

**Lawyer's Committee For
Civil Rights Under Law**

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**THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, HEARING ON
CLASS ACTION LITIGATION AND THE CLASS ACTION FAIRNESS ACT OF 2001.**

JULY 31, 2002

Good morning, I am Thomas J. Henderson, Chief Counsel of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). The Lawyers' Committee for Civil Rights Under Law is a 39 year old nonpartisan, nonprofit civil rights legal organization. It was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination.

I would like to thank Chairman Leahy and the members of the Committee for holding these important hearings on the Class Action Fairness Act of 2001 and, in particular, for providing the Lawyers' Committee with the ability offer members of the Committee on the Judiciary with evidence of the significant negative impact this legislation will have on critical civil rights litigation. We appreciate the opportunity to present the Committee with our analysis of the implications that this legislation will have on the Lawyers' Committee, our independent local affiliates, and our clients across the country.

The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. As such, through both litigation and public policy the Lawyers' Committee has been actively engaged in efforts to combat racial discrimination and segregation throughout out nation. However, the primary work of the Lawyers' Committee has always centered on using the rule of law through the state and federal judicial systems to secure redress for clients who have faced racial discrimination. Our major objective is to use the skills and resources of the private bar to obtain equal opportunity for minorities by addressing factors that contribute to racial justice and economic opportunity. The Lawyers' Committee pursues this goal by bringing class action and impact litigation in five major civil rights areas: voting, employment, education, housing and environmental justice. It is through our role as civil rights litigators that we express our concerns about the Class Action Fairness Act of 2001 and the devastating impact it will have on the civil rights litigation that the Lawyers' Committee has been engaging for nearly four decades.

I. Introduction

Class actions have proven to be an essential tool for civil rights enforcement efforts in the experience of the Lawyers' Committee. Historically, Lawyers' Committee cases have been class actions brought in federal court seeking injunctive and, in some cases, equitable monetary relief under Federal Rule of Civil Procedure 23 (b)(2) to vindicate rights under the United States Constitution or federal civil rights statutes. In recent years, however, with Congress' recognition that effective enforcement of the nation's civil rights laws required more complete remedies, including compensatory and, in appropriate cases, punitive damages, Lawyers' Committee class actions have increasingly included actions that seek compensatory and punitive damages under Rule 23 (b)(3), as well as equitable relief under Rule 23 (b)(2).

Class actions are essential to the enforcement of the nation's civil rights laws. They are a vitally important and are often the *only* means by which persons can challenge and obtain relief from systemic discrimination. Indeed, Rule 23 (b)(2) was designed, in part, to accommodate, and has served as a primary vehicle for, civil rights litigation seeking broad equitable relief.

Our concern over this legislation and other efforts to profoundly impact federal class action rules has been ongoing. Beginning with the introduction of the Class Action Fairness Act in the 106th Congress, the Lawyers' Committee has been actively engaged in educating the Congress about the harmful effects this legislation will have on critical class action lawsuits, especially its impact on our civil rights litigation efforts. During the 106th Congress, we sent letters to both this Committee and the House Judiciary Committee, each of which were considering similar legislation, offering substantial analysis of the legislation's impact from a civil rights perspective and opposing the legislation. Further, in February of this year we submitted extensive comments to the Advisory Committee on the Civil Rules, on behalf of 18 civil rights, public interest, and bar organizations regarding proposed amendments to Rule 23, the Rule of Federal Civil Procedure governing class actions. Additionally, in its efforts to ensure continued access to the judicial process on behalf of classes of persons who suffer discrimination and inequality the Lawyers' Committee has commented on proposed amendments to rules of procedure that will enhance or diminish access to the courts for clients bringing meritorious civil rights claims.¹

The mission of the Lawyers' Committee does not involve state tort, contract or consumer law and, as a general rule, we do not bring state law tort, contract or consumer cases. It would have been easy for us to view this legislation as concerning only litigation in those areas and, thus, irrelevant to our work. We could have simply remained a bystander in what might appear to be another monumental dispute about tort reform. But this legislation is not about state tort, contract or consumer law. Rather it concerns the role and availability of the courts and of class actions, and of access to justice for those who have no alternative but to rely on the courts for the protection of their rights and freedoms.

¹ See February 1, 1999, Comments of the Lawyers' Committee for Civil Rights Under Law on Proposed Amendments to Rules 5, 26, 30, and 34; Supplement to the February 1, 1999 Comments of the Lawyers' Committee for Civil Rights Under Law; December 1990 Comments of the Lawyers' Committee for Civil Rights Under Law on Proposed Revisions to Rule 11.

It is our belief that the proposals referred to as the Class Action Fairness Act of 2001, S. 1712 and H.R. 2341, are unjustified and unjustifiable attempts by Congress to impose federal judicial regulation on matters of law committed to the States under our Constitution. The determination of state law tort, contract and consumer cases is not the responsibility of the federal judiciary under the Constitution. The imposition of such substantial new responsibilities on the federal courts will further impair the ability of those courts to carry out the essential functions they are to serve under the Constitution – the determination of matters involving federal interests, rights and responsibilities. Similarly, compressing virtually all class actions into the federal courts, imposing federal standards on nearly all class actions and other forms of aggregating claims, and adding new procedural requirements, as this legislation would allow, will further erode the availability of class actions and increase the burdens and delays in their use. Accordingly, this legislation will serve to deny to those who are without substantial financial means or political power the access to justice that class actions have so critically provided.

The epic reallocation of judicial responsibility proposed in this legislation is opposed by both the federal and state judiciary, and its constitutionality is doubtful. More critically, the legislation would tear cases from state judicial systems, equipped with thousands and thousands of judges, who administer the laws involved on a daily basis, and thrust them on a relatively tiny federal judiciary that is not equipped to handle them and is ill-equipped even to handle the volume and complexity of cases now on its docket. In the end, access to the federal courts and to the class action device to secure justice in matters where truly federal issues are at stake will be casualties of this legislation.

II. How the Class Action Fairness Act Changes the Law

It is important to be clear on what the legislation would change in class action practice. For example, it has been a subject of debate whether the legislation would “federalize” class actions and what that means. It is clear that the legislation would make very substantial changes, first with respect to state law class actions that are now litigated in state, rather than federal, courts and, second, in the procedures to be applied in federal court class actions.

More specifically, as to the first of these categories, the legislation would largely eliminate from the state courts class actions brought only under state law and under state law procedures, that is, cases in which no federal question is raised. It would do so in several ways. First, the legislation would impose federal court jurisdiction in such cases and provide for the removal of these cases from state to federal courts. This aspect of the legislation not only creates an entirely new and substantial class of cases subject to federal jurisdiction, but also provides to defendants, or a single disaffected class member or class member willing to collaborate with defendants, the ability to determine the choice of forum in which a case will be heard.

Second, the legislation would effectively eliminate state law class action and claim aggregation vehicles and impose federal class action standards – now and whatever they may be in the future – on cases involving only state law claims. Simply stated, state class action rules and mechanisms would no longer apply, cases dealing exclusively with state law claims would be subject to federal class action rules. The Class Action Fairness Act does this by providing for removal into federal court and requiring the dismissal of any actions that do not

satisfy the prerequisites of Rule 23 of the Federal Rules of Civil Procedure (1332 (d) (6)), despite the fact that they raise only state law issues. The ability to remove and dismiss cases that do not conform to Rule 23 effectively eliminates state law class action, claim aggregation and public interest litigation devices, at least at the choice of defendants. This is a breathtaking intrusion of federal regulation into the province of the States and on the litigation of state law claims. State class action, claim aggregation and public interest litigation devices must, of course, comply with constitutional requirements. However, displacing these methods and eliminating the ability to develop the means for resolving state law claims other than as provided in Federal Rule 23 goes far beyond ensuring the due process that is already constitutionally required.

The impact of this legislation on federal class actions is profound. It would impose new, burdensome and unnecessary requirements on litigants and the federal courts. Both the Senate and House bills would impose difficult and costly notice requirements that will further complicate and delay the disposition of class actions. Specifically, proposed Section 1717 would require notice to federal and state officials based on determinations of primary regulatory responsibility and the residence of all class members. These additional and substantial notice requirements and built-in delays are not a matter of due process, but are overly burdensome and improperly assume that federal and state officials have both an interest in, and a capacity to respond to, each and every state law class action on the part of federal and state officials.

The legislation creates additional problems. For example, the prohibition on approving settlements that involve named plaintiffs receiving amounts different from other members of the class is not a reasonable or practical limitation in all instances. In many employment discrimination cases there are fewer employment opportunities denied because of discrimination than there are qualified potential claimants. In those situations, a person who sues as an individual can receive a full award of back pay and in a proper case can obtain an order placing him or her in the job denied because of discrimination. A class member in such a situation must share in the total back pay award, and has only an opportunity to be one of the persons selected for hire or promotion because not all can be selected. If the price of trying to protect others is that he or she must also lose the full measure of individual relief and take only the same percentage share as those who never took any action to challenge the employer, individuals would be deterred from becoming a class representative. Thus, rather than a reform, this provision would hinder civil rights class actions.

The legislation passed in the House would go further in imposing new procedures and requirements in all federal class actions that are not justified, would effectively foreclose certain cases, including many civil rights cases, and would build-in further needless delay and expense in the disposition of federal class actions. The House bill would contradict established federal procedure by requiring fact pleading as to all claims as to which the defendant's state of mind is an element (Sec. 1716), would provide appellate review of interlocutory class certification orders (Sec. 1292(a)(4)), and would require stays of proceedings in connection with both motions to dismiss and certification appeals.

The fact pleading requirement would have the effect of requiring dismissal of meritorious claims, particularly civil rights claims and claims to enforce constitutional protections where an intent to discriminate is a required element. Many civil rights class actions would fall victim to this requirement. The Federal Rules have long established a notice pleading

standard in recognition that the facts of a case are often not available to a plaintiff at the outset of litigation, and can be uncovered only through discovery. This is particularly true of many civil rights cases, in which virtually all of the facts of the case – particularly those which would bear on the defendant’s subjective intent – are in the control of the defendant. The requirement that a complaint plead specific facts or be dismissed, while discovery is stayed so that the plaintiffs cannot gain access to the facts needed to establish their case, will combine to impose an insurmountable hurdle for civil rights plaintiffs. The result will be that their complaints will be dismissed.

In addition, imposition of mandatory appeals of class certification orders, rather than the discretionary appeals now available under Rule 23 (f), is both unnecessary and will build-in to class litigation literally years of delay in the disposition of cases. There is no legitimate interest in requiring appellate review of all interlocutory class certification orders and imposing a stay on all proceedings while they are determined, particularly where all agree that the disposition of class action litigation often already takes too long.

To the extent that the legislation seeks to add protections for plaintiff class members, they are minimal and unnecessary. It does not alter the process of, or standards for, the settlement of class actions, other than indicated above, and the matters with which it is concerned have been more than sufficiently addressed in proposed amendments to Rule 23 adopted in May by the Committee on the Rules of Practice and Procedure of the United States Judicial Conference. Specifically, the proposed amendments will require a number of burdensome new notices, hearings, procedures and judicial determinations, that will themselves add new and substantial burdens, delay and expense in federal class action practice. In short, the provisions of the legislation that purport to benefit plaintiff class members are too small and transparent a fig leaf to mask the great disservice this legislation would work for those who need resort to the class action – in federal or state court – to vindicate their rights and interests.

III. The Lack of Justification for the Class Action Fairness Act

In entertaining a suggestion that Congress so fundamentally restructure the allocation of responsibility between the state and federal judiciary in our dual system of courts, it is important to understand and examine the basis offered for such a change. The literature of proponents and supporters of the legislation suggest that it is to rid corporations of frivolous lawsuits, eliminate state court bias against corporations incorporated in a different state, and to place these cases of “national importance” in federal courts where they belong.

The suggestion that state courts are biased against corporations from other states such that they will entertain and sustain frivolous cases, is used as a justification for a drastic alteration in the meaning of diversity jurisdiction. This, in turn, depends upon a perception of corporations by state courts as “foreign” in states where they do business, simply because they are incorporated in another state. But we all know that the state of incorporation often has little or nothing to do with the actual location of a corporation’s offices, plants and business operations, and of its contacts with a state as a business entity, contractor, employer, licensee and corporate citizen. The state of incorporation is an artificial factor that does not give rise to bias of the type to be addressed through diversity jurisdiction.

More importantly, the suggestions of state court bias against corporations offered in support of this legislation involve an unparalleled deprecation of state judicial systems that lack any empirical basis. In the area of civil rights, a concern that state courts might not fairly apply the law is premised on historical fact, more than a century of national experience after the Reconstruction Amendments, and countless state laws and procedures designed to preclude African Americans and others from the courts and other functions of government. Yet there is a presumption that state courts are competent to determine even federal civil rights claims. No such historical or factual basis supports the extreme and careless allegations of state court bias against corporations made in support of this bill, and not for the proposition that state courts should not be trusted to decide federal claims, but that state courts cannot be trusted fairly to decide claims under their own state laws. Frankly, as an attorney who has argued that in some circumstances state courts cannot be trusted to fairly determine federal rights, I have been shocked by the self-serving rhetoric and anecdotes put forward as though they represent a substantial factual basis for this legislation. Those allegations trivialize and demean our state courts, our federal system and the crucial role that federal courts must be available to serve in protecting the interests secured by the Constitution and federal law.

As an alternative to a diversity jurisdiction rationale, proponents would elevate state tort, contract and consumer cases to ones of “national importance” because large corporations doing business in a number of states are involved. But this characterization of such cases as of “national importance” cannot substitute for a proper basis for federal jurisdiction. Such a characterization does not correspond to provisions of the Constitution regarding the proper allocation of judicial power between the state and federal courts. “National importance” is not synonymous with “federal question.” For example, these cases do not involve matters on which Congress has chosen to exercise its powers under the Commerce Clause and which, therefore, involve interests subject to federal regulation. Rather, the legal issues involve questions of state law among private parties. The Lawyers’ Committee is an ardent defender and proponent of the power of Congress and the exercise of that power in furtherance of national interests. We have urged Congress to act to protect constitutional and federal interests through legislation, and have raised our voice in the courts to defend the exercise of that power in challenges to legislation. However, there is nothing about a state law class action against a corporate defendant that makes it an appropriate case in which to confer federal jurisdiction, and Congress should confine the jurisdiction of the federal courts to matters in which there is a proper federal interest.

IV. The Effects of the Class Action Fairness Act.

The consequences of such legislation for class action practice in the federal courts would be astounding and, in our view, disastrous. Redirecting state law class actions to the federal courts will choke federal court dockets and delay or foreclose the timely and effective determination of cases already properly before the federal courts, in addition to the newly redirected cases. In addition, this legislation is one of a number of measures that would make federal class action litigation more difficult, burdensome and expensive, the result of which would make class actions less available to, and effective for, those whose rights cannot otherwise be protected.

First, this legislation would substantially expand the caseload of the federal courts to include hundreds, if not thousands, of complex cases that do not involve questions of federal law. It is well established that the dockets of federal courts are already significantly overburdened. It is important to point out that the federal courts have less than 1,500 judges, bankruptcy judges and magistrate judges, compared to more than 30,000 judges currently serving on state courts. Imposing substantial numbers of new cases on the overburdened dockets of the relatively modest number of federal courts will clog those dockets with the consequence that it will be more difficult to have any and all cases decided.

Currently, there are approximately 4,500 class actions in the federal courts. Although there is not uniform record keeping that would tell us the number of state court class actions, it is reasonable to assume that there are a very substantial number that would be displaced by this legislation. Even a relatively modest increase in the number of class actions in the federal courts – and there is no reason to suppose that the increase would be modest – would substantially increase the volume of work required by judges to dispose of cases.

The increased caseload is not the only burden, this legislation would also increase the number of complex and time-consuming cases that those courts must decide. Class actions take a greater share of the time of district judges than do other forms of litigation. In fact, empirical studies have shown that class actions on average consume almost five times more judicial time than the typical civil case.² Thus, the stress on the federal courts and the demands on the time of judges would exceed the mere increase in the number of cases on the docket.

The effect would be to make judges less able to devote time to both existing cases before the federal courts and those that would be redirected by this legislation. All commentators on the subject agree that the most effective means of addressing the particular demands of, and problems that arise in, class action litigation is more careful judicial supervision of such cases. By unrealistically increasing the demands on federal judges, this legislation would have precisely the opposite effect. Judges will have less time and opportunity to give careful supervision to critical class action litigation.

Indeed, faced with overburdened dockets, it can be expected that judges will engage in a form of triage to clear the docket by closing cases. This would lead to an exacerbation in the pressure improperly to dispose of cases by dismissal. This is a problem that particularly affects civil rights cases, and in many districts it is already difficult for civil rights plaintiffs with meritorious cases to survive pre-trial motions in order to have the opportunity to go forward to trial on the facts of the case. The unjustified dismissal of cases is a trend in the federal courts that the Supreme Court has consistently sought to correct. See *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), and *Reeves v Sanderson Plumbing Products*, 530 U.S. 133 (2000). An increase in the number of cases federal courts are to handle will only ratchet up the pressure on district judges to dispose of as many cases as possible at the earliest stage of the litigation.

Moreover increased numbers of cases on federal court dockets and further procedural hurdles will exacerbate the difficulty in securing certification of class actions in

² Wilging et al., “Empirical Study of Class Actions in Four Federal District Courts”. Federal Judicial Center, 1996.

proper civil rights cases. In the late 1980's and early 1990's, Congress determined that effective enforcement of the nation's civil rights laws required that the victims of discrimination have available more expansive remedies, including compensatory and, in appropriate cases, punitive damages.³ In order to ensure the effective enforcement of these civil rights laws and fulfill the intent of Congress, it is essential that class actions accommodate civil rights class actions that request compensatory and punitive damages. The only real opportunity for most victims of pattern and practice discrimination to prove and recover damages, or secure other relief, is through class actions. Yet, decisions of some courts of appeals have interpreted Rule 23 (b) in a manner that would make class certification rare, if not impossible, in cases seeking these congressionally mandated damage remedies.⁴ Such misguided interpretations of Rule 23 turn expanded civil rights remedies against the victims of discrimination: civil rights plaintiffs would be forced to elect between class-wide remedies for systemic discrimination, or the rights of individual class members to recover damages. These misapplications of Rule 23 (b) confound the intent of Congress, frustrate federal civil rights enforcement, and deny the benefit of the law

³ Thus, in the Fair Housing Amendments Act of 1988, 42 U.S.C. §3601 et seq., as amended, Congress eliminated a \$1,000.00 limit on punitive damage awards and provided for civil penalties in federal enforcement actions in housing discrimination cases. And in the Civil Rights Act of 1991, 42 U.S.C. §2000e, et seq., as amended; and, 42 U.S.C. §1981a, Congress provided for compensatory and punitive damages for discrimination in employment. As well, the Supreme Court determined that damages were available under other federal civil rights statutes. See e.g., *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (damages available for intentional violations of Title IX of the Education Amendments Act and Title VI of the Civil Rights Act of 1964).

⁴ Specifically, the decisions of some courts of appeals have interpreted the Advisory Committee Notes to the 1966 Amendment to the effect that Rule 23 (b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages,” and interpreted the requirement of Rule 23 (b)(3) that common questions “predominate” over questions affecting individuals, in a manner that would preclude certification of almost any civil rights action that sought a damages remedy. See *Smith v. Texaco*, 263 F.3d 394 (5th Cir. 2001), *withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), *modified, suggestion for reh'g denied* (Oct. 2, 1998); and, *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). In addition, some courts of appeals have interpreted the requirement of Rule 23 (b)(3) that class treatment be “superior,” in a manner that would prevent certification of civil rights class actions (as well as preclude individual actions) seeking to establish a pattern or practice of discrimination. See *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 758-762 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); see also, *Allison v. Citgo Petroleum Corp.*, 151 F.3d at 420-426. *But see Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)(certification of civil rights class action seeking damages available, alternatively, through 23 (b)(2), 23 (b)(2) modified to provide opt-out notice, or bifurcated certification under 23 (b)(2) and (b)(3)); *Lemon v. Int'l. Union of Operating Engineers, Local 190, AFL-CIO*, 216 F.3d 577 (7th Cir. 2000)(certification of civil rights class action seeking damages available, alternatively, through 23 (b)(3), divided certification under 23 (b)(2) and (b)(3), or 23 (b)(2) modified to provide opt-out notice); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999)(same).

to victims of discrimination. In considering legislation on the issue of class actions, Congress should not add to the difficulty in securing the opportunity to prove and obtain relief for patterns and practices of unlawful discrimination. Yet by compressing virtually all substantial class actions into federal courts and imposing additional burdens on their prosecution, this legislation would increase pressure on courts to dispose of class actions by denying certification altogether.

This legislation, is one of a number of measures that is making class action litigation more difficult and costly and less accessible and effective. For example, the proposed amendments to Rule 23 recently approved by the Committee on Practice and Procedure impose a number of new procedural requirements and judicial determinations, as well as a number of new notice requirements to federal class action practice, that will further complicate and delay disposition of class actions and make them more expensive and less available to the victims of discrimination and others with federal interests that need to be protected. Further, amendments to the Civil Rules in 1993 and 2000 have made federal courts less well equipped to handle large and complex class actions by imposing limits on the opportunity for discovery. In combination, all of these changes are rendering federal courts inhospitable and ill-equipped forums in which to litigate complex class actions. Forcing virtually all substantial class action suits into these forums, as the Class Action Fairness Act would have us do, will further compound the difficulty of filing and litigating a class action, including important civil rights cases.

V. Conclusion

On behalf of the Lawyers' Committee, our Board of Directors and Trustees and our independent local affiliates, I would like to thank you again for the opportunity to share the concerns we and others in the civil rights community have about this pending legislation. We believe the effect of this legislation on the availability of federal civil rights class actions will be devastating and urge you to reject it. The Lawyers' Committee joins with a host of other organizations in opposing this legislation. We believe the impact that it will have on the ability of our clients to seek legal redress through class actions will be profound, and will result in new and substantial limitations on access to the courts for victims of discrimination.