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on Class Action Legislation

**Presented to the American Bar Association's Task Force on Class Action
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Thank you for inviting the Association of Trial Lawyers of America (ATLA) to present its views on proposed class action legislation to the ABA's Task Force on Class Actions. ATLA, the world's largest organized trial bar, presently has over 50,000 members, who primarily represent plaintiffs in civil actions.

ATLA's Class Action Policy

ATLA's Board of Governors enacted our current policy on class actions on October 5, 1996. That policy provides, in part, the following:

“In general ATLA opposes changes to court rules governing class actions or the use of procedural devices in class actions that would diminish the right to trial by jury and/or equal access to the courts. ATLA believes the constitutional right to trial by jury in civil cases is a fundamental right. Meaningful exercise of that right requires: (1) that plaintiffs have autonomy in the decision to pursue remedies individually or as members of a class....”

Simply put, the proposed class legislation, H.R. 2341 and S. 1712, denies plaintiffs access to state courts for claims brought under state law and limits the choices plaintiffs have to redress wrongful conduct. By allowing defendants to remove plaintiffs' state claims to federal court at any time prior to final judgment, by instructing federal judges to dismiss rather than remand plaintiffs' claims, and by allowing defendants to abuse the removal device so that plaintiffs' substantive claims are never heard, pending class action legislation dramatically alters the playing field in favor of defendants at the expense of plaintiffs.

History of Legislation

This is the third Congress that has attempted to pass anti-consumer class action legislation. The bills¹ were originally introduced late during the 105th Congress after it became apparent that the old standard bearer of so-called “tort reform” legislation—product liability reform—could not pass the U.S. Senate. During the 106th Congress, the class action bills were reintroduced in the House as H.R. 1875 and in the Senate as S. 353. H.R. 1875, sponsored by Representatives Bob Goodlatte (R-VA) and Jim Moran (D-VA), passed the House floor by a vote of 222-207 on September 23, 1999. S. 353 was subsequently approved by the Senate Judiciary Committee, but was never brought to the Senate floor, in part, because the Firestone tire fiasco² would have certainly led to a filibuster on the Senate floor and the Senate could not afford to tie up floor time indefinitely. The bill numbers for the 107th Congress are H.R. 2341³ and S. 1712. While the bills have changed slightly from the 105th to the 107th Congress, those changes have been extremely marginal, and ATLA has consistently opposed the legislation.

¹H.R. 3789 was sponsored by then House Judiciary Chairman Henry Hyde (R-IL) and was marked up by the House Judiciary Committee. The bill did not make it to the House floor prior to adjournment of the 105th Congress. The Senate bill, S. 2083, sponsored by Senators Chuck Grassley (R-IA), Herb Kohl (D-WI), and Strom Thurmond (R-SC), was marked up by the Subcommittee on Oversight and Courts and referred to the full Senate Judiciary Committee where no further action was taken.

²During late summer and early fall of 1999 information that Firestone had knowingly sold defective tires causing more than 800 injuries and 271 deaths was the subject of a number of Congressional hearings as well as a prominently featured news story.

³H.R. 2341 recently passed the House by a vote of 233-190. Action in the Senate is less certain as a spokesman for Judiciary Committee Chairman Leahy (D-VT) has publicly questioned the justification for removing most state class actions to federal court as required under the legislation.

Federalism Concerns: Local Cases Belong in State Court

ATLA supports diversity jurisdiction, and has testified against legislation designed to curtail or eliminate diversity jurisdiction. Our position then and now is that changes in the delicate balance between the federal and state judicial systems, established by the Constitution and refined by the courts over 200 years, should not be undertaken lightly. Those who drafted the Constitution and their contemporaries who enacted the first Judiciary Act wanted to assure out-of-state parties that a forum free of discrimination was available to them. The changes in diversity jurisdiction in H.R. 2341 and S. 1712 are not based on fairness to the litigants. If enacted, the bills would result in a large number of state class action cases inappropriately moving to an already backlogged federal court system. At the same time, the bills' removal provisions would allow defendants to use procedural gimmicks to gain unfair advantages over plaintiffs.

Specifically, the proposed legislation changes two aspects of diversity jurisdiction. First, it alters the statutorily granted amount-in-controversy requirement from \$75,000 per plaintiff to \$2,000,000 per class. Second, it drastically changes the requirement of complete diversity—that all plaintiffs must be citizens residing in different states than all defendants—to minimal diversity—any plaintiff class member must be a citizen residing in a different state than any defendant.⁴ These requirements makes it much easier for class actions to be removed to federal court.

Proponents of the legislation argue that certain class actions are “national” in nature, and therefore, belong in federal court. How can a class action be decided “nationally” when a federal judge is being asked to apply state substantive law? The Supreme Court decided long ago in *Erie v. Tompkins*⁵ that in cases where federal jurisdiction is based solely on the diversity of citizenship of the parties, *even the federal court must apply state law*. And under H.R. 2341 and S. 1712, federal courts would be applying state law for any class action in which federal jurisdiction is based on diversity principles.

Further, how can the proponents argue that state judges are biased when a substantial number of the federal bench once served in state judiciaries? It simply can't be that Presidential appointment and Senate confirmation result in a better judges. (That's like saying that state legislators become better lawmakers upon their election to Congress.) Given this country's history of preserving and deferring to states' rights, legislation that is based on the idea that state courts are not as competent as federal courts simply doesn't ring true. As ATLA previously stated in testimony⁶ on the House class action bill:

⁴In *Strawbridge v. Curtiss*, 7 U.S. 267 (1806), Chief Justice Marshall developed the concept of complete diversity. In *Snyder v. Harris*, 394 U.S. 332 (1969), the Supreme Court held that the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.

⁵*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

⁶Statement of Richard H. Middleton, Jr., Vice President, Association of Trial Lawyers of America on Class

“If there are specific kinds of actions that Congress truly believes need to be in federal court, the legislation should address those cases directly. It should not shift masses of local cases into federal courts in the hope that the problem cases will be among them. In short, this is a situation that calls for a scalpel, not a chainsaw.”

During the 106th Congress, the Judicial Conference of the United States, the Conference of Chief Justices, and several attorneys general opposed the class action “reform” bill due to federalism concerns. The federal courts do not want the additional workload of class action cases that require federal judges to apply state law, and the state courts do not want to have their authority usurped by the federal government. An additional letter of opposition was recently sent to Judiciary Committee Chairman, Senator Patrick Leahy (D-VT) and to the Ranking Member, Senator Orrin Hatch (R-UT) from the Conference of Chief Justices. The National Conference of State Legislatures is also sending a letter to the Senate opposing class action legislation.

Policy Concerns: Specific Problems Caused by the Class Action Legislation

H.R. 2341 and S. 1712 raise several policy concerns relating to judicial backlog, forum shopping and procedural delay that are detrimental to the interests of consumers and undermine the efficient use of the class action device in redressing repetitive, small claims.

Judicial Backlog. The bill’s proponents know that since the mid-1990s, the federal civil dockets have been severely backlogged due to the unprecedented numbers of judicial vacancies and the increasing federalization of state and local criminal drug laws. Federalizing a majority of state class actions at this moment only ensures that such cases will go to the back of the line of the civil docket – all the more so because class actions require so much judicial attention in handling discovery and trial.

Statistics recently released by the Administrative Office of the U.S. Courts indicate that caseloads in the federal courts during fiscal year 2001 continued near or exceeded FY 2000 caseload levels.⁷ Postponing class action adjudication by removal to federal court will delay justice for thousands and cause countless more to abandon legitimate claims. Justice delayed is truly justice denied.

State courts are better suited to adjudicating class actions than federal courts. State courts' civil dockets often move with much greater speed than their federal counterparts due to a smaller caseload and greater experience with the state's civil laws. State courts are also much more willing to consider new applications of state law than federal courts, which are understandably reluctant to decide controversial issues of state law. And since there is no general federal tort law, federal courts would be applying state law in virtually every class action removed to federal court—a very time consuming responsibility for federal judges. Even though many of the proponents of class action legislation do business in all 50 states and must follow state insurance, tax, and other state law requirements, they do not want to be responsible in state court for their wrongful conduct.

⁷See *Federal Courts Caseload in Fiscal Year Continues at High Levels*, released by the Administrative Office of the U.S. Courts, Mar. 13, 2002 and available at www.uscourts.gov.

Forum Shopping. Proponents of H.R. 2341 and S. 1712 claim that legislation is necessary to stop forum shopping by plaintiffs. But, these bills don't eliminate forum shopping; rather they create opportunities for defendants to forum-shop without restrictions. By allowing the defendant to remove to federal court at essentially any point prior to final judgment, plaintiffs can go through the time and expense of a state court trial, only to find themselves removed to federal court at the last possible moment.⁸ Thus, if defendants don't like how the case is proceeding in state court, they get to bypass the state court appeals process in favor of a completely new certification proceeding and trial in federal court.

It is absurd to suggest—as some proponents have—that abuses in the class action system have arisen, in part, because many state court judges are elected. *Since when is it Congress' role to lecture the states regarding how the citizens of a particular state choose their government?* Nothing could be more destructive of the federal system than for Congress to eliminate longstanding state authority whenever it disagrees with how the citizens of a sovereign state choose to be governed. Further, the Constitutional protections of due process extend to both state and federal courts.⁹

Proponents of class action “reform” like to point to the rare state judge who shows an unwarranted propensity for certifying nationwide class actions. What they don't tell you is that state court abuses have been appropriately handled by state Supreme Courts and state legislatures. In Alabama, for example, the State Supreme Court reprimanded a certain judge who had certified numerous classes of questionable merit to ensure that such abuse would not occur in the future, and the Alabama legislature enacted legislation to address the problem. Similarly, proponents point to “national” class action brought in certain counties in Mississippi as an argument for so-called class action reform. What they don't tell you is that Mississippi is one of three states¹⁰ that doesn't recognize class actions. Mississippi liberal joinder rules for mass torts would remain unchanged by these bills.

⁸28 U.S.C. §1446 provides that a defendant file for removal within 30 days of receipt of a pleading or paper from which it can be ascertained that a case is removable. Section 5 of the proposed legislation allows any defendant, without the consent of all defendant, or any plaintiff class member, without the consent of all members, to remove to federal court, before or after the entry of a class certification order. This situation allows a defendant to simply wait and see how things are going on pretrial motions, or even at trial. If it looks like the defendant is losing, it can demonstrate diversity and remove. Defendant is given another bite at the apple after previewing the plaintiff's evidence and strategy.

⁹The Supreme Court held in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that in class action cases, state courts must assure that (1) the defendant receives notice plus an opportunity to be heard and participate in the litigation; (2) an absent plaintiff must be provided with an opportunity to remove himself or herself from the class; (3) the named plaintiff must at all times adequately represent the interests of absent class members; and (4) the forum state must have a significant relationship to the claims asserted by each member of the plaintiff class.

¹⁰The other two states are New Hampshire and Virginia.

Indeed, for every anecdote about a “frivolous” claim, there are dozens of worthy suits appropriately won by injured plaintiffs. Because of the hurdles and burdens placed upon class action plaintiffs by the proposed legislation, however, many of these actions, including virtually all tobacco litigation, would have never seen their day in court.

A recent state class action in Arizona illustrates these points. **In the *Baptist Foundation of Arizona* case,¹¹ the BFA issued worthless notes and sold them in many Arizona communities. Approximately 13,00 investors lost \$590 million in this scheme in “off the books” transactions with sham companies that were controlled by the Foundation and corporate insiders. BFA collapsed even though the company had received an unbroken string of supposedly “clean” audits by its outside accountant, Arthur Andersen. The victims of this ponzi scheme filed a state class action suit against BFA, Arthur Andersen and others.¹²** (A class action filed in federal court by some of the victims was dismissed when the class could not meet the burdensome pleadings requirements of the Private Securities Litigation Reform Act.) This case, which involved primarily state residents of Arizona against an Arizona defendant for violations of Arizona securities statutes and consumer fraud laws¹³, would be removed to federal court by Arthur Anderson if the class action legislation becomes law.

Procedural Delay. H.R. 2341 and S. 1712, creates a revolving door (merry-go-round) between state and federal court regarding procedure while plaintiffs’ substantive claims are never actually heard in either forum. If the plaintiffs file their class action in state court and are removed to federal court—and remember that the bill would allow removal *at any time* prior to final judgment—and the federal court finds that the class fails to meet the requirements of Rule 23¹⁴, the judge is instructed to dismiss the case rather than remand it back to state court, the regular course of action when a federal court decides it

¹¹A mirror image of the Enron scandal, Arizona Baptist Foundation is the largest bankruptcy ever of a non-profit. Craig Harris, *Andersen settles Baptist Suit*, azcentral.com (March 2, 2002), *Settlement Sum Revives Hope for Baptist Investors: Andersen to pay \$217 million* (March 3, 2002).

¹²Arthur Andersen, who had agreed on March 1, 2002 to pay \$217 million to settle this case, reneged this settlement three weeks later after failing to obtain approval from its insurer. Its insurer, Professional Services Insurance Company, is a wholly owned subsidiary of Andersen Worldwide. With the collapse of the settlement, the Arizona trial has been rescheduled for April 29—only days before the federal obstruction of justice trial is set to begin against Andersen for its role in the collapse of Enron.

¹³This case could not be brought in federal court under the onerous provisions of the Private Securities Litigation Reform Act because BFA securities were not “covered” securities—that is, they were not registered or traded on a national stock exchange.

¹⁴Four states use Field Code rules based on the “community of interest” test (California, Nebraska, South Carolina and Wisconsin) and seven States (Alaska, Georgia, Louisiana, New Mexico, North Carolina, Rhode Island, and West Virginia) use class action rules modeled on the original Federal Rule 23 (1938).

lacks jurisdiction to hear state law claims. In fact, a previous supporter of the class action legislation, Representative Barney Frank (D-MA), has changed his position and is now firmly opposed to the bill because of the proponents' unwillingness to amend the legislation so that removed cases are remanded back to state court if the federal judge fails to certify the class under F.R.C.P. 23.

The plaintiff can re-file an amended class action in state court or federal court, but there is nothing to prohibit the defendant(s) from once again removing to federal court or to prevent the judge from once again dismissing the case. After dismissal from federal court, a plaintiff could re-file his case as an individual claim, but may have trouble finding a lawyer to provide representation on a contingency basis. Thus, the plaintiff may be left without a remedy. And even if class members could re-file individual claims in lieu of the class action, state courts would be overwhelmed with repetitive cases.

The bill would also, for the first time, give defendants an absolute right to appeal a district court's order granting class certification. In addition to handing defendants yet another opportunity to halt discovery, in many cases inappropriately, the bill would result in forcing plaintiffs, who originally filed a class action in state court based on state claims, to expend resources to defend a federal class certification order in federal circuit court.

Other Problems. Another unfair component of the proposed legislation can be nicknamed after the great Ray Charles song, "Hit the Road, Jack." There are some 4,700 counties and independent cities in the U.S. There are only 94 federal district courts. Many large western states have only one, including Arizona, Colorado, Nevada, and Utah. In addition, the bill changes the amount in controversy from the requirement of \$75,000 per plaintiff to a \$2,000,000 aggregate. As a result, consumers who have claims for several hundred dollars may be forced to travel from their county seat to a federal courthouse at great expense, a further deterrent to aggregating small claims that hold corporate wrongdoers accountable and prevent consumer rip-offs.

The Current System May Not Be Perfect, But There is No Need to Throw Out the Baby with the Bath Water

ATLA's policy has been that tort and consumer causes of action should be prosecuted as class actions only when society's interest in deterring wrongful conduct can be advanced, when individual litigation to redress wrongful conduct would be impractical, and when the rights of the victims to fair and timely compensation can be protected. Some class actions do not follow these guidelines. ATLA generally opposes coupon-only resolutions of class actions. Corporations must be required to "cost-out" their end of a settlement so that the public knows exactly what each wronged consumer will receive as reasonable compensation.

While there is enough anecdotal evidence to suggest that coupon settlements are problematic, the proposed class action legislation does nothing to address this problem other than to require judicial scrutiny of coupon and other noncash settlements—a requirement that judges should already be

following. And since the problem of coupon settlements occurs just as frequently in federal court as state court, legislation removing state cases to federal courts does nothing to address the problem.

What we do need are more resources for the courts, including a fully staffed federal judiciary with adequately paid federal judges, more class actions resolved at the state court level, judicial scrutiny of coupon schemes, and the end of collusive settlements.

Conclusion

When daily headlines around the country are revealing fraud, deception, and worse by companies such as Enron and Arthur Andersen, now is not the time to shield the conduct of corporate wrongdoers. Justice delayed is justice denied. At a time when it's important for irresponsible businesses to be held accountable, enacting this class action legislation sends the wrong message. Congress should protect consumers, employees, and pensioners, not corporate wrongdoers. H.R. 2341 and S. 1712 violate ATLA's principles on access to justice for everyone and deny plaintiffs the opportunity to pursue class action remedies in state court. We urge the ABA to join us in opposing legislation that creates additional burdens for the federal judiciary, violates long standing principles of federalism, and delays consumers' access to justice.

