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CUTTING CLASSES:
THE SLOW DEMISE OF CLASS ACTIONS IN AMERICA

Class action lawsuits are among the most important tools that individuals and small businesses have to protect their rights, hold large corporations accountable and deter future misconduct.

- When a company has received a large windfall through small injuries to large numbers of people, a class action lawsuit is often the only way harmed individuals can afford to challenge this wrongdoing in court.

- Class actions have been used to protect citizens from a wide array of abuses, from consumer fraud to civil rights violations to environmental harm to automotive defects to health care abuses.

There are strict and complex rules in place for bringing class actions.

- Before a class action lawsuit can move forward, it needs to be "certified" by a court. Under federal and state rules, there are strict requirements regarding the size of the class (typically at least 40 members), "commonality" (class members must suffer the same injury), requirements specific to the class representative, and others rules regarding the best interests of the class.

In 2005, Congress passed a law that provides reckless corporations with the authority to decide, in most cases, which court will hear a class action case that accuses them of wrongdoing.

- The 2005 "Class Action Fairness Act" (CAFA) lets defendants "remove" or transfer state class actions into the smaller, already clogged federal court system[1] – a system now struggling with severe budget cuts due to the sequester.[2] Since CAFA passed, federal court judges have been unable to deal with flood of state cases and have been throwing out meritorious cases.[3]

- The business community is now asking Congress to allow even more state class actions in federal court[4] - although the U.S. Supreme Court has already been doing this job for them.[5]

The Supreme Court is making it more difficult to certify class action lawsuits.

- In 2011, in *Wal-Mart v. Dukes*, the Supreme Court threw out a civil rights sex discrimination class action brought on behalf of over 1 million women who worked at Wal-Mart stores around the country, saying that the plaintiffs did not have enough in common to proceed as a class.[6] It has already been cited by over 500 in lower court rulings,[7] with claims being dismissed before certification is even addressed.[8]

- In the more recent *Comcast v Behrend*, the Supreme Court would not let a class of Philadelphia cable subscribers proceed as a class against Comcast for overcharging for basic cable packages. Because the Court found problems with preliminary evidence of damages calculations, it refused to certify the case,[9] prompting the reading of a harsh dissent in open court by Justices Ginsburg and Breyer.

The Supreme Court is allowing corporations accused of wrongdoing to simply ban class actions altogether.

- In the 2011 case, *AT&T v. Concepcion*, the Court allowed companies to ban class actions via forced arbitration clauses found in many contracts today. The Court said the class action ban was legal even though there is a law[10] in California, where the case was brought, that declared that such class action bans were "unconscionable" and could not be imposed. Since *Concepcion*, Public Citizen found that over 100 potential class actions have been dismissed,[11] but the numbers are likely much higher.

- In 2013, the Supreme Court decided a case that closed the door on even more class actions.

    - Past Supreme Court decisions have held that victims with federal law claims (antitrust, civil rights, etc.) must be able to "effectively vindicate their rights."[12]

    - In *American Express v. Italian Colors Restaurant*, small businesses - restaurant owners, store owners, and merchants - claimed that the cost of bringing their individual cases in arbitration against American Express would be so high that they would not be able to bring them, and would be unable to "vindicate their rights."[13] The court held that arbitration clauses and class action waivers are enforceable, even in cases like this, where they prevent the injured parties from "vindicating their rights."

Given these developments, there is only one solution: Congress must amend the Federal Arbitration Act of 1924[14] to restrict the use of forced arbitration and class action bans.

NOTES

[1] According to CAFA, defendants in class actions that involve more than $5 million when any class member resides in a different state than any defendant (unless two thirds of the class and the primary defendants are in the state where the case was originally filed) can remove them to federal court. 28 U.S.C. Sections 1332(d). See also, http://www.abajournal.com/magazine/article/a_step_up_in_class/

[2] "Sequestration outlook bleak for federal courts," *National Law Journal*, (March 8, 2013.)

[3] Testimony of Thomas M. Cobol, Partner, Hagens Berman Sobol Shapiro LLP, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, "Class Actions Seven Years After the Class Action Fairness Act," June 1, 2012, http://judiciary.house.gov/hearings/Hearings%202012/Sobol%2006012012.pdf

[4] Testimony of John H. Beisner On Behalf of the U.S. Chamber Institute for Legal Reform Before the Subcommittee on the Constitution of the Committee on the Judiciary United States House of Representatives, "Class Actions Seven Years After the Class Action Fairness Act" (June 1, 2012.)

[5] In *Standard Fire* Insurance Co. *v. Knowles,* 568 U.S. ___ (2013), the Court invalidated the plaintiff's signed document stipulating that the class recovery would be no more than $5 million, which would be below the threshold triggering CAFA.

[6] *Wal-Mart v Dukes*, 131 S.Ct. 2541 (2011).

[7] Seyfarth Shaw, "Ninth Annual Workplace Class Action Litigation Report" (January 2013), http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf

[8] Andrew Longstreth, "Wal-Mart v Dukes shakes up employment class actions," *Thomson Reuters News and Insight*, (Jan 9, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/01_-_January/Wal-Mart_v__Dukes_shakes_up_employment_class_actions/

[9] Daniel Fisher, "Class-Action Lawyers Face Triple Threat at Supreme Court," *Forbes*, (Oct 1, 2012), http://www.forbes.com/sites/danielfisher/2012/10/01/class-action-lawyers-face-triple-threat-at-supreme-court/.

[10] *Discover Bank v Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005).

[11] Public Citizen "During National Consumer Protection Week, Consumer Advocates Warn About Harms of Forced Arbitration," March 7, 2013, http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3830

[12] *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985.)

[13] Respondent's Brief, *American Express Co. v. Italian Restaurant*, No. 12-133, January 22, 2013, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-133_resp.authcheckdam.pdf (argued February 27, 2013).

[14] 9 U.S.C. §§ 1-16.