Loyola Consumer Law Review

Volume 17 | Issue 1 Article 6

2004

Class Action Fairness Bill Stalls in Senate

Douglas C. Nelson

Class Action Fairness Bill Stalls in Senate

On July 8, 2004, the Senate voted 44-43 against ending the debate over the Class Action Fairness Act ("CAFA").[24] Without the 60 votes needed for cloture, Democrats, who generally opposed the bill, defeated the bills passage—at least for now. Democratic Senator Tom Carper of Delaware remarked, "Before the bill was brought up, Democrats supporting the legislation consistently said that in order to get the bill done, Republicans should not cut off debate too quickly and should let Democrats offer amendments. That didn't happen."[25] Republicans, however, insist the bill had already undergone significant bipartisan compromise and that Democrats, instead of challenging the bill on its merits, attempted to load it down with "poison pill" amendments unrelated to class action lawsuits and aimed only at defeating the bill.[26]

At there best, class action lawsuits protect the rights of large groups of individuals, often consumers, who, for all practical purposes, are unable to seek relief individually. However, despite the class action lawsuit's noble purpose and undeniable success in many instances, arguably, no component of our legal system is more susceptible to abuse.[27] The "fairness" of class action lawsuits, for both plaintiffs and defendants, is dependant on the careful observance of fundamental rules that allow the class action device to function as originally intended. For instance, class action rules require that the legal and factual questions of a particular case be shared by each member of a class.[28] This rule protects the interests of the unnamed members of the plaintiff class by insuring that their interests are being represented by the attorneys representing the named plaintiffs. This rule of "commonality," as it is sometimes called, also protects defendants from the danger of oversized judgments resulting from an oversized class.[29]

---

[24] Chris Grier, *Class-Action Bill Fails Crucial Vote, Senate Leader Declares It Dead*, BEST'S INSURANCE NEWS, Jul. 9, 2004.

[25] *Id.*

[26] *Id.*

[27] Walter Dellinger, *The Class Action Fairness Act: Curbing Unfairness and Restoring Faith in our Judicial System*, Progressive Policy Institute, at 1-2, *available at* www.ppionline.org (Mar. 2003).

[28] *Id.* at 2.

[29] Dellinger, *supra* note 27, at 2.

The fairness of class action lawsuits also depends on vigilant judicial review of class action settlements. Unnamed plaintiffs are often swept into the litigation with little knowledge of the issues involved, and with no direct involvement in litigation decisions.[30] Consequently, class action plaintiffs are vulnerable to unethical attorneys who settle the class' cause of action by negotiating "sham settlements" that provide large payouts to the plaintiffs' attorneys, while leaving the plaintiff class with only a nominal recovery.[31] Tales of consumer class action plaintiffs receiving meaningless coupons from defendant corporations while plaintiffs' attorneys collect multi-million dollar fees are becoming commonplace, as is distrust of the class action devise.[32]

If courts cannot be relied upon to insist that class action settlements compensate the very plaintiffs on whose behalf the suit was purportedly filed, then the value of the class action devise must be questioned. One study found that when class actions are brought on behalf of consumers in state courts, the class' attorneys frequently collected more money than all the class members combined.[33] Meanwhile, in federal court, class recoveries usually exceed attorney fees by wide margins.[34]

To some, the growing number of class action suits brought in particular states, and in particular counties, appears to corresponds with the lax enforcement of fundamental class action rules in these courts and signals the need for reform.[35] Republican Senator Orin Hatch, a proponent of the proposed Act, opines:

> [U]nlike our Federal courts which have judges who are insulated from political influence through lifetime appointments, many State court judges are elected officials who answer through the political process itself. . . .There are jurisdictions in this country, State jurisdictions and local jurisdictions, that border on corruption, that literally don't care what the facts are, don't care what the law is.

---

[30] *Id.*

[31] 150 Cong. Rec. S7,563 (2004).

[32] *Id.*

[33] DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (1999).

[34] Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts* (1996).

[35] 150 Cong. Rec. S7,564 (2004).

> They are just going to give the plaintiffs' attorneys whatever they want.[36]

Meanwhile, states which are less attractive to plaintiffs' attorneys are, in effect, surrendering their authority over their citizens' claims and handing over the interpretation of their own laws to other states.[37]

The Framers of our Constitution anticipated these types of problems and consequently provided the federal courts with "diversity jurisdiction," i.e., jurisdiction over cases arising between citizens of different states.[38] Federal statutes defining the scope of diversity jurisdiction, however, were drafted long before the advent of the modern class action and have been interpreted to exclude most class actions from federal court.[39] Presently, class action suits may only be filed in, or removed to, federal court when no plaintiff is a resident of the same state as any defendant, and when the claim of each plaintiff exceeds $75,000.[40] The result is that most class actions are denied access to federal court and cases which are truly national in scope, involving thousands of class members living in all parts of the country, are heard in state courts.[41]

The CAFA, as proposed, would make federal courts more accessible to class action plaintiffs by redefining diversity jurisdiction requirements for large interstate class action suits, while at the same time limiting smaller intrastate class actions to state courts.[42] This legislation would grant diversity jurisdiction to federal courts whenever any of the named plaintiffs in a class action lawsuit reside in a different state than any of the defendants, so long as the amount in controversy for the claim as a whole exceeds five million dollars.[43]

Furthermore, the proposed legislation would require that the fees for attorneys representing a consumer class be calculated based upon the value of the coupons that are actually redeemed by the

---

[36] *Id.*

[37] Dellinger, *supra* note 27, at 1.

[38] *Id.* at 4.

[39] *Id.* at 5.

[40] 28 U.S.C. § 1332 (2000).

[41] Dellinger, *supra* note 27, at 5.

[42] S. 2,062, 108th Cong. § 4 (2004).

[43] *Id.*

consumer class.[44] As a result, attorneys would no longer profit sham settlements that provide only meaningless coupons to injured consumers. The legislation would also require that notice of pending settlements by given to state and federal officials to allow them an opportunity to object to class action settlements that do not appear to be in the best interests of the citizens they represent.[45]

Opponents of the bill, such as Democratic Senator Patrick Leahy of Vermont, argue that it will deny citizens the right to bring state law claims in their own courts.[46] Senator Leahy explains:

> In other words, you might have somebody from state A, but they have invested a huge amount in the second state. They are involved in things in that second state. They do something in that second state. They may deprive citizens of their rights in that second state, and they can't sue in that state.[47]

Senator Leahy argues that special interest groups are trying to lock plaintiffs out of state court. He claims these groups are relying on a small number of anecdotes, and large sums of money spent on radio and television advertising, in an attempt to free themselves from a state-based tort system that has developed over the last 200 years.[48] "I think we should take steps to correct actual problems in class action litigation where they occur. But simply shoving most suits into Federal court will not correct the real problems faced by plaintiffs and defendants."[49]

Joining Senator Leahy in opposition to the bill were the attorneys general from several states including, California, New York, and Illinois.[50] In a letter addressed to majority leader Bill Frist, and minority leader Tom Daschle, the attorneys general expressed their concern that the CAFA "unduly limits the right of individuals to seek redress for corporate wrongdoing in their state courts. We

---

[44] S. 2,062, 108th Cong. § 3.

[45] *Id.*

[46] 150 Cong. Rec. S7,566 (2004).

[47] *Id.*

[48] *Id.* at S7,565.

[49] *Id.*

[50] *Id.* at S7,566. Attorneys General of Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, New Mexico, Oklahoma, Vermont, and West Virginia also joined Senator Leahy in opposing the CAFA in its present form. *Id.*

therefore strongly recommend that this legislation not be enacted in its present form."[51]

While acknowledging that some class action suits have resulted in extraordinary fees for attorneys and minimal recovery for class members, the attorneys generals categorized the CAFA as "fundamentally" and unnecessarily "altering the principles of federalism" and "inappropriately usurp[ing] the primary role of state courts. . ."[52] Instead, the states' attorneys general urged the Senate to consider "targeted efforts to prevent such abuses. . ." This approach, the states' attorneys general suggest is consistent with the views expressed by many of the organizations that have come out against CAFA, including: American Association of Retired Persons; American Federation of Labor—Congress of Industrial Organizations; Consumer Federation of America; Consumers Union; Leadership Conference on Civil Rights; National Association for the Advancement of Colored People; and Public Citizen.[53]

While those on both sides of the CAFA can claim to be pro-consumer, it is telling that pro-business groups, such as The National Association of Manufacturers ("Association"), have thrown their support behind the Act.[54] The Association reports that the U.S. tort system cost U.S. businesses $205 billion in 2001, or just over two percent of the gross domestic product.[55] Furthermore, the Association warns that tort costs could reach 2.33% of gross domestic product by 2005.[56]

Although the CAFA undeniably contains pro-consumer elements, its ultimate effect will almost certainly be to reduce the amount of money awarded as a result of class action lawsuits. The well-documented abuses in the current class action system can be cured by federal legislation targeting specific areas where abuses have occurred, most notably settlements that favor attorneys over class members, without making wholesale structural changes to our national tort system. While in this light the Senate's failure to pass CAFA is a victory for consumers, some measure of class action reform is needed, and the same issues will be before the Senate again

---

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Donald E. Hegland, *Betrayed Again, Redux*, ASSEMBLY, Aug. 1 2004.

[55] *Id.*

[56] *Id.*