

CLASS ACTION LITIGATION ABUSE IN AMERICA

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INTRODUCTION

I urge the American Bar Association to support the Class Action Fairness Act, H.R. 2341 and S. 1712, and to actively urge the U.S. Congress to pass this measure as soon as possible.

Class actions have long been a valuable aspect of the legal system, permitting the efficient resolution of suits involving multiple parties allowing for plaintiffs with limited means to pursue small but significant claims. Over the last decade, however, aspects of class action practice have gone terribly wrong.

Increasingly, state courts are certifying class actions in cases where class treatment cannot reasonably be justified; class actions are being settled on terms that do not provide the class members with meaningful relief; and the potential for massive but unwarranted liability is forcing defendants to settle class action strike suits. These problems are largely attributable to two developments --the unprecedented migration of national class actions to the state courts, and the proliferation of class claims initiated by entrepreneurial lawyers on behalf of class members who have not suffered any substantial injury.

THE STATE-COURT CLASS ACTION PROBLEM

Until the last decade, virtually all national class actions were filed in federal court. In recent years, however, there has been an explosion of class action filings in state court. Although the absence of centralized datakeeping in the state courts makes it impossible to quantify the problem precisely, the available empirical and anecdotal evidence leaves no doubt that state-court class actions against out-of-state defendants have increased many-fold since 1990. This point is not controversial: the migration of national class actions to the state courts is acknowledged by leading plaintiffs' lawyers, has been noted by federal judges, and has been widely reported in the press. This development has had a number of serious adverse consequences:

Forum-shopping. Lax enforcement of certification rules by a few jurisdictions allows plaintiffs bringing national class actions to shop around for the most favorable forum, even when that jurisdiction has little connection to the underlying dispute. As a result, a handful of states get far more than their proportionate share of class action filings. When one state cracks down on abusive class actions, the lawyers simply shift their business to other jurisdictions.

Manipulation of the rules to defeat federal jurisdiction. The lawyers are able to keep national class actions from federal court by manipulating the rules that govern federal

jurisdiction. Under current law, a case may be removed from state to federal court if all of the plaintiff class representatives are citizens of a different state than all of the defendants, and if each plaintiff is seeking more than \$75,000 in damages. To prevent removal, class counsel may include a named plaintiff that has the same citizenship as one of the defendants, or may name a local “straw defendant” (such as a local pharmacy in a suit against national pharmaceutical manufacturers) that has the same citizenship as one of the plaintiffs, or may “shave” their claims by forgoing damages for class members in excess of \$74,999. These tactics may cause considerable expense and inconvenience for local defendants, and may severely disadvantage the class members whose lawyers have surrendered valuable claims.

Displacement of state law. State courts hearing national class actions sometimes apply the law of the forum state to govern the claims of all class members, even when many members of the class live in states whose laws differ dramatically. A local court entertaining a national class action against an auto insurer, for example, recently held that the defendant insurance company acted illegally in using “non-OEM” parts (i.e., parts not produced by the original equipment manufacturer) in preparing estimates for repairs – even though most states permit (and some states require) use of non-OEM parts in an effort to benefit consumers by keeping down repair costs. In cases like this, local courts effectively override the considered policy choices of other states, disadvantaging those states’ citizens.

Ill-equipped or biased courts. In addition, many state courts have neither the experience nor the resources to handle complex class actions. They also lack any mechanism to consolidate related class suits brought in other jurisdictions, meaning that defendants often are required to defend against multiple class actions filed in state courts across the country. Federal courts, in contrast, have the expertise and resources necessary to deal adequately with multi-party litigation, and also are able to consolidate related class actions into a single proceeding. At the same time, there is little doubt that local courts sometimes give favorable treatment to local plaintiffs, at the expense of out-of-state class action defendants; indeed, the Framers of the Constitution provided for diversity jurisdiction in the federal courts to guard against precisely that danger of bias against out-of-state parties.

OTHER CLASS ACTION ABUSES

The migration of national class actions into state courts that provide inadequate scrutiny of the certification and settlement process has greatly exacerbated other problems appearing in class action practice. Many of these abuses are related to the emergence of lawyer-driven suits in which class members have no real interest:

Strike suits that aggregate many trivial or non-existent claims. Increasingly, class actions involve lawyer generated suits challenging asserted misconduct that caused no real injury, and produce judgments from which class members derive no real benefit. In such suits, the attorneys recruit the class representatives and then attempt to work out settlements with the defendants in which the absent class members receive essentially

worthless coupons or other minimal benefits, while the lawyers receive seven- or eight figure fees. Although the amounts at stake in these cases for individual class members are minimal, the enormous size of the classes, along with the unpredictability of juries in some jurisdictions, make such suits bet-the company propositions for the defendant. This reality, combined with the substantial expense of litigating a massive class action, often places insurmountable pressure on the defendant to settle.

Collusive settlements. Small-claimant class actions also are vulnerable to collusive settlements. The class representatives in such suits do not monitor the litigation, freeing plaintiffs' counsel to pursue their interests at the expense of the class. The result is that defendants may buy off class counsel in return for a settlement that provides nothing of value to the class members. Indeed, because multiple class actions may be filed in different jurisdictions by different sets of lawyers, the defendant may seek out the plaintiffs' attorney who will offer it the best deal, that is, the cheapest settlement.

Payment of "bounties" to class representatives. The problem of unfaithful attorneys is magnified by the growing practice of giving enhanced payments (or "bounties") to class representatives, offering them a share of the settlement award that is disproportionately larger than that provided to absent class members. Such a settlement leads to a divergence of interests between the class representatives – who will receive the bounty only if the settlement is approved – and the absent class members, who receive no bounty at all. In such circumstances, class representatives cannot be expected to look out for the interests of other members of the class.

Incomprehensible class notices. Class members are supposed to receive notices informing them of their rights and giving them the opportunity to opt out of any settlement. In practice, however, class notices are often indistinguishable from junk mail and in many cases are virtually incomprehensible. As a consequence, class members are left unaware of rights that they may be surrendering and unable to gauge the adequacy of class settlements.

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