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Fighting Together for Economic Justice

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BEFORE THE COLORADO SENATE JUDICIARY COMMITTEE

TESTIMONY IN SUPPORT OF HOUSE BILL 22-1071

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Chairman Lee and members of the Committee, thank you for holding this hearing on H.B. 22-1071, a bill to improve protection of consumers in Colorado by authorizing class actions for certain claims. Passage of H.B. 22-1071 would significant improve enforcement of Colorado's current law prohibiting unfair and deceptive trade practices, bringing the state in line with the majority of other states.

My name is Carolyn Carter. I am the Deputy Director of the National Consumer Law Center (NCLC), a nonprofit organization, founded in 1969, that works for consumer justice and economic security for low-income and other disadvantaged people. NCLC publishes a series of twenty-one practice manuals on consumer law and utility law, including *Unfair and Deceptive Acts and Practices* (10th ed. 2021), *updated at* www.nclc.org/library. That treatise analyzes the UDAP (Unfair and Deceptive Acts and Practices) statutes in the fifty states, including Colorado's Consumer Protection Act, and the decisions of the courts interpreting and applying those laws. I am the primary author of that treatise, and have also published two reports that analyze the strengths and weaknesses of the UDAP statutes in the fifty states, the most recent of which is Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws (March 2018).

Prohibiting Class Actions Greatly Weakens the Effectiveness of UDAP Statutes

Colorado's Consumer Protection Act is seriously weakened by its ban on class actions. When a business descends to unfair and deceptive tactics, it rarely singles out just one consumer for this treatment. To the contrary, consumer fraud is often committed on a broad scale, with a fraudulent product or scheme foisted on thousands of consumers. Requiring each of these consumers to hire an attorney individually and bring an individual suit is inefficient and reduces the power of the protections the state intended to create by enacting the UDAP statute.

Aggregation of claims into a single case through the class action mechanism recognizes the economic reality that each individual loss may be too small to merit the cost of pursuing a claim. Moreover, it is patently unfair to consign consumers to the sole option of individualized

suits, when the supplier followed a standard practice and cheated many consumers in the same way.

It is through class action status and class-wide discovery (the procedures by which both sides obtain information from each other before trial) that the defendant's allegedly harmful practice and its application to large numbers of similarly-situated consumers can be accurately determined. Ferreting out proof of the defendant's practices can be time-consuming and extraordinarily expensive. To relegate consumers to individual suits, where each has to bear this expense over and over again, denies them any realistic ability to obtain redress. Refusing to allow a class action leaves consumers without a practical remedy in many circumstances, particularly for small-scale fraud practiced on a large number of people. Consumer fraud is so pervasive that governmental resources are never sufficient to ensure compliance.

Knowing that class action relief may be available to consumers who have been harmed by their illegal activities provides an important incentive to businesses to abide by the law's prohibitions, and not commit unfair and deceptive practices in the first place. That is why the very existence of the remedy ameliorates the need for it to be employed too often.

Class actions are an efficient way for consumers to obtain redress when an unfair or deceptive practice affects many people. They are particularly important when the dollar amount per person is small. As Congress has recognized, class action lawsuits "permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm."[1] The Colorado UDAP statute's class action ban is particularly harmful, because several courts have held that it restricts class actions not just in state court but also in federal court. *See, e.g.*, *Murtagh v. Bed Bath & Beyond*, 2020 WL 4195126 (D. Colo. July 3, 2020); *Friedman v. Dollar Thrift Auto. Group, Inc*., 2015 WL 8479746 (D. Colo. Dec. 10, 2015).

H.B. 22-1071 Would Bring Colorado into Line with the Vast Majority of Other States

Forty states allow consumers to band together to enforce the state UDAP statute, recognizing the importance of this remedy to enforce the law. Colorado is one of only ten states—Alabama, Arkansas, Colorado, Georgia, Louisiana, Mississippi, Montana, South Carolina, Tennessee, and Virginia—that deny consumers the right to join together in a class action under the state UDAP statute.

H.B. 22-1071 would bring Colorado into line with the forty other states and the District of Columbia that do not exclude consumer protection suits from the class action mechanism.

Class actions are allowed in Colorado to rectify almost every other kind of wrong. Singling out consumer fraud for kid-gloves treatment is an unsupportable policy that H.B. 22-1071 would rectify.

I applaud the House for having passed this bill and urge the Senate to do the same. Thank you for considering my testimony.

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[1] CAFA (Class Action Fairness Act of 2005), Sec. 2(a).

DENVER METRO CHAMBER OF COMMERCE

HB22-1071 Damages In Class Actions Consumer Protection Act

Wednesday, March 2 2022
Senate Judiciary
Upon Adjournment | SCR 352
Testimony: Denver Metro Chamber of Commerce – Legal Advisory Committee

Mr. Chair and fellow members of the Senate Judiciary Committee. The following comments are submitted on behalf of the Denver Metro Chamber of Commerce and the Chamber's Legal Advisory Committee (LAC).

The Chamber stands in opposition to HB22-1071.

The Colorado Consumer Protection Act (CCPA) was designed to protect consumers and is currently serving that purpose well. Actions led by the Attorney General and District Attorneys are accountable to the public and responsive to those aggrieved. They prioritize ending and deterring any future anti-consumer behavior to large monetary verdicts. Additionally, if there is a negative public impact, the Office of the Attorney General can take up the case and pursue monetary verdicts to ensure that public interest is protected.

We do not hear supporters arguing that the Attorney General has been anything less than diligent in pursuing anti-consumer behaviors. The proposal does not augment the tools available to the Attorney General, but rather floods the market with profit-driven competition to serve as the primary enforcer of the state's consumer interest. Allowing financial penalties for individual litigants in a class action drives up reasonable attorneys' fees in a manner not benefitting consumers injured by the action in question, due to the consolidation of fact sensitive cases. It also overturns the Colorado Supreme Court's decision to recognize the common fund doctrine.

We are not in favor of the use of the Lodestar method for the determination of reasonable costs. It is not our assertion that hourly rates are unreasonable. It is our assertion that creation of a putative class requires an unnecessary number of hours to de-individualize and standardize the claims of each plaintiff while simultaneously jeopardizing the actions of legitimately aggrieved plaintiffs in order to fulfill the needs of commonality within the class.

When claimants bring their own suits, this is not a risk. Nor is it a problem when the Attorney General or District Attorney's initiate the class action, as their primary objective is to address the anti-consumer behavior, rather than seek the highest dollar settlement.

The threat of privately enforced state laws through class action lawsuits puts a substantial burden on business owners, typically improperly leveraged by the private attorney's threats of class actions. This suit would be predicated on behaviors that private attorneys perceive as violating CCPA even in cases where the Attorney General or District Attorneys have exercised their discretion not to prosecute. Indeed, private attorneys can come pick up the least meritorious claims whisked aside from the Attorney General's desk and pursue them under the guise that they are self-deputizing to enforce a public law.

DENVER METRO CHAMBER OF COMMERCE

This is done in the name of settlement negotiation, meaning whether a business owner agrees and settles at a higher rate, or declines and is subjected to an unsuccessful class action, they are burdened by the corresponding higher dollar amounts on a case that has already failed at least one level of government review.

For all of the reasons mentioned above, the Chamber cannot support HB22-1071.