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The Special Interests behind "The Class Action Fairness Act"

Any doubt that big business expects to benefit greatly from a federal takeover of most state class-action lawsuits is dispelled by the overwhelming amount of money and manpower that major companies and industries have spent on the class-action legislation that is now before Congress. At least 100 major corporations and pro-business associations have banded together to spend millions of dollars and to employ at least 475 lobbyists from 2000 to June 2003 to make sure that class-action legislation is tilted in their favor, according to a 94-page Public Citizen report released in 2003. Many corporations that portray themselves as victims of unjustified class actions have, in fact, engaged in unfair and harmful practices that would not have been corrected if consumers had not been represented in class-action lawsuits. The so-called "Class Action Fairness Act" contains a number of changes that will enable corporations to injure or defraud average Americans while hiding behind legal loopholes or procedural technicalities.

Industries that Want Federal Class-Action Legislation – and Why

Insurance: No industry has thrown more manpower into federalizing class-action lawsuits than the combined efforts of insurance companies and their industry associations, which have devoted at least 193 lobbyists to the issue from. These lobbyists have been divided among life insurance (79), property and casualty insurance (60) and HMOs (59). Insurance companies would benefit from proposed class-action legislation because the law would send more cases into federal courts, where judges often fail to find a "predominance" of common issues (i.e. that common questions of law or fact predominate over individual issues) which is a requisite for giving a case class-action treatment. In fact, a Public Citizen review of 43 class-action cases involving life insurance marketing practices found that 11 of the 17 state cases (65 percent) were certified for class-action adjudication, but only nine of 26 federal cases (35 percent) were certified. In other words, life insurers were nearly *twice as likely* to avoid class-action certification in federal court. Unfair practices ascribed to insurance companies have included:

- Manipulating software in order to systematically lower payments to injured claimants, in some cases by as much as 10 percent. At least six insurers that are lobbying for federal class action bills use a software program called "Colossus" to assess claims. In October 2002, a New Mexico state court certified a class-action complaint against **Allstate**, the nation's first class action against a company accused of using this controversial tool in an abusive fashion. **Farmers Insurance** now faces similar allegations in Washington state courts.
- Billing customers for the standard cost of medical services instead of the discounted rate the HMO actually pays to providers. HMOs that have denied their customers the benefit of this "billed/paid" distinction settled class-action suits in Ohio for $9 million and Rhode Island for $4.4 million.

Bank and Consumer Credit: At least seven credit card companies, mortgage lenders and their trade associations employed at least 36 lobbyists to urge lawmakers to pass class-action legislation. Consumer credit and lending companies have drawn lawsuits from consumers and enforcement actions by state officials for a number of unfair and deceptive practices:

- **Household Finance** agreed to pay $484 million to settle charges brought by dozens of state attorneys general that it systematically misled customers about interest rates and fine print in loans. Following Household's settlements with the states, several class-action lawsuits were also settled.
- A California class action revealed that the **Bank of America** failed to credit car loan payments when they were received, resulting in increased interest payments and late charges. Bank of America also settled a class-action lawsuit and agreed to pay $700,000 to account holders in Washington state for operating "undercover" automated tellers and charging their own customers out-of-network fees to use them.

Retail: The retail sector has devoted 31 lobbyists to class-action legislation, including 20 lobbyists employed by three retail corporations that settled or lost verdicts in class-action lawsuits concerning their practice of forcing employees to work unpaid overtime. Retail corporations could gain an upper hand under legislation that diverts class-actions lawsuits into federal courts because federal judges are less inclined than state judges to rule that common issues of a case "predominate" over individual issues. This means that fewer class-actions are certified in federal courts. A case in point: three federal courts have declined to certify class actions against **Wal-Mart** for unpaid worker hours – but at least four state courts have done so. Workers have relied on class-action lawsuits to win compensation from retailers who have engaged in unfair employment practices:

- **Sears** and 25 other retailers settled the largest sweatshop lawsuit in history in September 2002 for $20 million. The class-action lawsuit claimed that thousands of Asian workers were kept in indentured servitude in Saipan, forced to pay recruitment fees and give up a wide range of personal freedoms to keep their jobs and avoid reprimand.
- **Wal-Mart** agreed to a $50 million settlement in a Colorado class-action lawsuit and $500,000 in a New Mexico class action involving allegations that it forced employees to work off the clock. It currently faces about 40 class-action suits involving similar allegations.

Pharmaceuticals: America's largest pharmaceutical companies have dedicated at least 21 lobbyists to passage of federal class-action legislation. One advantage drug companies can expect if the proposed legislation diverts class-action lawsuits into federal courts would be the tendency of federal judges to apply state laws conservatively. This would prevent relatively new remedies – medical monitoring, for example – from being expanded. Consumers have received compensation through class-action lawsuits against pharmaceutical companies for a range of unfair and unsafe practices:

- **Aventis** and five other vitamin makers agreed to pay $19.6 million to settle price-fixing claims brought in a class-action suit in a Massachusetts state court. The suit alleged that the companies had engaged in an international conspiracy to fix prices and allocate markets for bulk vitamins that are used in many processed products, including cereals, milk and bread.
- A class-action lawsuit against **American Home Products** (now **Wyeth**) was settled when the company agreed to provide medical monitoring to millions of consumers who had used

its anti-obesity drug, Redux. Testimony revealed that the company had delayed warning customers of possible heart-valve damage linked to the drug.

Gas and Oil: Since 2000, the gas and oil industry has devoted at least 21 lobbyists to the push to rewrite class-action laws. Under the proposed legislation, gas and oil corporations could expect to benefit from the doctrine of "preemption" under which state laws must give way if they exceed or conflict with federal laws because federal judges are more likely to accept the supremacy of federal law. Consumers have received compensation through class-action lawsuits against gas and oil corporations for environmental problems and unfair business practices:

- **Mobil Oil Corporation** is embroiled in a class-action lawsuit certified by a Louisiana state court on behalf of 6,000 individuals claiming injuries, emotional distress and economic loss caused by hazardous substances in their drinking water. A Mobil refinery in Chalmette, La., allegedly discharged oil and grease into the Mississippi River in 1998. Approximately 3.4 million gallons of untreated, contaminated waste water and storm water, containing more than 52,000 pounds of oil, grease and other contaminants, infiltrated the drinking water of the surrounding parish.
- **Exxon** settled a New Jersey class action alleging deceptive advertising designed to convince consumers who did not need high-test gasoline to use it in their cars. The Exxon advertising campaign drew scrutiny from the Federal Trade Commission, which said consumers paid as much as 20 cents a gallon more for premium gas. In 2002, Exxon agreed to issue one million $3 discount coupons for Exxon gasoline.

Tobacco: At least two major tobacco firms have lobbied for class-action legislation in Congress, underwriting the efforts of 17 lobbyists. Tobacco companies would benefit from legislation that diverts class-action lawsuits into federal courts because federal judges are inclined to find that federal law "preempts" state law. Cigarette companies make no secret of their preference for federal courts. And they have successfully argued that the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969 provide them with a preemption defense against liability claims in state-related actions. In fact, Richard A. Daynard, chairman of Northeastern University's Tobacco Products Liability Project, has observed that, "To send tobacco class actions to federal court is to send them to their death." Consumers have been successful, however, in bringing class-action lawsuits in state courts alleging that cigarette companies have misrepresented the tar and nicotine levels of so-called "light" cigarettes. Details of such class actions include:

- An Illinois judge awarded **Philip Morris** customers $7.1 billion in a class-action lawsuit involving the false advertising of Marlboro Lights and Cambridge Lights. Testimony in the case revealed that the company has known through its own scientific testing for 25 years that its light cigarettes are actually *more* dangerous than regular cigarettes because they burn with less oxygen, releasing more toxins.
- Class-action certification was granted in 2001 to smokers of Marlboro Lights in Massachusetts and Florida in a lawsuit against **Philip Morris**. And class-action lawsuits alleging fraudulent claims for "light" cigarettes have been filed against **Philip Morris** in California, Minnesota, Missouri, New Jersey, Ohio, Tennessee and West Virginia. Class-action certification was granted in separate lawsuits filed against **R.J. Reynolds** and the **Brown and Williamson Tobacco Corp.** in Illinois claiming that the companies misled consumers about the safety of "light" cigarettes.

For a copy of the full report go to http://www.citizen.org/congress/civjus/class_action/

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