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Class Action Legislation: Bingaman Amendment Needed to Allow Nationwide Consumer Protection Suits

On many occasions, sponsors of the class action bill have said that "nationwide class actions belong in federal court." They have also implied that their bill would allow such cases to proceed in federal court. That, however, is not true.

The reason that many nationwide cases are brought in state courts is that federal courts have refused to certify nationwide class actions. Here is the background: There is no general, catchall federal consumer protection law that individual consumers may invoke. The basic federal consumer protection law is Section 5 of the Federal Trade Commission Act. This law prohibits unfair and deceptive business practices, but contains no private right of action. It may only be enforced by the FTC. There are some specific federal consumer laws, such as the Truth in Lending Act (TILA) and the Real Estate Settlement Practices Act (RESPA) that allow class action suits. Those suits may proceed on a nationwide basis in federal court.

But for the most part, consumers must bring their cases under state Unfair and Deceptive Acts and Practices laws (UDAP), or bring common-law contract claims. Most of these laws are substantially the same from state to state. Most UDAP laws are based on Section 5(a)(1) of the Federal Trade Commission Act, and provide that judges should look to FTC decisions as precedents.

In recent years, there has a been a trend toward filing nationwide class actions, based on state laws, when misconduct has affected consumers identically on a nationwide basis. Several state courts have allowed suits to proceed this way, because the state laws are substantially uniform. In those instances when the laws have not been interpreted uniformly by each state's courts, the court hearing the class action can group the states having similar interpretations into subclasses. The Constitution prohibits certification of a 50-state class when there are "material" differences in states' laws. Shutts v. Phillips Petroleum, 472 U.S. 797 (1985). But if there are mere "nuances" in states' laws, one court may apply them all.

The problem is that, while some state courts will certify nationwide class actions when there are non-material differences, the federal courts will not. In decisions such as Castano v. American Tobacco 84 F.3d 734 (5th Cir. 1996), In Re Bridgestone-Firestone, 288 F.3d 1012 (7th Cir. 2002) and Wadleigh v. Rhone-Poulenc, 51 F3d 1293 (7th Cir. 1995) the federal courts have said that any nuanced differences are enough to defeat class action certification, based on a strict reading of Rule 23.

Because of this policy, one consequence of moving class actions to federal court would be to endanger refunds to consumers in less-populated states. Class actions will have to be brought on a state-by-state basis. Simply put, while it may be economical to bring a one-state class action in Illinois, with over ten million residents, it will not be feasible to bring class actions in smaller or less densely-populated states. In fact, there are many states that have no attorneys experienced in filing consumer class actions at all.

The result will be a patchwork of class actions, with consumers in large states receiving refunds for overcharges, kickbacks, and other frauds; while consumers in less-populous states receive nothing. Some of the state-court class action settlements that sponsors of S. 2062 have decried led to millions of dollars being paid to consumers in every single state. These include cases for defective plastic plumbing and defective Masonite siding. But in states such as Nebraska, Arkansas, Delaware, and many others, there may be too few residents affected by a product to make a single-state case worthwhile. Under the bill, residents of Rockford, Illinois could receive $2,000 reimbursements when shoddy building materials disintegrate, while residents of Beloit, Wisconsin just a few miles up the road receive nothing.

Another possibility would be to consign consumer class actions to oblivion. Identical one-state and multi-state cases would be consolidated under the MDL statute for pre-trial purposes before a single judge. Often, the judge will strongly encourage the attorneys to refile the cases as one nationwide class action case so the judge can more efficiently rule on pre-trial motions, including class certification. Once consolidated in that fashion, the case may not be certified because so many different state laws are involved.

The Bingaman amendment, drafted by 2 prominent law professors, Arthur Miller of Harvard University, and Samuel Isaacharoff of Columbia University, would allow federal courts to certify nationwide class actions to the full extent of their constitutional power to do so. The amendment would allow it by either of two ways:

(a) Let federal judges apply one state's law to the case—a recommendation made by the prestigious American Law Institute in 1994. In making that recommendation in its Complex Litigation Project, ALI scholars reasoned that allowing a single state's tort law to apply to all similar claims would "foster the consolidated treatment" of such claims. This is one of the stated goals of S. 2062's proponents.
(b) In the alternative, let the federal court use the "grouping" technique that has been used by some state courts. Such an approach would not allow a federal court to certify a nationwide class if there are material differences in state laws, but would not allow denial of a multi-state class simply because of nuanced differences in state laws. This would ensure that no consumers are left behind because they inhabit a small or sparsely-populated state, or because they bought insurance or another product in one state and then moved to another state where the defendant company has few customers.