awkward instrument, Congress ignored its potential and likely effects on consumers' ability to bring state consumer protection and common law claims, real effects proven over the last seven years.

IV. Federal Courts Routinely Deny Certification and Thereby Thwart State Attempts to Protect Their Citizens

Before CAFA, federal courts would often not certify multistate class actions. In the decade before enactment of the statute, the U.S. Courts of Appeal of at least six circuits had denied or reversed class certification in multistate class actions because of perceived difficulties in dealing with variations in state substantive law.[16] The U.S. Chamber of Commerce crowed about the fact that federal courts regularly refused to certify such classes, suggesting to the U.S. Court of Appeals for the Second Circuit that "it is nearly a truism that nationwide class actions in which the claims are subject to varying State laws cannot be certified because they are simply unmanageable."[17]

During this pre-CAFA time, vigilant state courts were able to carry the weight of state consumer protection class action litigation. While federal courts were reluctant to get involved in multistate actions and sit as a super-class action forum, state courts routinely and effectively embraced their traditional role of protecting consumers by overseeing class actions. This process allowed consumers to have their claims adjudicated and state courts to deal with state-by-state issues, while preserving the resources of the federal judiciary to address federal and other concerns. For example, in the 1990s and early 2000s, Microsoft faced claims by the U.S. Department of Justice, state Attorneys General, and scores of consumers that the company violated federal and state antitrust laws by monopolizing the market and forcing consumers to overpay for software. Single-state class action suits on behalf of consumers proceeded in approximately twenty states, nearly all of which resulted in successful resolutions. At the same time, Judicial Panel on Multidistrict Litigation transferred and consolidated before one judge all related federal cases against Microsoft. Allowing the state courts to oversee claims concerning their own consumer protection laws relieved the federal judiciary of the necessity of weighing in all state-specific matters.

In one fell swoop, CAFA changed all that. CAFA placed nearly all class actions on the shoulders of the federal judiciary, foisting upon them the work of all state court judges, and virtually removed state court judges from the picture in major class matters.

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[16] *See* 151 Cong. Rec. S1168 (statement of Sen. Bingaman) (listing the Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits and noting at least twenty-six federal district courts had likewise denied certification of multistate consumer classes).

[17] *Id.* (statement of Sen. Bingaman) (quoting U.S. Chamber of Commerce amicus brief in *In re Simon II Litig.*, ultimately decided by the Second Circuit at 407 F.3d 125 (2d Cir. 2005)).

Since the passage of CAFA, the federal courts have only picked up the pace, denying efforts to certify claims by consumers, workers, and others on the grounds that "rendering a class action on these claims essentially unmanageable is the tremendous variation in state laws that would overwhelm any common questions that could be demonstrated."[18] Even nationwide classes utilizing a single state's laws have been criticized and decertified in the federal courts. In fact, the Eighth Circuit twice decertified the same nationwide class of consumers implanted with recalled prosthetic heart valves linked to heart failure.[19] The district court found the defendant's

[18] *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 630 (D. Kan. 2008) (finding differences in state consumer protection acts, negligence, unjust enrichment, and punitive damages principles undermine the typicality and commonality prongs of Rule 23 and defeat class certification). For just a sampling of post-CAFA denials of class certification of consumer protection, unjust enrichment, and other state and common law claims, *see, e.g.*, *Powers v. Lycoming Engines*, 272 F.R.D. 414, 430 (E.D. Pa. 2011) ("because we cannot group the differing laws to apply them as a unit, a single nationwide class action would be unmanageable…. Thus, in light of the choice of law issues, we cannot conclude that a class action would be manageable."); *Marshall v. H & R Block Tax Servs. Inc.*, 270 F.R.D. 400, 410 (S.D. Ill. 2010) (denying motion to certify eleven-state class of purchasers of extended warranty on defendant's services, writing "the differences in the required proofs of the states' statutes demonstrate that a multi-state certification would not be manageable because of the multiple and different variables that would have to be proved as to each class member. The Court therefore concludes that common issues of law do not predominate in Plaintiffs' consumer protection claims.."); *Muehlbauer v. GMC*, 2009 U.S. Dist. LEXIS 26971, 14 (N.D. Ill. 2009) (denying motion for class certification brought by consumers alleging defective manufacture of anti-lock brake components in cars sold nationwide, writing "Courts have long held that the laws of unjust enrichment vary from state to state and therefore are not appropriate for nationwide class action treatment…. The cases do not stand for the proposition that only national class actions for unjust enrichment are inappropriate; rather, the cases explain that multi-state class actions for unjust enrichment are inappropriate because the individual states' laws regarding unjust enrichment are too nuanced to lend themselves to class treatment."); *Alligood v. Taurus Int'l Mfg.*, 2009 U.S. Dist. LEXIS 131371, 10-12 (S.D. Ga. 2009) (denying motion for class certification for nationwide class or subclasses of purchasers of rifles and ammunition on grounds that state warranty laws differ and "the attempt to manage variations in state law with six different subclasses for each defendant would likely result in a procedural quagmire, making the case unmanageable."); *Vulcan Golf LLC v. Google, Inc.*, 254 F.R.D. 521, 533-34 (N.D. Ill. 2008) (concluding "the differences in the unjust enrichment laws are sufficiently substantive to preclude class certification."); *Siegel v. Shell Oil Co.*, 256 F.R.D. 580, 584-85 (N.D. Ill. Sept. 23, 2008) (denying certification of consumer protection and unjust enrichment claims, noting "[l]ike the variation in the states' unjust enrichment laws, '[s]tate consumer-protection laws vary considerably.'"); *In re Conagra Peanut Butter Products Liability Litigation*, 251 F.R.D. 689, 697 (N.D. Ga. 2008) (after describing in detail differences in states' unjust enrichment laws, stating that "[t]his morass is useful to establish not only the lack of uniformity of unjust enrichment claims across the country, but also the inferiority of class-wide resolution due to discerning the many differing legal standards."); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 158 (S.D.N.Y. 2008) (decertifying a settlement class after determining "differences in the pertinent state consumer-protection laws undermine the cohesiveness of the Settlement Class, and raise concerns regarding the propriety of grouping individuals with distinctly different substantive claims in a single nationwide class."); *In re. GMC Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 315 (S.D. Ill. 2007) (denying motion for class certification after holding that "determining whether GMC in fact has made enforceable express warranties to the class, as Plaintiffs claim, will require the Court to apply the significantly-differing laws of forty-seven states, a prospect that defeats both the predominance and manageability requirements of Rule 23(b)(3).")

[19] *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005); *In re St. Jude Medical, Inc.*, 522 F.3d 836, 839-40 (8th Cir. 2008) (*In re St. Jude II*). But the district court was not as quick to certify nationwide classes as critics would suggest. Plaintiffs had asked the district court to certify three nationwide classes of consumers implanted with the faulty heart valves: one for injunctive relief in the form of medical monitoring, one under the Minnesota consumer protection statutes, and one based on common law for personal injuries. After conditionally certifying all three classes, the district court decertified the personal injury class, finding variations in state law would affect predominance and superiority, by requiring at least 25 subclasses. *See In re St. Jude.*, 425 F.3d at 1118.

home state of Minnesota bore significant and sufficient contacts to the challenged acts and certified a nationwide class of patients under the Minnesota consumer protection statutes; in 2005, the Court of Appeals decertified the class on the grounds that the lower court failed to engage in a full choice-of-law analysis for each individual consumer, speculating that Minnesota lacked sufficient contact with many class members' claims and that many other states' laws would govern.[20] Following remand and the recertification of the same class under the same statutes, the Court of Appeals again decertified the class in 2008, seemingly finding the Minnesota consumer protection statutes require a showing of reliance – despite the Minnesota Supreme Court's holding to the contrary.[21]

As grounds for the denial of class certification, federal courts often cite the need to apply the law of state where each consumer resides because "each respective state's interest in enforcing its consumer fraud laws trumps [the forum state's] interest."[22] But by refusing to certify any class in the face of "unmanageability" or "insurmountable obstacles" posed by multiple states' laws governing a class action, federal courts are failing to respect any state's interest in enforcing its consumer protection laws.

Worse yet, these certification refusals deny American citizens their Constitutional guarantee to a day in court and the opportunity to have their claims adjudicated. If consumers must band together in a class action to seek redress for their injuries, because any single individual's claim is too small to justify the costs of litigation, and if such class actions can only proceed in federal courts that will not certify their claims, the courthouse doors effectively close, leaving consumers with no remedy.

Applying choice-of-law considerations and certifying a multistate class is not easy. It can require a significant undertaking, both by counsel and the court, but it is not impossible.[23] Despite this, many courts refuse to entertain the possibility.

Published decisions of courts denying motions for class certification or decertifying classes do not tell the full story. The problem goes much deeper than the many decisions one can cite where a federal court denied class certification of consumer protection, warranty, unjust enrichment, and other state and common law claims, due explicitly to concerns over the difficulties that may be found in choice-of-law issues, multiple states' laws, or subclasses. CAFA's legacy – this unwillingness or inability to allow meritorious claims to continue in the face of choice-of-law issues and/or the application of multiple states' laws – is much broader. It resides in courtrooms and law offices across the nation, where no public record reveals its

[20] *In re St. Jude*, 425 F.3d at 1120-21.

[21] *In re St. Jude II*, 522 F.3d at 839-40 (finding that even though the Minnesota consumer protection acts require no showing of reliance, the defendant is entitled to defend the case by showing or attempting to show individual instances of failure to rely on the defendant's misrepresentations and that such potential variation defeats class certification).

[22] *Laney v. Am. Std. Cos.*, 2010 U.S. Dist. LEXIS 100129, *68 (D.N.J. 2010) (refusing to certify a nationwide class due to in part to the unmanageability of applying multiple states' consumer protection acts)

[23] *See, e.g., In re Pharm. Indus. Avg. Wholesale Price Litig.*, 252 F.R.D. 83, 107 (D. Mass. 2008) (certifying a class of third party payors of health care benefits and a class of third party payors and consumers under the consumer protection statutes of multiple states).

presence but its impact is felt nonetheless. It is in the remarks of a judge who tells litigants that the court does not have the resources to manage a case in which the amended complaint asserts claims under the laws of fifty states. Or in the decision of an attorney who tells prospective class members that although they and thousands others were defrauded, he cannot file their case because the courts will not allow a multistate class to be certified.

Even the Hon. Jack B. Weinstein, long castigated by big business as too consumer-friendly, opted against contending with state law claims in a recent class action concerning allegedly fraudulent and illegal misrepresentations about the blockbuster atypical antipsychotic Zyprexa. Instead certifying a class of third party payors under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961–1968, Judge Weinstein observed:

> In view of the ease of administering a class action based upon a single national law, RICO, it would be inexpedient and wasteful of court and litigant energy to attempt to shape the present case to conform to fifty separate state substantive-procedural rules. In the absence of a federal conflicts of law rule, or other solution, the court prefers to avoid engaging in such a daunting enterprise. Solutions required under the Class Action Fairness Act of 2005, providing for removal of state-substantive-law-based cases, can be put off for the future.[24]

The fact that many federal jurists can be hamstrung by the increased attention to state law these cases require should come as no bombshell. CAFA was enacted with no accompanying increase in resources to the federal judiciary to deal with an increased caseload and substantially more of these potentially complex cases. Instead, a single federal judge is now expected to do the work of multiple state court judges (and in the same amount of time). CAFA also failed to provide for changes to the procedural rules governing class actions or the choice-of-law frameworks under which they would have to operate to attempt to allow meritorious claims to continue and instead thrust the federal judiciary into the role of developing and interpreting various states' laws, a role long held by state courts. As NYU Law Professor Arthur Miller noted at the time,

> It is not surprising that federal courts are reluctant to grant certification to multistate class actions based on state consumer protection laws. After all, these are laws with which the federal courts generally are not familiar or comfortable. Imagine the discomfort of a federal judge, then, when confronted with a case involving tens of thousands of individuals from all fifty states and state laws that at least superficially appear to be different. Moreover, our federal courts have limited resources and are responsible for adjudicating a tremendous array of substantive matters. State courts, on the other hand, are far more comfortable handling cases involving state contract or tort law and are, therefore, more inclined to try to find a way to hear and resolve those cases.[25]

[24] *UFCW Local 1776 & Participating Emplrs. Health & Welfare Fund v. Eli Lilly & Co. (In re Zyprexa Prods. Liab. Litig.*), 253 F.R.D. 69, 201 (E.D.N.Y. 2008), *rev'd*, 620 F.3d 121 (2d Cir. 2010).

[25] 151 Cong. Rec. S1170 (daily ed. Feb. 9, 2005) (text of letter from Arthur B. Miller to Sen. Bingaman).

Many foresaw just this result. During debate on CAFA, Senators Dianne Feinstein of California and Jeff Bingaman of New Mexico introduced an amendment that would clarify the application of state law in multistate class actions.[26] Seeking to add a new subsection to CAFA entitled "Choice of State Law in Interstate Class Actions," the amendment provided that a "district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will be applied" and would instead take steps to "attempt to ensure that plaintiffs' State laws are applied to the extent possible."[27] The amendment, Professor Miller noted, would prevent consumers from being ensnared

> in the ultimate Catch-22 situation – their lawsuit is in federal court because the class includes people from many states and Congress has said that is the only place the class can go, but then, the federal court will not grant class certification precisely because the class involves citizens from multiple states. *That simply violates the most basic principles of citizen access to the courts.*[28]

The Feinstein-Bingaman amendment would have prevented this result by "allow[ing] a federal court to choose not to follow the choice-of-law rule of the state in which the court is located. The federal judge could instead make the case more manageable by choosing the law of one state with sufficient ties to the underlying claims to meet the choice of law requirements that the Constitution demands be met."[29] The amendment failed.

V. CAFA Favors Defendants at the Expense of Consumers

"Class actions were designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries."[30] They exist solely to attempt to level the playing field between individual consumers harmed in small but concrete ways and companies, most of which have sprawling reach, virtually unlimited resources, and a cadre of hourly-paid attorneys at their disposal. In the last seven years, CAFA has tilted the field back towards class action defendants. For example:

- *MDL proceedings*. If multistate class actions cannot be heard in state court and federal courts refuse to address and certify classes involving multiple states' laws, CAFA leaves only one apparent alternative: the filing of nearly fifty single-state class actions concerning the same conduct.[31] Nearly all of these actions could and would be removed under CAFA and transferred and coordinated through the multidistrict litigation process,

[26] *See id*. at S1166 (statement of Sen. Feinstein).

[27] *Id*. (providing text of SA 4).

[28] *Id*. at S1170 (text of letter from Arthur B. Miller to Sen. Bingaman) (emphasis added).

[29] *Id*.

[30] S. Rep. No. 109-14, at 4.

[31] This assumes the economic viability of filing in every state, an assumption that cannot be made lightly. Many states' populations are too small to justify the significant resources that litigating class actions take; their citizens would likely be left out of any chance at recovery.

an outcome specifically contemplated by the Act.[32] Considering "the convenience of parties and witnesses" as required by the statute governing multidistrict litigation, the Judicial Panel on Multidistrict Litigation often sends the cases to a federal court in the defendant's backyard, which serves as a waiting room until the federal court denies class certification on the grounds that too many states' laws are at issue.

- *Forum-shopping*. Plaintiffs are often accused of forum-shopping to attempt to find a court most receptive to their claims.[33] But CAFA itself is the epitome of forum-shopping, with the shoe on the other foot and Congress's imprimatur: if defendants do not want to be in state court, they no longer have to be.

- *"Justice delayed is justice denied."*[34] Between removal, multidistrict litigation consolidation proceedings, the potential certification of novel issues of state law to state supreme courts, and the fact that a single judge must now bear the full weight of complex consumer class actions, the time from injury to recovery (if any) can drag on for years and years. These delays harm only consumers and injured victims.

VI. The Combination of CAFA and Mandatory Arbitration Provisions Limits Consumers' Access to the Courtroom

The tilting of the playing field does not end with CAFA. While CAFA significantly limits the ability of consumers to hold corporations accountable, big businesses are taking affirmative steps to avoid any and all accountability, even before a claim is ever filed. Consumer contracts often include provisions requiring all claims be resolved not through the court system but through arbitration, a process that is expensive and stacked against consumers in favor of corporate repeat players. This one-two punch – limiting class actions and foreclosing all other legal remedies – makes it virtually impossible for consumers to access the courtroom to hold wrongdoers accountable.

Although class actions are frequently the *only* practical way consumers can hold a corporation accountable and bring a claim against the company for smaller amounts of money, the Supreme Court recently gave corporations the green light to ban *all* class proceedings – both in court and in arbitration – in the fine print of contracts, so long as that ban is included within an arbitration clause. In *AT&T Mobility LLC v. Concepcion*, the Court found that the Federal Arbitration Act ("FAA") allows corporations to deny consumers their Seventh Amendment right to a trial by jury and instead force them into a corporate-designed system of mandatory binding arbitration for any disputes.[35] Because no individual consumer would bother with a formal process to recover $30,

[32] S. Rep. No. 109-14, at 38 (stating "[i]f other class actions on the same subject have been (or are likely to be) filed elsewhere, the Committee intends that this consideration would strongly favor the exercise of federal jurisdiction so that the claims of all proposed classes could be handled efficiently on a coordinated basis pursuant to the federal courts' multidistrict litigation process as established by 28 U.S.C. §1407.")

[33] Whether forum shopping by plaintiffs is a bad thing is a debatable proposition. Arguably, it is the duty of plaintiffs' counsel to file a case in the jurisdiction and forum she believes will best protect the rights of her clients.

[34] William Gladstone, British politician (1809-1898).

[35] 131 S.Ct. 1740, 1748 (2011).

AT&T's contract banned *all* class actions and instead required customers to bring *individual claims* in a forced arbitration system designed by AT&T.[36] Some states, including California, banned as unconscionable most class action waivers in consumer contracts, particularly in the context of arbitration.[37] But the Court found the FAA broadly trumps state laws; under this ruling, class action bans may be upheld so long as they are part of an arbitration clause.[38]

Corporations have been hiding outright bans on class actions in the fine print of contracts. *Concepcion* has opened the floodgates: corporations, including Microsoft, Sony Playstation Network, Starbucks, Match.com, and Netflix, are adding class action bans to the mandatory arbitration provisions already contained in consumer contracts. Consumers frequently do not even know these bans exist; when they learn of such bans, they have little choice but to agree to the restrictions, leaving them with even less recourse to combat corporate wrongdoing.

VII. Conclusion

CAFA moved into federal courts claims where no federal law was or is at issue and where only state causes of action are typically involved. But the refusal of the courts to certify a class under one state's law or under multiple states' laws thwarts state consumer protection efforts and leaves no remedy for consumers.

[36] *See id*. at 1744.

[37] *See id*. at 1745, 46.

[38] *See id*. at 1748.