Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

Feb. 7, 2005

Contact: Valerie Collins (202) 588-7742
David Roach (202) 454-5136

Business-Backed Class Action Bill Locks Consumers Out of Court

Statement by Public Citizen President Joan Claybrook

This week, the Senate will debate one of the most unfair, anti-consumer bills that we've seen in years. This business-backed class action legislation (S. 5) will lock millions of consumers out of the courthouse. Business interests have spent tens of millions of dollars to pass it to avoid public accountability for fraud and deceptive practices.

Let me say that we recognize the class action system is not perfect. There are reforms that we favor, such as getting rid of collusive settlements that businesses like, but which provide little or no benefit for the class members. But such an important change can be made with freestanding legislation. It does not require a wholesale undercutting of the current class action system, as this bill would do.

As everyone knows, we've seen a landslide of corporate corruption and malfeasance in recent years. If this legislation passes, we'll see even more consumer deception and market misbehavior, because many citizens will no longer have the means to hold unscrupulous business people to account. That is the goal of the 500 lobbyists working to pass this bill: to make it impossible for legitimate claims to be decided in court.

They claim this bill merely allows defendants to move state-filed class actions to federal court. But in fact, it creates a Catch-22 for consumers. Here's why: The legislation will result in most multi-state class actions being heard in federal court. Under S. 5, defendant corporations will be able to force most state-filed class actions lawsuits, which are now heard in state courts, into overburdened federal courts. There, federal judges generally do not certify cases that are based on state consumer protection laws, which means the cases are blocked and can't be considered on the merits. The result will deny millions of Americans justice for marketplace fraud and deceptive practices.

Consumers won't be able to file individual suits or many single-state class action suits because in many cases the amount of recovery would be too small to warrant the expense of a lawsuit against a major national corporation with very deep pockets. So consumers will be locked out.

This is an issue of basic fair play. The American Revolution was fought, in part, over no access to the civil courts so that citizens could redress their grievances. This is a right that is essential in a democracy. But this right will, in many cases, literally be taken away by this legislation.

A coalition of more than 80 consumer, senior, environmental, labor and civil rights organizations – not to mention state and federal judge associations and many state attorneys general – oppose this legislation.

Some of us are urging the Senate to adopt two amendments that will help protect the legal rights of citizens should S. 5 become law. One, called the "consumer amendment," will be offered by Sen. Jeff Bingaman and has increasing momentum. It is simply a procedural change to give federal judges the ability to certify multi-state lawsuits that are based on state law by selecting one state law for processing the case. If this simple measure is not adopted, then we will know that the true intent of this bill is to keep legitimate cases out of court.

The second amendment, to be offered by Sen. Edward Kennedy, would exempt discrimination cases and wage-and-hour disputes from the effects of this bill. Bill proponents have given no justification for including such cases in this legislation. It will only serve to delay cases or outright deny workers the pursuit of justice.

Today, you will hear about a number of state cases that demonstrate the absolute need for state class actions to remain a vibrant part of our judiciary. These cases show how plaintiffs were able to pursue justice in state courts – but the federal courts turned a blind eye to their plight because of procedural technicalities that only serve to shield corporate defendants from accountability.

###

Public Citizen is a national, nonprofit consumer advocacy organization based in Washington, D.C. For more information, please visit www.citizen.org.

Statement of Janet Varnell, Esq.
Co-chair, National Association of Consumer Advocates
Feb. 7, 2005

My name is Janet Varnell. I am a mother, a wife and a citizen of the great State of Florida. I am also a consumer advocate with a decade of front-line experience representing everyone from municipal water authorities to mobile home owners in class actions in both state and federal courts.

At first glance, this legislation appears benign – simply moving class actions to federal courts and applying stricter rules. In reality, this law will unilaterally disarm individual Americans. Filing a class action in state court, to be heard by our own state court judges, applying the protections afforded under our own state laws, is one of the few remaining weapons we have to fight corporate abuse. Moving the overwhelming majority of class actions to federal court will ultimately result in an impossibly clogged federal court system with a small group of overworked, under-funded, unwelcoming judges left to resolve problems that states have handled for over 200 years.

Why is it important for states to have the power to decide these cases? Consider this scenario for a moment: If you have children, I would assume that, like most parents, you want your morals, your values and your rules to govern your children. No one has a better understanding of your values and rules than you, nor do they have a better sense of what your children need. You are the best person to apply and interpret your values and no one can protect your children better than you.

This law sends your children to be raised by a distant cousin. The federal courts will be told to apply the law of your state. Perhaps, they can be told in some abstract way what the rules of your house are, but remember they did not ask for your children; they do not want your children; and they will never love, protect and serve the best interests of your children the way that you would. Each state is like a parent. They have the right and responsibility to protect and govern the citizens of their states. It is best this way because in most circumstances, state courts can best resolve the issues affecting their citizens in keeping with their own house rules. Political accountability, diversity and a closeness to the people are just a few of the constructs that will be lost when these cases are left to the whim of the appointed, overworked federal bench.

The best government -- is the government closest to home. A city is the best government for the people of that city. A county is the best government for the people of that county. And a State, is the best government for the people of that State. This is a ribbon of common sense that runs through the very fabric of our system of governing. It is supposed to be a rare and necessary occasion when power is taken from the state and placed in the federal government.

The type of disputes we are talking about here most often impact individuals in a very real way. For instance, many of the cases I have handled involved big corporations stealing small amounts of money from the poor and disadvantaged. So, while the backers of this legislation complain that state court class actions are a “drain on the economy,” the truth is that just a handful of big corporations have occasionally experienced the financial hardship they all-too-often inflict on their customers.

In a few minutes, you will hear from some of the living, breathing people who are at the heart of this struggle. I dare the proponents of this bill to face these people and call their problems frivolous. As you

hear their stories, you will see that these are not the money-grubbing extortionists that have been spoon-fed to the press by the corporate marketing machine. They are your neighbors, your preachers, your grandparents. I hope, as you listen, you might even see yourself in their shoes. But, the next time that a large, faceless global conglomerate rips you off, justice will likely be out of reach. Unless you are ripped-off and damaged enough to file your own lawsuit, it won't matter if the company made millions doing it. You will find it far more difficult to find a lawyer to take the case because there will be fewer lawyers willing to take on the incredible risk and difficulty involved. If you do find a lawyer, your case will move at a snails pace. And even if you actually get the opportunity to ask a federal judge to permit a class action, you will be faced with an unaccountable, disconnected federal judge, with an extraordinarily heavy docket who is unlikely to certify your case. And you will have no case. You will have no remedy. You will be, a child, unprotected, and left in the cold.

Contact: Janet Varnell, Esq.
Varnell & Warwick, PA
20 LaGrande Boulevard
The Villages, FL 32159
352-753-8600
jvarnell@aol.com

Jillian Aldebron, Civil Justice Media Coordinator & Counsel
Public Citizen
202-454-5135
jaldebron@citizen.org

Statement of Shaneen Wahl

Plaintiff, victim of a "death spiral" health insurance scheme
Port Charlotte, Florida
Feb. 7, 2005

My name is Shaneen Wahl. I am 55 years old. I have been retired since 1995, but before that I was a real estate agent and mortgage broker for 20 years. When my husband's job ended in the mid-90s and he was unable to find another acceptable job due to the real estate crunch, we looked at our financial situation and decided that if we lived prudently, we could retire. So what we first thought was a catastrophe turned out to be the beginning of our American dream. We bought an RV and began traveling.

Health insurance was a necessary part of our retirement planning (we had no employment-based policies), so we purchased a zero deductible policy with American Medical Security, a Wisconsin-based group health insurer in 1993 for $194 a month. In 1996, however, I was diagnosed with breast cancer. Not long after this our monthly premiums began to climb. In 1998, when we were paying $588 a month, we unexpectedly received a cancellation letter telling us that if we would re-apply we would be guaranteed a new policy. We did re-apply, but the new policy had a $500 each deductible and cost $1,180 per month.

Our prospects for a modest but secure retirement were quickly fading. In response to my inquiries, the Florida Department of Insurance informed me that there was nothing to be done because out-of-state insurers were exempt from rate restrictions mandated by Florida law. I could not go to another insurance company because of my pre-existing condition, so we were forced to pay the $1,180. Then, in August of 2000, we got another premium hike—this time, to $1,881, or over $22,000 a year! We drove all the way to the American Medical Security home office in Green Bay, Wisconsin to challenge the increase, but they gave us short shrift.

We were unwittingly caught in what Newsweek magazine in 1999 dubbed "the death spiral"—the unscrupulous practice by health insurers of weeding out healthier customers to leave a pool of high risk individuals with no place else to go, and then jacking up premiums dramatically.

So I set off on a self-appointed mission to get the law changed in Florida. The state's Insurance Commissioner, Tom Gallagher, had been working since 1993 to pass laws that would put a stop to the extortionist tactics my insurance company was using, but his hands were tied due to aggressive lobbying by the health insurance industry. Ultimately, we did succeed in getting a portion of the Florida law changed. But that did nothing to help policyholders like me recover the millions of dollars lost due to American Medical's outrageous conduct. And the company was taking advantage of tens of thousands of other chronically ill customers: Florida was one of its largest markets.

In the end, my only recourse was to take American Medical to court. My attorney, Jeff Liggio, and his team won our state court class action lawsuit against American Medical, and will recover the money we and the other class members lost as a result of the company's greed and misconduct. It turned out that what American Medical was doing—including instituting rate hikes of as much as 60% a year—was not legal at all, and the Florida Department of Insurance could have discovered this if they only had enough staff to really do their job.

My husband has since gone on Medicare and my premium is now $300 per month. State class actions allow consumers to take on big and powerful corporations. State class actions can and do accomplish what our public servants, even the great ones like Tom Gallagher, have not. Those who have been wronged are afraid to complain, thinking they will be further penalized in their premiums if they do. They also know that they don't have the means, by themselves, to take on the big insurance companies and their high priced corporate attorneys to fight for their rights and reimbursement of overcharges. If Congress takes away the option of a state class action, or makes it so difficult that it is no longer a viable process, people who are victims of corporate wrongdoing will be powerless and hushed even further…and that is what these companies want. They want the people they have wronged to just disappear.

Contact: Jeffrey Liggio, Esq.
Liggio, Benrubi & Williams PA
1615 Forum Place, Suite 3B
West Palm Beach, FL 33401
561-616-3333
jliggio@liggiolaw.com

Jillian Aldebron, Civil Justice Media Coordinator & Counsel
Public Citizen
202-454-5135
jaldebron@citizen.org

Shaneen Wahl
Plaintiff
Port Charlotte, Florida
(941) 235-1520

This case illustrates how federal courts are reluctant to interpret state law: Group health insurance victims are hit with unconscionable, unlawful renewal premiums.

An out-of-state group health insurer, American Medical Security (AMS), annually recalculated renewal premiums for its customers based on individual claims history and medical status for the prior year, in violation of Florida law. This illegal practice was not caught by the Florida Department of Insurance, which had erroneously pre-approved the company's policy form. The state had only seven or eight staff to review more than 13,000 filings per year. Because it lacked sufficient staff resources to vet each form, the regulatory agency habitually relied on the insurers' own certifications that they were complying with state law.

Roberta Sands, a 64-year-old wearing a pacemaker and suffering from diabetes, was one of thousands of victims of this illegal insurance scheme. Sands saw her group health renewal premium surge from $253 per month to $4,800 per month—an increase of over 1,800%. Fortunately for her, she was able to join in a class action lawsuit brought by Florida consumers who had group policies with Wisconsin-based AMS. The class was certified in state court, which enabled the full application of Florida common law jurisprudence to the facts of the case. The trial court found that American Medical breached its contract with the class members because the insurance statutes that it violated were considered, based on state court precedent, to be incorporated into the terms of every insurance policy. As a result, the case settled and claimants such as Sands got their health coverage reinstated at prior reasonable rates.

Susan Friedman, a breast cancer survivor who had group insurance with another out-of-state company engaged in the same unlawful practices, was not so lucky. When the 40-year-old veterinarian tried to file a similar class action lawsuit in state court against group health insurer New York Life, the defendant succeeded in removing the case to federal court. There, the District Court for the Southern District of Florida, dismissed the case. Why? Because in the absence of a state supreme court decision holding that the terms of the insurance statutes are incorporated into insurance policies, the federal court chose to interpret Florida law so narrowly as to find no private right of action for a statutory violation. That left Friedman with no legal basis on which to file a lawsuit.

Federal case not certified: *Friedman v. New York Life Insurance Co.*, 2004 WL 350726 (S.D. Fla.)
State case certified: *Addison v. American Medical Security*, 2002 WL 1454102 (Fla. Cir. Ct.)

Other Contacts:

Jeffrey Liggio, Esq.
Liggio, Benrubi & Williams PA
1615 Forum Place, Suite 3B
West Palm Beach, FL 33401
561-616-3333
jliggio@liggiolaw.com

Jillian Aldebron
Public Citizen
202-454-5135
jaldebron@citizen.org

Statement of Shelly Toliver
Plaintiff, victim of illegal repossession scheme
Hartford, Connecticut
Feb. 7, 2005

My name is Shelly Toliver. I am 35 years old and a mother of two children, aged 9 and 2. I am a firefighter and have worked for the City of Hartford Fire Department for five years.

When I was pregnant with my first child, I bought a car that was financed by Credit Acceptance Corporation. A few years later, my husband and I experienced some financial problems, and I fell behind in my payments. Credit Acceptance Corporation repossessed the car. I was told that, in order to get my car back, I had to pay the full amount of the car loan, which was about $17,000. We did not have that kind of money, and Credit Acceptance Corporation sold my car at an auction. After the sale, they sent me a letter telling me that I owed them $10,000 because they did not get enough at the auction to pay off the loan.

My credit report showed that my car had been repossessed and that I owed Credit Acceptance Corporation $10,000. This was the only bad thing on my report, and it prevented me from getting approved for other loans. I could not get another car loan. That was extremely frustrating, because I had a young child and wanted to buy a safe and reliable car.

I also did not think that it was fair that I owed money after Credit Acceptance Corporation took my car, wouldn't let me get it back, and sold it. I went to Consumer Law Group, a Connecticut law firm, for help. It was there that I learned that Credit Acceptance Corporation had done the same thing to many other people, even though it was probably against the law. I became even more upset when I heard that Credit Acceptance had taken hundreds of consumers to court to collect the money it claimed was owed on deficiencies after the repossessed vehicles were sold, and it was bringing more suits every week.

We decided that the only way to fight Credit Acceptance Corporation was by bringing a class action lawsuit, and I agreed to serve as a plaintiff in the case. I thought that it was important that we try to help all of the other people whose rights had been violated, and to stop Credit Acceptance from continuing to take advantage of vulnerable consumers who were too unsophisticated, too poor, or too disempowered to defend themselves.

Credit Acceptance Corporation tried but failed to get the case removed to federal court, then it tried but failed to get the case dismissed. After the state court judge approved the case as a class action, Credit Acceptance Corporation agreed to settle. All the class members had their debts to Credit Acceptance wiped out, and most of us got some money as well.

Although the money was nice, the main thing was getting this debt off of my credit

report. I was finally able to get a car loan to buy a safe and reliable car for my family. Today, my family is financially sound, and I am working towards getting my bachelor's degree. I can only wonder where I would be if I had not been allowed to bring my case in the Connecticut court system.

Contact: Daniel S. Blinn, Esq.
Consumer Law Group, LLC
P.O. Box 1039
Rocky Hill, CT 06067-0997
860-571-0408
dblinn@consumerlawgroup.com

Jillian Aldebron
Civil Justice Media Coordinator & Counsel
Public Citizen
202-454-5135
jaldebron@citizen.org

Shelly Toliver
Defrauded by credit company in car purchase
Hartford, Connecticut

This case shows how class actions were intended to level the playing field by protecting the average consumer against unfair, deceptive or coercive commercial practices.

Shelly Toliver purchased a car nine years ago, when she was 26 years old and pregnant with her first child. Since she could not afford to pay for the vehicle outright, the dealership facilitated a loan through Credit Acceptance Corp., an out-of-state financing company based in Michigan. When Toliver fell behind on her payments, CAC repossessed her vehicle. Then, instead of giving Toliver a chance to pay the amount in arrears and get her car back, CAC demanded payment of the full contract balance—amounting to some $17,000. It is a violation of Connecticut law to accelerate a debt for the loan balance on a car. Instead, creditors must allow purchasers to redeem their vehicles for the amount in default, plus any repossession and storage fees. In fact, CAC violated not one but a number of statutes, including the foreclosure provisions of Connecticut's Retail Installment Sales Finance Act (RISFA), the Uniform Commercial Code (UCC), and the Connecticut Unfair Trade Practices Act (CUTPA).

But Toliver's car was gone. When she failed to come up with the money, CAC sold the vehicle for what they said was $7,000, and then charged Toliver with a $10,000 deficiency. This was the only bad mark on Toliver's credit report. Because of this debt, she was unable to get credit approval. In 1999, she sought legal advice, and brought a class action against CAC on behalf of 3,811 consumers whose vehicles were repossessed and who were sent notices seeking the full contract balances owed rather than the reinstatement amounts.

Ultimately, CAC settled, wiping out any deficiencies purportedly owed to the company (totaling $8.4 million), deleting the debt from plaintiffs' credit reports, and paying each class member $125. After the settlement, Toliver, who is now a 35-year-old mother of two and a firefighter with the Hartford Fire Department, was able immediately to buy another car and benefit from a good credit rating. Toliver's attorneys subsequently brought smaller suits against Fleet Bank, American Honda Finance Corp., Universal Underwriters Acceptance Corp., and Arcadia Financial, all of which were engaging in the same unlawful practices. These suits were settled for comparable amounts.

Under the pro-business class action bill, S. 5, Toliver's case would have been removed to federal court where it would have had a lower priority (after criminal and other matters) on the long federal docket, and resolution of the case would have been further delayed—while Toliver remained unable to clear her bad credit or purchase a vehicle. It is not certain that the case would have been certified for class treatment in federal court, where judges frequently try to avoid litigation by compelling arbitration—a process that is prohibitively expensive and often prejudicial to injured consumers.

Contact: Daniel S. Blinn, Esq.
Consumer Law Group, LLC
P.O. Box 1039
Rocky Hill, CT 06067-0997
860-571-0408
dblinn@consumerlawgroup.com

Jillian Aldebron,
Public Citizen
202-454-5135
jaldebron@citizen.org

Statement of Patricia Nefores
Plaintiff, victim of invasion of privacy and a mail order swindle
Mansfield, Ohio
Feb. 7, 2005

My name is Pat Nefores. I am married and have two grown children and a beautiful young granddaughter. I am probably not what you would think of as the typical class action plaintiff. I am a political conservative. I vote Republican. I have a comfortable income. Like probably many of you, I always thought that this could never happen to me—that only certain kinds of people are cheated or exploited, and that somehow it must be at least partially their own fault. I am more surprised than anyone to find myself standing here today to tell you that class actions are the only defense we have left against the unethical tactics used by corporations to squeeze unjustified profit out of *all* consumers.

Here is my story: when my granddaughter was three years old, my credit card was mysteriously charged $69 for a product from Sesame Street. This was actually a double mystery. The first was that I had never ordered anything whatsoever from Sesame Street. The second was that I had never used this credit card—not once—in the 10 years I had it. I kept the card strictly in case of an emergency.

In distress, I sought the advice of my father, a retired, conservative Republican judge. He was outraged and encouraged me to investigate how my credit card could have been charged without my authorization. After making a number of inquiries, I learned that my bank had sold the personal, private information it had on file for me—including my credit card number—to a marketing company. To add insult to injury, I later learned that this same company, BrandDirect Marketing, had been sued for unfair and deceptive trade practices by several state attorneys general.

The bank refused to take the $69 charge off my credit card. Moreover, the bank had an arbitration clause in one of its documents that, if it applied to me and my situation, would cost me thousands of dollars to arbitrate my dispute—all in an effort to get $69 taken off my credit card. I learned that the arbitration forum that the bank used almost never found in favor of consumers.

It appeared that the only way to stop this fraud once and for all was to file a class action lawsuit on behalf of everyone who had been a victim of this scheme. Since I have never been in a lawsuit I was reluctant to do so, but I felt strongly that these companies should be not allowed to do what they did.

Neither the bank nor the marketing company denies that it profited from the sale of my private information without my permission. Even so, they have fought me at every step, always arguing that I had to arbitrate my case. I feel that they have tried to hide behind a one-sided and unfair arbitration clause that was prepared by the bank's lawyers. I never agreed to the arbitration clause and I have since learned that this agreement prohibits all lawsuits including class actions. Two courts have already found that this arbitration agreement does not to apply to the issue in my case, and that the agreement is unconscionable and, therefore, unenforceable. But neither the bank nor BrandDirect has given up: they are appealing these rulings to the Ohio supreme court.

I am consumer, not a business person. I did nothing wrong. I applied for a credit card in good faith. I have followed all the rules, handled my finances responsibly, and have been careful in my commercial transactions. Nothing in the card holder agreement gives these companies the right to invade our privacy

and sell our personal information in order for them to make money—and then force me and other consumers to arbitrate our individual claims in an unfavorable forum and to forgo our day in court.

If Congress passes the class action bill, S. 5, my case could end up in a federal court. Federal courts are more likely to compel arbitration, which would require me to pay thousands of dollars to participate in a proceeding that is stacked against me, and which would provide no relief whatsoever to the thousands of other consumers whose privacy is being invaded and who are being cheated by BrandDirect. Federal courts are backlogged, which means even further delays in getting this case resolved. We have already been in court for three years just arguing over arbitration—essentially, arguing over my right and the rights of other injured consumers to be heard in a court of law. Removal to federal court would delay justice even longer. In the interim, the bank and the marketing company will continue to profit at our expense.

Contact: John L. Huffman, Esq.
Mickel & Huffman
520 Spitzer Building
Toledo, OH 43604-1351
419-242-8461

Jillian Aldebron, Civil Justice Media Coordinator & Counsel
Public Citizen
202-454-5135
jaldebron@citizen.org

Patricia Nefores
Victim of credit card company scheme for a mail order swindle
Mansfield, Ohio
(contact attorney John Huffman, 419-242-9800)

Patricia Nefores had a First USA/Bank One credit card that she used responsibly, making all payments on time. Unbeknownst to her, however, First USA/Bank One sold her private account information to an unaffiliated third party—BrandDirect Marketing, an infamous mail order business that has been successfully sued by several state attorneys general for unfair and deceptive trade practices. Nefores first became aware that something was wrong when she began receiving magazines in the mail that she had never ordered, followed by unauthorized charges appearing on her credit card statement. Attempts to stop the magazines from coming proved fruitless, and assurances by BrandDirect that the error would be corrected did not prevent new charges from showing up on her monthly statement.

Ultimately, Nefores was forced to seek redress by suing First USA in 2000 (amended in 2001 as a class action) for invasion of privacy and unjust enrichment. The defendant responded, not by contesting the substantive allegations, but by fighting vehemently to remove the matter to federal court. There, First USA would be more likely to succeed in enforcing an unconscionable arbitration clause and thereby eliminate any chance of obtaining class certification: the arbitration clause prohibited Nefores from filing a class action lawsuit. Moreover, the exorbitant cost of arbitration was designed to make any prospective plaintiff think twice about taking legal action against First USA.

The trial court found that the claims Nefores was making against First USA were outside the scope of the arbitration clause, so it could not be enforced. The appeals court then sent the matter back to the trial court to determine whether or not the arbitration clause was valid and enforceable. The trial court categorically ruled that the arbitration clause was an unenforceable adhesion contract because it was unilateral and one-sided. Defendant appealed yet again, only to lose in a unanimous decision upholding the order of the trial court. First USA has now appealed to the state supreme court, which has not yet issued an opinion.

The legal wrangling has delayed Nefores' ability to vindicate her rights in courts for three years—and has stalled progress on class certification. If the pro-business class action bill S. 5 is enacted, Nefores may well find herself back in federal court, where the case may never be certified for class treatment, or may be delayed for many more years. Nefores could bring an individual case against First USA, but that would leave thousands of other unwitting victims of BrandDirect's fraudulent practices out in the cold.

See: *Nefores v. BrandDirect Marketing, Inc./First USA*, No. 2004-1815 (S.Ct. Ohio)

Contact:

Sylvia A. Goldsmith, Esq.
Murray & Murray Co., LPA
111 East Shoreline Drive
Sandusky, OH 44870
419-624-3000
sylvia@murrayandmurray.com

Jillian Aldebron
Public Citizen
202-454-5135
jaldebron@citizen.org

Statement of Robert C. Sanders
Daughter was killed by an airbag
Upper Marlboro, Maryland
Feb. 7, 2005

Class actions serve an important societal function. Regulatory agencies frequently do not take adequate enforcement action against hazardous products or unfair business practices. Class actions fill the void by providing an alternative means of corrective action and an important incentive for corporations to conduct business in a responsible manner.

Illustrative of the limitations of regulatory oversight are the continued problems caused by poorly designed airbag systems. My family was directly impacted by this problem when my 7-year-old daughter Alison was killed in a 9.3 mile per hour intersection collision in Baltimore by a passenger airbag in October 1995. Alerted by a rash of airbag deaths, of which my daughter's was only one, the National Transportation Safety Board investigated and determined that my daughter would not have been injured if the airbag had not deployed.

As airbag related deaths and injuries counted to mount across the county, the National Highway Traffic Safety Administration, to its credit, finally promulgated more rigorous airbag performance requirements, which in turn prompted automakers to design safer systems. However, this took a number of years and, even then, NHTSA denied petitions requesting the recall of the most hazardous systems.

It has been left to consumers to protect themselves through court action seeking mandatory retrofitting of dangerous airbag components before they cause further deaths and injuries. Efforts to date to have these cases certified as nationwide class actions in federal court have been unsuccessful. This past October, however, a state court in Oklahoma permitted plaintiffs to go forward as a nationwide class. The case, filed five years ago, will go to trial in September 2005. If the plaintiffs prevail, the automaker will have to replace certain dangerous airbag components. Without the proposed retrofit, hazardous airbag systems will continue to cause preventable inflation-related deaths and injuries.

The public interest requires that plaintiffs in class actions continue to have access to state court. Congress should reject bills that seek to bar or limit this access.

Contact: Robert C. Sanders, Esq.
Law Office of Robert C. Sanders
301-574-3400

Jillian Aldebron, Civil Justice Media Coordinator & Counsel
Public Citizen
202-454-5135
jaldebron@citizen.org

Rob Sanders
Daughter was killed by an airbag
Upper Marlboro, Md.
(301) 574-3400

This case illustrates how federal courts are reluctant to certify a class where the laws of multiple states are involved. Family-style minivans were equipped with airbags that endanger the lives of child passengers.

Residents of Louisiana tried to file a class action lawsuit against Chrysler, alleging that the airbags in its minivans deployed so forcefully that they could injure or kill occupants sitting in the front seat, especially women, children, the elderly and short adults. Chrysler had never conducted safety testing on the airbags, which were designed to protect a 167 lb. adult traveling at 30 mph, with dummies that approximated the size and weight of children and smaller adults. As a result, the airbags themselves posed a serious hazard, killing at least one child. The case was consolidated in federal multi-district litigation with two other cases that also alleged dangerously defective airbags. The U.S. District Court for the Eastern District of Louisiana, however, dismissed all cases without reaching the issue of class certification, finding that plaintiffs' claims were precluded, non-existent, or not compensable.

Subsequently, Oklahoma resident Sheryl Ysbrand brought suit against DaimlerChrysler in state court on behalf of one million consumers nationwide who had purchased similarly equipped minivans. The Oklahoma state court certified a class and avoided multi-state law problems by deciding that the case would be tried under the laws of Michigan, where defendant DaimlerChrysler had its principal place of business. Class certification was ultimately upheld on appeal by the state's highest court. DaimlerChrysler made a last ditch effort to kill the case by trying to remove it to federal court—in a jurisdiction that had rarely, if ever, certified a class. But the U.S. District Court for the Eastern District of Oklahoma in Muskogee held that the case was properly filed in state court and remanded. The U.S. Supreme Court refused to hear DaimlerChrysler's appeal.

The case is now going forward, but DaimlerChrysler's removal tactics have delayed progress on the merits of the case, first filed in August 2000, for nearly five years. All the plaintiffs are asking for is the cost of replacing existing airbags with others that deploy less rapidly and would, therefore, not pose a safety risk to the car's occupants. In fact, DaimlerChrysler's regular replacement airbags, which it provides to customers whenever an airbag needs to be changed due to damage or having been used, do deploy with reduced speed and force.

Federal case not certified: *In re. Air Bag Products Liability Litigation*, 7 F.Supp.2d 792 (E.D. La., 1998)
State case certified: *Ysbrand v. DaimlerChrysler Corp*, 81 P.3d 618 (Feb. 2003) (state case certified)

Other Contacts:

Harry Scoufos, Esq.
Law Offices of Harry Scoufos, PC
918-775-5546

Jillian Aldebron,
Public Citizen
202-454-5135
jaldebron@citizen.org

Statement of Georgie Hartwig
Plaintiff, forced by her employer to work without pay
Kettle Falls, Washington
Feb. 7, 2005

My name is Georgie Hartwig. I am 48 years old, married with a family, and live in a small town in the northeast corner of Washington State called Kettle Falls. I was a Wal-Mart employee in Colville Washington for nearly seven and a half years, and worked my way up from morning stocker through sales associate, then freight receiving coordinator, and finally department manager. But in every job I had at Wal-Mart, I ended up having to work on average 2 to 5 hours each week without getting paid. The store was constantly understaffed, so we all had really heavy workloads to compensate. Even though I worked more than 40 hours a week, I was strongly discouraged from asking for overtime—or asking for any pay at all for the extra hours. One of my bosses once told me that if I couldn't get it done in the time allotted or couldn't find a way to get it done, then they'd find someone who could. So my choice was to accept 40-hours pay no matter how much time I put in, or lose my job.

The Personnel Department even changed my time cards so that some of the hours I clocked in for just "disappeared." I could check my time for the previous week on a Saturday, if I was working that day, and sometimes I'd see that I had a half-hour or maybe even two hours of overtime. But the following Monday it would be gone. When I questioned it, I was told by the personnel manager that the time clock was broken.

Even though I was being exploited, I did not quit my job until October 2001. There are not a lot of employment options in rural northeast Washington—and I needed my job to support my family. After I was terminated, I joined with two other former Wal-Mart employees to bring a class action lawsuit against the company. We believe that Wal-Mart violated Washington's employment laws by making us and other hourly employees work "off the clock" and through our rest and meal breaks, and locking us in the store at night.

Most people working low-wage jobs like me don't have the money or the know-how to demand what they are owed by a big corporation like Wal-Mart—even though they are being taken advantage of and have the right to hold their employer accountable under the law. I couldn't have sued Wal-Mart alone—the money they owe me is a lot for me, but it is not enough to hire a lawyer. When you figure, though, that around 40,000 people have worked at one of Wal-Mart's 35 Washington stores since 1995, the back pay we are all entitled to really adds up.

The combined strength and pressure of many employees filing a class action lawsuit together makes a big, out-of-state company take notice that its behavior won't be tolerated in our state. If one employee filed a lawsuit alone, it probably wouldn't get the same type of attention from the media—and from big companies—that a class action does. Media coverage by itself puts a lot of pressure on a company to clean up its act and live up to the standard of the law—and this is especially true in cases involving employment, consumer protection, and the environment.

Under the bill the U.S. Senate is considering right now, S. 5, many people like me would lose our right to file class action lawsuits in state court against out-of-state companies. Instead, our class action lawsuits would be sent to federal court—even when we were trying to enforce state laws involving health, safety and

consumer regulations. That means that state courts would not have the authority to enforce some state laws, laws that were enacted by our legislatures to protect the citizens of our state.

Federal courts are overloaded with cases, and it can take many years to for a class action suit to move through that system. We've already been waiting three years in state court—and after all that, our class action was only just certified in October 2004 and Wal-Mart has appealed to the state supreme court. How much longer would we have to wait in federal court? And how much longer does Wal-Mart get to hold on to our money, money that we honestly earned, money that should be going to put food on our tables, not into corporate profits. Wal-Mart has more than 3,000 stores in the U.S., with sales of almost $26 billion. Yet we have to go begging to the court to get a tiny fraction of that money, which we worked for, and now here I am begging Congress not to make it even more difficult to collect our hard-earned wages.

An important part of what it means to be an American citizen is the entitlement of every individual to seek protection of his or her rights in a court of law, and to have access to that court in a timely way. Congress should protect this guaranteed right of all citizens. The bottom line is: if Congress passes this bill, citizens like me and the other employees who joined me in bringing suit to enforce our rights will have to wait longer for our day in court—if we get it at all. Meanwhile, companies get the message that it's okay to violate state laws because the state courts will have less power to enforce them. We're not asking for a hand out. We're just asking for what's fair.

Contact: Beth Terrell, Esq.
Tousley Brain Stephens PLLC
700 Fifth Avenue, Suite 5600
Seattle, WA 98104-5056
(206) 682-5600
bterrell@tousley.com

Jillian Aldebron, Civil Justice Media Coordinator & Counsel
Public Citizen
202-454-5135
jaldebron@citizen.org

Statement of Daniel Blinn, Esq.
Consumer Protection Attorney
Rocky Hill, Connecticut
Feb. 7, 2005

My name is Daniel Blinn, and I am the managing attorney of Consumer Law Group. We are a small law firm in Rocky Hill, Connecticut. Although Consumer Law Group has only three attorneys, including myself, we are the largest firm that represents consumers in the entire state.

Before I founded Consumer Law Group in 1997, I was a partner in a medium-sized corporate law firm in Hartford. I took a significant cut in salary because I believed that my skills would be put to better use helping consumers. I began practicing consumer law because of my desire to represent the public interest and individuals for whom access to lawyers is severely limited.

Over the past eight years, I have learned the importance of class actions to people such as Shelly Toliver. When she first contacted my firm in 1999, she did not have money to pay an attorney, but she was in dire need of legal assistance. Credit Acceptance Corporation had repossessed her car and was now claiming that she owed them nearly $10,000. The company had already brought lawsuits against hundreds of other individuals whose cars it had repossessed. Most of them could not afford lawyers, and many of them did not bother to defend the suits, nor were they aware that they had valid defenses. Credit Acceptance Corporation was obtaining judgments against scores of Connecticut consumers who were powerless to defend themselves, and it was bringing dozens of new suits every month.

We knew that the only way to help Shelly Toliver and our other clients, as well as thousands of others in the same predicament, was by bringing a class action lawsuit. Very early in that suit, Credit Acceptance Corporation tried to transfer the case to federal court. We believed that Connecticut courts should interpret our state's repossession laws, and we successfully moved to have the case transferred back to state court. An experienced and highly respected state court judge considered our case and interpreted the repossession laws that had been passed by our state legislature. The judge denied Credit Acceptance Corporation's motion to dismiss the suit. After a long and bitterly contested battle, the judge granted our motion to certify the class. Shortly afterwards, Credit Acceptance Corporation agreed to settle the case in late 2001.
As a result, Shelly Toliver and nearly 4,000 other consumers were no longer responsible for nearly $10 million that Credit Acceptance Corporation had claimed that they owed. Most of them also received $125 in cash.

Consumer Law Group has brought similar suits against other auto finance companies that violated Connecticut's repossession statutes. Nearly 50,000 consumers have been relieved of deficiency claims of tens of millions of dollars. Their credit has been restored. Connecticut's laws have been interpreted and enforced in state court by state judges.

If the pending class action bill had been the law, it is likely that none of this would have been possible. Families like Shelly Toliver's would have been wrongly burdened by debts and would have had difficulty in purchasing a home or financing another car. State court judges should be permitted to interpret state law. Consumers like Shelly Toliver should be able to have small claims brought as class actions when there is

no other way for them to obtain justice. Businesses should not profit from their wrongdoing because consumers cannot economically pursue their claims on an individual basis.

Supporters of what should be called the Class Action *Un*Fairness Act have attempted to characterize this legislation as a consumer protection measure. Yet, these supporters represent primarily business interests. That is because the bill is a business protection measure that would shield corporations that violate the law. That is why consumer advocates oppose S. 5. That is why I oppose it. And, that is why informed consumers like Shelly Toliver oppose it.

Address: Consumer Law Group, LLC, 35 Cold Spring Road, Rocky Hill, CT 06033. Phone: 860 571-0408,x101. Cell: 860 324-3533.

Background: Managing attorney of Consumer Law Group; Chairman of the Consumer Law Section of the Connecticut Bar Association[1]

[1] The opinions expressed in this statement are those of Mr. Blinn and do not represent the opinions of either the Connecticut Bar Association or the CBA's Consumer Law Section

Georgie Hartwig
Former Wal-Mart employee
Kettle Falls, Washington

This case illustrates how federal courts are reluctant to certify a class where the laws of multiple states are involved: Wal-Mart employees work without pay.

When Wal-Mart employees wanted to sue the company because it forced them to work unpaid hours, they had a hard time getting into court. Three federal courts refused to certify class actions against the nation's largest employer, although at least five state courts[1] have done so. As a result, plaintiffs such as Georgie Hartwig, who worked at the Wal-Mart in Colville, Washington for nearly six years, may be able to get back pay for all the hours they worked. Hartwig had a number of positions at the store—freight receiving coordinator, sales associate morning stocker, department manager—but in each position was obliged to work time off the clock for which she was never compensated, worked overtime for which she was never paid, was occasionally locked into the store at night, and was denied meal and rest breaks. In fact, Wal-Mart stopped making its employees clock in and out for breaks and meals back in 2001 after an internal audit revealed that this would create a record of the company's practice of "time-shaving." On average, Hartwig estimated that she worked between two and five extra hours per week for which she received no money. And that does not include the substantial hours for which she was not paid during the holidays and at inventory time.

Hartwig's case is being heard in Washington, a state that has good wage and hour laws. But under S. 5, the case could be removed by Wal-Mart to federal court[2] where at worst it may not be certified at all (on a finding that questions of law or fact did not predominate, making the case "unmanageable"), and at best encounter significant delays resulting from a chronically overburdened federal court system. Equally troubling is that even if the case is heard in federal court, because the case involves novel state issues on which a state judge has not yet spoken—such as whether or not an employee who works through a lunch break but is still on the clock has been damaged—the federal court will have to restrict itself to the narrowest interpretation possible so as not to "create" state law. Meanwhile, Hartwig and other low-wage earners are being denied payment for their labor, while Wal-Mart gets to hold on to its ill-gotten gains. An estimated 40,000 current and former Wal-Mart employees in Washington could benefit from the lawsuit.

Federal case not certified: *Basco v. Wal-Mart Stores, 2002 WL 272384 (E.D. La. 2002)*
State case certified: *Barnett v. Wal-Mart Stores, No. 01-2-24553-8SEA (Sup.Ct. King Co., Wash. 2004)*

Contacts:

Toby Marshall, Esq.
Tousley Brain Stephens PLLC
700 Fifth Avenue, Suite 5600
Seattle, WA 98104-5056
(206) 682-5600
tmarshall@tousley.com

Jillian Aldebron
Public Citizen
202-454-5135
jaldebron@citizen.org

[1] In addition to Washington, Minnesota, California, Indiana and Massachusetts. Oregon is also proceeding with state claims after being heard on Fair Labor Standards Act violations in federal court.
[2] Wal-Mart has asked the court of appeals to review class certification. The provisions of S. 5 will apply retroactively to all class actions filed but for which certification has not been granted by the date of enactment.

Statement of David McIntyre
Plaintiff, victim of sub-prime lender's credit scheme
Bessemer, Alabama
Feb. 7, 2005

My name is David McIntyre and I live in Bessemer, Alabama. I have been married to my wife for 32 years, have two children, and five grandchildren.

I've worked as many as 16 hours a day at two different jobs, assembling jewelry and as a clerk in a convenience store, to pay my bills and support my family. I am also a preacher for the Bessemer Independent Church of God. I am here today to tell you my story about how I was treated by big business and by the federal court system.

In 1999, I received a credit card offer in the mail from Household Bank stating that I was "pre-approved" for a credit card with a $1500 credit line. This was great for me because we live mostly from paycheck to paycheck and are sometimes strung out at the end of the month, especially if there are unexpected expenses, like the car breaks down. I filled out the form and sent it to Household along with the $19 application fee. When the card came in the mail, it was not for the $1500 credit line that was advertised, but for only $300 worth of credit. The first $79 would be taken up by the annual fee, so really that only left me with $221 to start with. The interest rate was also very high.

Because the credit was so low and the interest rate so high, my wife and I decided the card was not a good deal. The agreement that was sent with the card stated that the terms and conditions did not become effective until the card was "used." I never used the card to make a single purchase. In fact, I put the card back in the envelope and put the envelope in my desk drawer and just forgot about it.

About a year later, I receive a letter from a collection agency telling me I owe $263 on a Household Bank MasterCard. I never had a MasterCard, so I thought the letter was a mistake. I thought they had the wrong David McIntyre. When I received a second letter a few months later, I called to clarify that the debt did could not belong to me.

As it turns out, Household Bank automatically activated the account and charged me a $79 annual fee even though I had never used the card. Household then added late fees and interest to get to the $263 that the collection agency was trying to collect.
The collection agency sent me back to Household to try and clear up this mistake. Household, in turn, sent me back to the collection agency after confirming that I never made a single purchase with the card, and never activated it. The collection company sent me back to Household a second time, who sent me back to collections.

During my final conversation with the collection company, the person on the phone told me that he didn't care if I never used the card. In his view, his company had bought the debt and I simply had to pay it. When I told him that it was unfair and that what they were doing was illegal, he dared me to go to court by saying "Go ahead and find yourself a good $1,000 an hour lawyer to sue over $263!" I was sick of the runaround and sick of them trying to intimidate me, but he just left me no other way out of the mess. They wouldn't even discuss removing the charge.

My attorney told me we had to go to Illinois Federal Court because that is where Household is headquartered. We filed the case as a class action because Household said this was their policy, so apparently they were doing this to lots of other people around the country.

The Federal Court sent me to arbitration even though the agreement with the arbitration clause only became effective once I used the card, and I'd never used it. Funny thing was that the arbitrator agreed with me and wrote a 10-page opinion saying so. But when we went back to federal court, the judge kept asking why this "old" case was still on his docket, and why it hadn't been settled. Then the judge basically listened to Household and threw the case out.

We got documents from Household showing that as many as 50,000 other people of modest means like myself had been charged although they never used their cards. Those people are now simply out of luck. They are the reason I am here today telling this story. The collection agency dared me to sue over a $263 because they knew it would be hard for me to get a lawyer to take my case for such a small amount. Who cares if my credit was ruined and I can't buy a car or a house. Who cares if one of the biggest banks in the world does not live up the terms of its own agreements.

If consumers like me cannot join together in class actions to get justice for what are big wrongs to us but in the general scheme of things are considered small wrongs in the legal world, then we will simply be forced to pay or have our credit ruined for doing absolutely nothing wrong. Many great things in this country have been achieved by many little people banding together to have a stronger common voice. That is how I think of class actions. Without them, individual consumers like me don't stand a chance against giants like Household Bank.

I ultimately settled my individual case with Household. The terms of the settlement are confidential.

Contact: Brian Warwick, Esq.
Varnell & Warwick, PA
20 LaGrande Boulevard
The Villages, FL 32159
352-753-8600
bwwarwick@aol.com

Jillian Aldebron, Civil Justice Media Coordinator & Counsel
Public Citizen
202-454-5135
jaldebron@citizen.org

David McIntyre
Preacher, victim of sub-prime lender's credit scheme
Bessemer, Alabama

This case shows how class actions were intended to level the playing field by protecting the average consumer against unfair, deceptive or coercive commercial practices.

Household Bank, which had a division dedicated specifically to targeting individuals with poor credit rating (Sub-prime Lending Group), solicited applications for its credit card through the mail. The mailing promised a credit limit of up to $1,200, with an annual fee of $79; the application fee was $20. This looked like a good deal to David McIntyre, a preacher from rural Alabama who had bad credit and a perpetual cash flow problem. He sent in the $20 along with his application, but when Household Bank sent him the new credit card, he found that he was approved for only $300 of credit. As a result, he declined to use the card. That did not stop Household Bank, however, from trying to collect its fee—and tacking on late fees and issuing bad credit reports—although the terms of the card explicitly stated that the cardholder agreement became effective only as of the first use of the card.

Household had preyed on some 50,000 individuals in this same way, knowing that only some 1% would qualify for the full $1,200 credit limit. A federal district court in Illinois refused to certify a nationwide class by using the excuse of irrelevant differences in the contract provisions—differences in matters that had nothing to do with the claim, such as the varying credit limits among Household cardholders—to defeat class certification. McIntyre was left to settle his case alone while tens of thousands of others throughout the country had no recourse at all.

Compare this to the case of American Fair Credit Association (AFC), also targeting low-income, unsophisticated consumers with a "credit repair program" advertised to fix their bad credit rating. AFC charged its customers $500 for a "membership fee" in the first year alone, while offering them a credit card with a limit of only $300. AFC tried to remove the state-filed class action to federal court, where one court twice declined to rule on class certification and denied the injured parties access to almost all discovery. In the end, the defendants were unsuccessful in quashing the case in federal court, but progress was delayed for years. Ultimately, the plaintiffs won their case in state court and the company agreed to a nationwide settlement—providing some $40 million in relief to over 300,000 low-income consumers.

Federal case not certified: *McIntyre v. Household Bank*, 2004 WL 2958690 (N.D.Ill.)
State case certified: *Mitchell v. American Fair Credit Ass'n*, 99 Cal. App. 4th 1345 (2002)

Contact:

Daniel Girard (for Mitchell)
Girard, Gibbs & DeBartolomeo
601 California Street, Suite 1400
San Francisco, CA 94108
415-981-4800
dcg@girardgibbs.com

Brian Warwick, Esq. (for McIntyre)
Varnell & Warwick, PA
20 LaGrande Boulevard
The Villages, FL 32159
352-753-8600
bwwarwick@aol.com

Jillian Aldebron, Civil Justice Media Coordinator & Counsel
Public Citizen
202-454-5135
jaldebron@citizen.org