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Areeda Hall 225
June 17, 2005

Dear Senator Bingaman:

I am happy to respond to your letter of June 14 asking for my views of your proposed "choice of law" amendment to the proposed "Class Action Fairness Act" (S. 2062). After decades of teaching, practicing, writing, and serving the Judiciary in various public service capacities in the fields of civil procedure, complex litigation, and class actions, I am very interested in any federal legislation affecting class action lawsuits, and particularly, in the possibility of making this particular legislation fairer and more balanced.

In general, S. 2062 would place in federal court most class actions that involve more than \$5 million in losses and more than 100 class members, and in which any defendant is a citizen of a state that is different from that of any member of the plaintiff class. In effect, the proposed legislation would federalize all class actions of any significance. I believe that this radical departure from one of the most basic, longstanding principles of federalism is a particular affront to state judges when we consider the unquestioned vitality and competence of state courts to which we have historically and frequently entrusted the enforcement of *state-created* rights and remedies. I recognize, however, that apparently a majority of the Senate supports the idea of moving most class action lawsuits from state to federal court. If that is the case, your proposed amendment is essential to ensure that, once class actions were moved into the federal courts, these cases not be consigned to oblivion. That real possibility goes beyond the just mentioned intrusion on federalism principles and raises legitimate concerns about the fairness and balance of S. 2062.

Proponents of S. 2062 argue that federal courts are the more appropriate forum for lawsuits involving plaintiffs from multiple states. They assert that the goal of the bill is to ensure that nationwide cases will "be litigated in the federal courts rather than in the courts of just one state (or county) or another."¹ Of course, that statement ignores the fact that state courts have been trusted to adjudicate multi-state controversies since the foundation of the Nation. Moreover, the truth is that these cases are *not* litigated in federal court; most commonly they are denied class certification. The proposed legislation would magnify that reality.

Federal courts have consistently denied class certification in multi-state lawsuits based on consumer laws as well as other state laws. This fact is acknowledged by most

¹ Testimony of Walter E. Dellinger III, Partner, O'Melveny & Meyers, before the U.S. Senate Committee on the Judiciary on Class Action Litigation, July 31, 2002.

class action practitioners and experts, regardless of their position on class action policy issues. Just last year, the U.S. Chamber of Commerce – the leading proponent of S. 2062 – filed an amicus curiae brief in the U.S. Court of Appeals for the Second Circuit urging the court to overrule a distinguished district court’s class certification decision because “... federal courts have consistently refused to certify nationwide class actions in product defect cases because the need to apply the laws of many different states would make such a sprawling class action unmanageable.”² The Chamber went on to conclude, “... 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.”³ On this point, the Chamber is correct – not a single Federal Circuit Court has granted class certification for such a lawsuit, and six Circuit Courts have expressly denied certification.⁴

It is not surprising that federal courts are reluctant to grant certification to multi-state 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.

Your proposed amendment will provide guidance to federal judges that will enable more multi-state consumer class actions to be certified in federal court and, hopefully, resolved on their actual merits. If S. 2062 is enacted without the amendment, class action lawsuits brought on behalf of consumers who have been defrauded or injured because of corporate misconduct that affected people in multiple states will continue to be non-viable.

The following is a brief description of how federal courts currently treat class actions based on different state laws. It will elucidate the need for an amendment like yours in the event that Congress does indeed give federal courts exclusive jurisdiction over class actions that involve solely state law claims.

The rationale that many federal courts use for refusing to certify consumer class actions that involve solely state law claims on behalf of citizens from different states rests on the requirement of Federal Rule of Civil Procedure 23(b)(3), which governs most

² Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Appellants, *In re Simon II Litigation*, No. 03-7141, United States Court of Appeals for the Second Circuit, June 3, 2003.

³ *Id.*

⁴ Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, the Districts of Connecticut, District of Columbia, Kansas, Massachusetts, Minnesota, New Hampshire, and New Jersey, the Eastern Districts of Louisiana, North Carolina, Pennsylvania, and Texas, the Northern Districts of Florida, Georgia, Illinois, Mississippi, Ohio, and Oklahoma, the Southern Districts of Alaska, Florida, Illinois, New York, and Texas, the Western Districts of Michigan, Montana, and Washington, and the Middle District of Alabama.

consumer class actions brought in federal court. Rule 23(b)(3) says, in pertinent part: "An action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." When courts feel compelled to apply the laws of different states to different members of a class action, they often find that questions of law common to the members of the class do not predominate, leading them to conclude that proceeding on a class action basis would prove to be unmanageable, and they deny class certification.

Federal courts often conclude they must apply the laws of different states to different members of a class action after they engage in a complex "choice of law" analysis to determine which state's law to apply to the claims of the class members. Under current doctrines, federal courts hearing state law based claims must use the "choice-of-law" rule of the state in which the federal district court sits. These procedural rules vary among states, but many provide that the federal court should apply the substantive law of the home state of the plaintiff, or the law of the state where the harm occurred. In a nationwide consumer class action, such a rule would lead the court to apply to each class member's claim the law of the state in which the class member lives, or lived at the time the harm occurred. As noted, most federal courts will not grant class certification in these situations because they find that the cases would be "unmanageable."

Your amendment would allow 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. That state often will be the state in which the defendant's headquarters is located, or where the product was designed or manufactured, or where the marketing materials were conceived, or where the particular business practice being challenged was developed or executed.

If the federal district judge chooses to reject the option of applying one state's law to the case, your amendment ensures that the judge does not deny class certification on the sole ground that the laws of more than one state would apply to the action. This protects consumers from being caught 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. I believe that your amendment strikes the appropriate balance among the interests of the class members, defendants, and the courts. Most important, it will ensure that S. 2062 does not lead to the unintended consequence of robbing from consumers their only avenue to seek redress from corporations that violate the law.

If S. 2062 passes without your amendment, the only outlet for injured consumers will be single-state class actions. But that would fly in the face of what the proponents of

the bill are apparently trying to achieve, which is to consolidate nationwide class actions in one forum, federal court, so that businesses do not have to face multiple lawsuits throughout the country. What is worse, the only plaintiffs who will be represented and compensated through single state actions are those from highly-populated states, where the damages suffered by the class members will be large enough to finance a costly and typically risky class action lawsuit. This may be a practical and viable solution for those who live in a state like California or Texas. But it will leave millions of consumers who have been harmed in less-populated states, such as your home state of New Mexico, without relief.

Your amendment effectively and efficiently allows multi-state class actions in consumer cases to be certified in federal court. It actually accomplishes what the bill purports to achieve – giving harmed consumers from multiple states one federal forum in which to seek relief. Under your amendment, the federal judge will have the discretion to apply one state's law, as long as that is constitutionally permissible. Or the judge may choose to manage the case in a different way, perhaps by grouping states together that have similar laws into subclasses or by using exemplar or test cases or by resorting to the increasingly sophisticated tool chest of management procedures our courts have developed. In any event, the judge may not dismiss a case on the ground that the litigation is unmanageable simply because multiple state laws apply. The judge does, of course, maintain the discretion to refuse to certify the class on other grounds. The amendment is quite modest, but it does restore some balance and fairness to the bill by increasing the likelihood that citizens will have access to the courts to present their grievances.

Your letter to me notes that proponents of the bill are portraying this amendment as anti-consumer. Such a characterization could not be further from the truth and is little more than rhetoric. Indeed, in my judgment, it is S. 2062 that is anti-consumer.

As noted above, under current practice, federal courts rarely certify nationwide consumer class actions. In almost every instance in which allegations of wrongdoing injuring large numbers of consumers have been brought, the decision to deny class certification will eviscerate any opportunity for the victims to seek redress. The individual members of the class simply will not suffer losses large enough to justify bringing suit solely on one person's behalf. It is hardly anti-consumer to provide a mechanism to enable federal courts to certify cases and afford consumers an opportunity to have their grievances heard.

Thus I believe your amendment provides a balanced solution. It allows injured consumers a better chance of getting their day in court. And it provides federal judges with a reasonable way to manage multi-state class actions based on consumer laws.

You also note that proponents of the legislation have suggested that this amendment is unconstitutional. There is no basis for such an assertion.

Your amendment expressly honors the Constitution by stating, "the district court may apply the rule of decision of one state having a sufficient interest in the claim that the application of that state's law is permissible under the Constitution." Although the amendment allows a federal judge to apply one state's law, it does so only when that is constitutionally acceptable.

The constitutional limitation on applying a single state's law to a multi-state action is derived from *Phillips Petroleum Co. v. Shutts et al.*, 472 U.S. 797 (1985), a case that I argued on behalf of Phillips Petroleum Co. before the Supreme Court. The Court held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 818 (internal cite and quotations omitted). Thus, as long as there are "significant contacts" and the choice of law is not "arbitrary" or "fundamentally unfair," then a single state's laws may apply to a multi-state class action. Neither party can object to that.

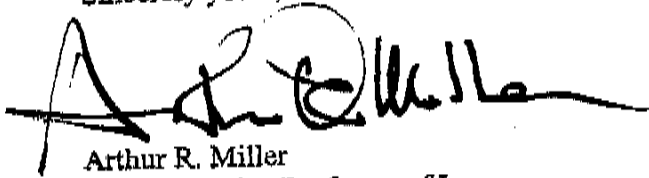
Because your amendment effectively codifies *Shutts*, it is constitutional. If there is a multi-state class action in which no single state's law meets the constitutional standard set forth in *Shutts* or if the judge does not choose to apply a single state law that does meet the constitutional criteria, then the judge may follow the choice of law rules of the state in which the district court sits. Part (b) of the amendment does not implicate the Constitution in any way. It merely provides that if the judge does not apply a single state law, then he or she may not deny certification under Rule 23 on the narrow ground that multiple states' laws apply to the case and make it unmanageable. It encourages federal judges to try to go forward and reach the merits of the dispute.

Thus, your amendment gives federal judges appropriate guidance about how to address multi-state consumer class action lawsuits. It does not mandate a result or tie their hands. This ability to make a case more manageable will allow at least some multi-state consumer class actions to be heard, rather than to be denied certification. As the California State Supreme Court aptly recognized, defendants should not be able to keep ill-gotten gains "simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." *State v. Levi Strauss & Co.*, 41 Cal.3d 460 (1986). Yet that is where this bill as written will lead us, and that is extremely bad policy.

Unless the Senate wants to enact legislation that, as a practical matter, eliminates multi-state class actions, it should not pass S. 2062 as it is written. Under S. 2062, multi-state class actions in consumer law cases, a vital mechanism for promoting social justice, giving people access to the courts, and dealing fairly with our citizenry, will become an artifact, a thing of the past. At a minimum, the Senate would be wise to adopt your amendment, which would allow plaintiffs to have their day in *federal* court; after all, the proponents of the legislation argue that is the goal of the bill.

Thank you again for your willingness to address this important issue. If you have any additional questions about S. 2062 or the benefits of your amendment, I would be happy to assist you further.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Arthur R. Miller'. The signature is fluid and cursive, with a large initial 'A' and 'M'.

Arthur R. Miller
Bruce Bromley Professor of Law

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