Statement of

The Honorable Richard J. Durbin

United States Senator

Illinois

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Hearing of the Senate Judiciary Committee

"Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations"

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I commend Chairman Leahy for calling this hearing today. In recent years, the Supreme Court has quietly issued a series of troubling decisions that have restricted access to the courts for private citizens and shielded corporations from liability for irresponsible or even fraudulent behavior. Congress has passed laws to protect workers and consumers against such abuse, but the Court consistently has sided against the interests of ordinary Americans. In a time when so many are struggling to afford health insurance, save for retirement, and avoid home foreclosure, the Court has thwarted the will of Congress and prevented citizens from enforcing their rights in court.

Setting an Artificial Punitive Damages Cap

When the Exxon Valdez supertanker ran aground off the Alaskan coast in 1989, the eleven million gallons of oil that spilled into Prince William Sound caused massive environmental and economic damage. Exxon's irresponsible decision to leave a relapsed alcoholic at the helm of the Valdez devastated communities and deprived fishers, sailors, and many others of their livelihoods. But the Supreme Court's recent decision in a case brought by a group of Alaskans against Exxon imposed a draconian and arbitrary cap on punitive damages and dramatically reduced a jury verdict for the plaintiffs--this despite the fact that Congress has never signaled its intent to cap punitive damages awards in this context. The decision blunts an important incentive for companies to prioritize safety. Unfortunately, the Court's approach in this case is emblematic of its recent jurisprudence.

Escaping Responsibility for Securities Fraud

Another recent Supreme Court decision shields corporations from liability for defrauding investors. When corporations commit fraud, as companies like Enron and Scientific-Atlanta did so brazenly, there should be a legal remedy. Indeed, Congress enacted the Securities Exchange Act to serve exactly that purpose. Yet the Supreme Court's misinterpretation of that law in Stoneridge v. Scientific-Atlanta (2008) deprives individuals of access to the courts so long as the defendant company did not attach its name to any fraudulent statements. The impact of this decision is that companies like Scientific-Atlanta, which was complicit in a scheme to defraud investors, escape liability. But investors--including our nation's seniors--should not have to watch helplessly as their retirement savings evaporate because of a corporation's misconduct.

Mandatory Pre-Dispute Arbitration

The Supreme Court's interpretation of the Federal Arbitration Act--in Circuit City Stores, Inc. v. Adams (2001) and Gilmer v. Interstate Johnson Lane Corp. (1991)--similarly stacks the deck against workers and consumers. Too often, Americans have no choice but to sign away their rights when applying for a job, signing up for a credit card, or engaging in other consumer transactions. This means that disputes between employers and employees and between businesses and consumers are resolved by a for-profit arbitration firm--not the traditional courts. It is estimated that 30 million American employees--25% of the non-union workforce--have lost the right to go to court to pursue discrimination claims due to mandatory pre-dispute arbitration clauses.

A high-level manager of one of these firms has called mandatory arbitration a "field of dreams." But as Harvard Law Professor and arbitration judge Elizabeth Bartholet has testified before this Committee, mandatory pre-dispute arbitration can be a nightmare for employees and consumers. Because companies are repeat players in the often unfair game of arbitration, they call the shots. As a result, it is exceedingly rare for an employee or a consumer to prevail in one of these arbitration hearings. Arbitration firms and their clients routinely reject arbitrators like Professor Bartholet, who are independent and on occasion rule for a consumer.

Gutting the Americans with Disabilities Act

I would like to highlight another important example of the Supreme Court's anti-worker decisions. It is not the focus of today's hearing but it is an issue Congress aims to address in the near future. The Americans with Disabilities Act of 1990--a landmark piece of legislation--has made it possible for people

with disabilities to enter the social and economic mainstream of American life. As a Member of the House of Representatives, I was an original co-sponsor of this legislation, so I know first-hand that Congress enacted the ADA to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

Yet today, because the Court has misconstrued the will of Congress, the ADA no longer protects many categories of people with serious disabilities from employment discrimination. In a case called Sutton v. United Airlines (1999), the Supreme Court held that the ADA does not protect people who can mitigate the effects of their disability. For example, if a diabetic woman controls her glucose levels so well that she functions as if she were not diabetic at all, an employer can refuse to hire her simply because she is diabetic.

In Toyota Motor Mfg. v. Williams (2002), the Court again narrowed the scope of the ADA by refusing to require an employer to make a reasonable accommodation that would have allowed a woman suffering from a physical impairment to continue to work on a factory assembly line. The Court reasoned that because she could still perform certain daily tasks, such as brushing her teeth, she was not entitled to protection under the ADA. These results are fundamentally unfair, and they do not reflect Congress's intent when we passed the ADA.

Time for Considered Action

In light of recent Supreme Court decisions, it is once again incumbent upon Congress to enact laws that protect consumers from corporate fraud and workers from discrimination. I am a co-sponsor of the Arbitration Fairness Act, a bill introduced by Senator Feingold that would make arbitration truly fair and voluntary. Legislation is pending to restore the original meaning of the ADA and ensure that its positive legacy endures. It is important that Congress continues to consider these and other measures to help level the playing field for America's workers and consumers.