

**Statement of Sen. Orrin G. Hatch**  
**Before the ABA Tort & Insurance Practice Section**  
**Continuing Legal Education Program,**  
**“The Future of Class Action Litigation in America”**  
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SEN. HATCH: Thank you for having me here today. Coming into a roomful of lawyers as one of the principal authors of the Class Action Fairness Act, I should probably be looking for the back exit. I learned a long time ago that it is never a good idea to offer too candid an assessment of your views where you do not know your audience. And so here I stand before a roomful of lawyers to discuss *The Future of Class Action Litigation in America*. Maybe the best thing for me to do is hedge my argument.

But on the issue of legal reform, hedging might be necessary. We really do need to be careful to balance the right of Americans to have access to courts for injuries they sustain at the hands of corporations. On the other hand, there is a real expense to the explosion of litigation to which corporations are subject. I wanted to discuss with you the need for a balanced approach with respect to a number of bills that have become law or are being considered in the 109<sup>th</sup> Congress.

I am proud of the Class Action Fairness Act. This bill was a long time coming. I worked on this bill in the 105<sup>th</sup>, 106<sup>th</sup>, 107<sup>th</sup>, and 108<sup>th</sup> Congress. For a time during this debate, I was the Chairman of the Senate Judiciary Committee that had jurisdiction over the bill. This was legislation that required serious compromise because of the conflicting interest at stake.

There was bipartisan agreement that our class action system was in need of reform. Truly national class actions should not be heard in remote state courts with little tie to any of the parties involved. At the same time, we recognized that there is a place for class action litigation within our legal system. Sometimes they are the best, or even the only, route to securing justice for a large number of plaintiffs. We did not want to discourage legitimate suits against wrongdoers.

I supported this legislation. Over the years we received too much evidence about the abuses in our existing class action system. I could not argue with the facts. At the same time, I would always have to tell my staff when they were working on materials to not attack *trial lawyers*. There are many good trial lawyers out there, both plaintiffs lawyers and defense lawyers. I am not

sure how good I was, but before being elected to the Senate, I was a trial lawyer. And so it was important to me that we produce a balanced bill, specifically in regards to the operation of the bill's grant of federal jurisdiction over interstate class actions.

And so to say that we took our time in achieving an acceptable compromise is an understatement. We reported a bill out of the Committee in the 106<sup>th</sup> Congress on a bipartisan basis. We did the same in the 108<sup>th</sup> Congress. And the 109<sup>th</sup> Congress proved the charm as we first passed it in the Judiciary Committee and then on the Senate floor by a vote of 72-26 in February.

Though it was frustrating at times, the key section of the bill, Section 4, was improved over the course of our debates and negotiations. In the opinion of the bill's supporters, that section corrected a flaw in the existing application of the federal diversity jurisdiction statute, which prevented most interstate class actions from being adjudicated in federal courts. Specifically, our bill granted the federal district courts original jurisdiction to hear interstate class actions if: (1) any member of the proposed class is a citizen of a different state from any defendant; (2) the amount in controversy exceeds \$5 million; and (3) the class action lawsuit involves a class of 100 or more members.

In the opinion of many, this was sufficient to solve the problem. Yet we then went several steps further by incorporating two additional provisions to accommodate the states' interests in adjudicating local disputes.

First, pursuant to an amendment offered by Senator Feinstein during markup, federal jurisdiction does not extend to any case in which two-thirds or more of the proposed class members and the primary defendants are residents of the state where the action was filed. This exception keeps in the state courts those class actions that are prosecuted by a locally dominated plaintiffs' class with grievances against local defendants. Similarly, the Feinstein Amendment also provided that federal courts may, based on a number of carefully proscribed factors, decline to exercise jurisdiction in *middle tier* cases in which between one-third and two-thirds of the proposed class members and the primary defendants are residents of the same state. We then modified this Amendment further by adding an additional factor for federal courts to consider for the middle tier of cases, where there is a substantial nexus between the claims and the court selected by the plaintiffs.

Second, the states' interests in adjudicating local disputes on behalf of their citizens are further preserved through a newly created exception to federal jurisdiction for truly local controversies.

This was a modest bill. In essence, it made sure that national courts would hear national cases. We will have to wait and see whether it corrects the abuses that its proponents identified. We hoped to achieve a balance with that bill. Americans seem to agree that our legal system needs some balance. They want to preserve a person's day in court, without encouraging abusive lawsuits.

As you probably know, Congress has taken up other legislation this session that would curb these abusive suits. Recently, the President signed into law the Gun Liability Act. Congress was concerned that gun manufacturers would be sued, not for any negligent conduct, but for the cumulative impact of properly functioning, and legal, handguns. The House of Representatives has passed the so-called cheeseburger bill that would prohibit suits against the fast food industry for its supposed contribution to obesity and other health problems.

Soon we will probably take up asbestos reform. I championed that legislation when I was Chairman, and today Senator Specter is leading the fight to reform our asbestos litigation system. This represents a perfect case of the need to balance compensation for injured persons with the expense the litigation places on the companies that ultimately have to make these payments. This has been a particularly difficult balance to achieve, and only time will tell if we will accomplish it in the 109<sup>th</sup> Congress.

These bills tend to generate the most attention, but in my opinion, nowhere is the need for balance more glaring than with liability issues in the context of a pandemic or biological attack. I believe that the absence of liability protections for the producers and administrators of countermeasures represents a significant threat to our national security.

The reality of the situation is this—the production of countermeasures—particularly in the form of vaccines—is generally a high risk, low reward proposition. That translates into a lack of product, and that means the lives of millions of Americans are at risk. So what can be done?

The answer is simple—create more incentives for manufacturers of countermeasures. The question then becomes what form should those incentives take? That is where the problem lies. In my experience there are two ways of incentivizing action. You can either make the carrot bigger or the stick smaller, or both.

I think we should focus first on making the carrot bigger, meaning we should strengthen the intellectual property rights of those who are willing to put the time, money, and effort into producing effective countermeasures. Unfortunately, for a variety of reasons that I will not go into today, it is nearly impossible to broaden such rights. So, where does that leave us? If we cannot make the carrot bigger, then we are going to have to make the stick smaller. That is where we are today.

For weeks on end now, my colleagues on the HELP Committee and I have been working on making the stick as small—and sharp—as possible. If manufacturers cannot make money on something, then they will not research and subsequently produce it. Likewise, if they can break even or better, they may produce the product but they will not do so in the face of significant liability. So we must reduce the liability to encourage more production.

There are a variety of ways to limit liability in this context, but two approaches stand out. The first, of course, is to cover manufacturers under the Federal Tort Claims Act, or FTCA. The second, is to create a liability *shield* that would immunize manufacturers, administrators, etc. Both approaches have their share of plusses and minuses.

Regardless of the model, total immunization may actually encourage bad action. If there are no consequences whatsoever, then a manufacturer may be less than vigilant in its manufacturing process and people could get hurt as a consequence. A balance must be struck whereby bad actors can and will be held accountable. That can be done in a variety of ways, but again, two approaches stand out.

In the context of the FTCA or in the liability shield model, government subrogation actions may be permitted or even encouraged. The question then becomes whether or not the government should be able to obtain punitives if they are warranted and further, at what point should a company be liable even in a subrogation situation? Should a company be immune from negligence actions but subject to actions involving willful misconduct or some other higher standard? Or should the government be able to go after a company for any and all misconduct whether intentional or otherwise?

In the liability shield model the obvious question is to what degree, if at all, will a private litigant have his or her day in court? Should he or she be able to penetrate the shield if he or she was injured due to intentional misconduct? In other words, should there be a bad actors exception

to a liability shield? The answer, unequivocally, should be yes. However, it is unclear how such an exception should be crafted.

There are two general approaches to the bad actor exception. They consist of (1) limiting subrogation actions to situations of intentional malfeasance and (2) allowing individual litigants to pierce the liability shield.

As always, the devil is in the details.

The first approach is relatively easy to devise, but the second is not.

My head hurts at the very thought of it. And just when you thought things were getting interesting with the issues facing the FTCA and liability shield models, the Administration recently proposed a third way but I will let Secretary Leavitt speak to that.

Fundamentally, this country needs effective vaccines and other treatments for the avian flu. And the plague. And nerve agents. We are at risk and the only people who can help us are handicapped by the threat of overwhelming liability. For example, take a vaccine with a 1% adverse reaction rate, which is unrealistically low by the way. If the entire country is required to get the shot, the manufacturer can expect around 3 million lawsuits. That would put anybody out of business.

The bottom line is that we are faced with many difficult legislative choices here. How best to balance the need to compensate the injured and discourage bad actors, with the need to maintain industry and innovation. And in a case like this, we see that it is not a peripheral issue, but one of serious national importance.

I would like to conclude by noting that we cannot have a discussion of the legal system without a discussion of judges. Legislative success in the areas I have identified does not end with enacting sound legislation. We need judges who recognize and respect the boundaries between the legislative and judicial branches. That is, we need judges who will let legislators legislate. By refusing to creatively interfere, judges put the legislative focus right where it belongs.

The fight over judicial appointments, after all, is really a fight over judicial power. Is judicial power limited to interpreting and applying law made by the people and by legislators, or may judges themselves make the law they interpret and apply? The system created by America's founders, in which legislators accountable to the people make law and judges accountable to the rule of law interpret and apply it, maximizes ordered liberty. It puts the people and those they elect in charge of running the country, setting policy, and defining the culture. It makes legislators have to face those who elected them.

Those whose agenda will not succeed in the system America's founders gave us try to create a new system they think will give them what they want. This push for activist, law-making judges can come from the left or the right. In both cases, it is wrong. The political ends do not justify the judicial means. Judges are part of the government, and must remain limited as much as the legislative branch. If that means certain laws do not get passed, or do not get passed right away, or get passed in a different form, so be it. Liberty depends on government acting with legal authority, and only the people and those they elect have the legal authority to make law.

Let me mention one example from the area of tort law. In *BMW of North America v. Gore*, the Court decided that a two million dollar punitive damages judgment for a poor automobile paint job was "grossly excessive." The Constitution contains no such restriction. Justice Antonin Scalia dissented, and wrote: "Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments." Whatever he might have thought about tort reform as a policy issue, he knew who had authority to make policy decisions.

So the courts have the responsibility to ensure that legislation Congress passes, whether in the areas I have discussed or any other, is consistent with the Constitution. The courts do not have authority to create a new Constitution to use in that process. That way, the people retain the power to govern themselves, government remains limited, and legislators remain accountable.

In the end, I am not sure what the future of class action litigation will be. I have a guess, but ultimately it will be settled in the courts. At least for the time being. As legislators, we are constantly attempting to achieve the balance that I have suggested throughout. We want a system that is fair to all, regardless of their class or size. I can assure you Republicans and Democrats will continue to work to achieve that system.

Thank you.