

2005

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Recommended Citation

Douglas C. Nelson *Tort Reformers Score Class Action Victory*, 17 Loy. Consumer L. Rev. 575 (2005).

Available at: <http://lawcommons.luc.edu/lclr/vol17/iss4/11>

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Tort Reformers Score Class Action Victory

Big business lobbyists celebrated at the White House when President Bush signed the Class Action Fairness Act³¹ (“CAFA” or “Act”) earlier this year. While the Act addresses many of the criticisms of the class action device, its passage is viewed by some as a major blow to consumers and the tort bar that represents them.³² Plaintiff’s lawyers and consumer advocates, point to Vioxx, Enron, Firestone, WorldCom as evidence that Corporate America should not be granted what they argue is essentially immunity through tort reform.³³

At their best, class action lawsuits protect the rights of large groups of consumers by allowing them to combine their individually small claims into a single suit against large corporations.³⁴ Without the class-action device very few consumers would be willing and able to sue the phone company, for example, for the extra few dollars they improperly billed last year.³⁵

But there have been major criticisms of class action suits.³⁶ First, there is the problem of “forum shopping.”³⁷ When a class action suit involves thousands of plaintiffs and is nationwide in scope, plaintiffs’ attorneys have the option of filing in virtually any county in the United States.³⁸ Not surprisingly, plaintiff’s attorneys have been drawn to the counties that are most plaintiff-friendly, such as Madison County, Illinois.³⁹ Supporters of the CAFA, however, have persuasively argued that cases with nation-wide implications should be heard in federal court, and not in the most extremely pro-

³¹ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

³² Lorraine Woellert, *In This Battle, It's War By Anecdote*, BUSINESSWEEK, Mar. 14, 2005, at 77.

³³ Mike France, Lorraine Wollert, & Micheal J. Mandel, *How to Fix the Tort System*, BUSINESSWEEK, Mar. 14, 2005, at 70.

³⁴ 150 Cong. Rec. S7, 564 (2004).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ 150 Cong. Rec. S7, 563, 64 (2004).

³⁹ Marianne Lavelle, *Class Action Crackdown*, U.S. NEWS & WORLD REPORT, Feb. 21, 2005, at 46.

plaintiff state courts in the nation.⁴⁰ The CAFA does not limit a plaintiff's ability to file in a particular county, but it does allow defendants to remove cases involving more than 100 plaintiffs and an amount in controversy of more than \$5 million to federal court.⁴¹

"We're getting some of these enormous class actions out of problem jurisdictions, where a local judge makes rulings that apply to 50 states that a federal judge is not willing to make," stated a representative for the U.S. Chamber of Commerce,⁴² an organization notorious for pushing an anti-trial lawyer agenda.⁴³ This issue has, at times, touched on the much larger issue of the influence of local politics on the state judicial process.⁴⁴ Republican Senator Orin Hatch, a supporter of the Act opined:

[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. They are just going to give the plaintiffs' attorneys whatever they want.⁴⁵

While the issue of forum shopping pits plaintiffs against defendants, the problem of "coupon settlements" pits class action plaintiff's lawyers against the consumers they represent.⁴⁶ It has become an all too common occurrence for plaintiff's class action lawyers to walk away with millions, while the consumer class-members, on whose behalf the lawsuit was filed in the first place, walk away with free boxes of cereal, coupons for movie rentals, or thirty-dollar discounts on vacation packages.⁴⁷ As one tort reformer

⁴⁰ Lavelle, *supra* note 39, at 46.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Gretchen Morgenson & Glen Justice, *Taking Care of Business, His Way*, N.Y. TIMES, Feb. 20, 2005, at 31.

⁴⁴ 150 Cong. Rec. S7, 564 (2004).

⁴⁵ *Id.*

⁴⁶ Lavelle, *supra* note 39, at 46.

⁴⁷ *Id.*

put it, "When [plaintiff's lawyers] walk in with their \$5,000 suits and gold cufflinks, they don't look like the downtrodden."⁴⁸

CAFA will help to keep the interests of the plaintiffs' attorneys and their class members aligned by requiring that the fees attorneys receive are calculated based upon the value of the coupons actually redeemed by the consumer class members.⁴⁹ Consequently, attorneys can no longer "win" unless their clients also "win."⁵⁰

While it may be hard for trial lawyers to object to CAFA's coupon provisions, they point to the painfully slow pace of federal court as a major obstacle to injured plaintiffs who will now be channeled into federal court.⁵¹ "People don't understand what they're giving up in this debate," says one plaintiff's lawyer representing plaintiffs who were injured by Vioxx.⁵² The fact that the Exxon Mobil oil spill is still caught up in federal litigation illustrates the extent of the problem consumers may face.⁵³

Although trial lawyers and consumer groups fear that federalizing the class action lawsuit may effectively eliminate the class action mechanism, these concerns are largely based on anecdotal evidence.⁵⁴ There is no reason to think federal judges are not able to preside over a class action suit just as fairly as they preside over any other type of case.⁵⁵ Surely, some measure of deterrence will be lost, but consumers will stand to recover more than coupons when they prevail.⁵⁶ Furthermore, the level of deterrence provided by the most extreme pro-plaintiff counties may well have been excessive.⁵⁷

⁴⁸ Lorraine Woellert & Richard Dunham, *Trial Lawyers Will Take Their Case to the People*, BUSINESSWEEK, Mar. 7, 2005, at 53.

⁴⁹ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

⁵⁰ *Id.*

⁵¹ Lavelle, *supra* note 39, at 46.

⁵² *Id.*

⁵³ *Id.*; but see *The Chamber Wants Class Actions In Federal Court*, BUSINESSWEEK, Feb. 21, 2005, at 19 (arguing against any suggestion that state courts judges have more time to handle large cases than their federal counterparts).

⁵⁴ Lavelle, *supra* note 39, at 46.

⁵⁵ *But see id.* (suggesting that federal judges are skeptical of class action suits and citing anecdotal evidence of this skepticism).

⁵⁶ *Id.*

⁵⁷ *Id.* (citing a 2003 Madison County, Illinois, case in which a judge awarded a \$10.1 billion verdict in a lawsuit with alleged Philip Morris' advertising of a "light"

What consumers may find more troubling than the passage of CAFA is that the tort reformers are continuing to push for more.⁵⁸ President Bush has specifically targeted medical malpractice and asbestos litigation as well.⁵⁹ Meanwhile, other tort reformers are portraying CAFA as only “a modest procedural step,” and portraying the U.S. legal system as a serious threat to the U.S. economy.⁶⁰ They rant against the tort system as a tax on the American standard of living, and blame it for a host of problems including the high price of cars, to obstetricians being driven out of work.⁶¹

Ironically, it was big business that gave rise to our modern tort system in the first place.⁶² One-hundred years ago a consumer poisoned by canned food or a laborer who lost his arm was unlikely to find relief at the court house.⁶³ Before the *MacPherson v. Buick Motor Company* case in 1916,⁶⁴ New York consumers were not permitted to sue manufacturers of defective products.⁶⁵ But the “tort reformers” of this era “wanted to create social insurance for the many misfortunes of life, including accidental injury, disability, and unemployment.”⁶⁶ Then, after World War II, legal commentators including Richard Posner, began arguing that increasing big business’ exposure to liability was the “socially efficient” way to ensure that manufactures would implement and maintain safety improvements.⁶⁷ The tort system that has resulted is unique in the world and “causes the rest of the industrialized world to rub its eyes in wonder.”⁶⁸

cigarette was deceptive).

⁵⁸ France et al., *supra* note 33, at 70.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ France et al., *supra* note 33, at 70. In 1911, the families of the women killed in New York’s Triangle Shirtwaist Factory Building fire recovered only \$75 each “despite rotten fire hoses, locked escape doors, and other signs of clear negligence.” *Id.*

⁶⁴ 111 N.E. 1050 (N.Y. 1916).

⁶⁵ France et al., *supra* note 33, at 70.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* “Europeans would be extremely nervous with this kind of arrangement [U.S. tort system].” *Id.* But countries such as Germany, Britain, Belgium, and

While one might hope that the tort reform debate would be focused on defining our collective concept of justice, the debate has often emphasized economics instead.⁶⁹ At present, however, there is no authoritative evidence that tort litigation is weighing down the economy or spiraling out of control.⁷⁰ The economic data that does exist indicates that legal services in 2003 accounted for less than 1.5% of the gross domestic product, slightly less than in 1990.⁷¹ While there may be good arguments for tort reform, the available economic data does not signal alarm.⁷² Still, President Bush uses financial “data” when he rails against the tort system: “Junk lawsuits have driven the total cost of America’s tort system to more than \$240 billion a year—greater than any other major industrialized nation.”⁷³ But while such figures make for a more persuasive speech, the accuracy of this figure is in serious doubt.⁷⁴ In fact, the report that the President cites as his source does not even mention “junk lawsuits.”⁷⁵ The report’s author says that the data from the study did not distinguish between junk lawsuits and legitimate lawsuits, and merely identified the tort system as a whole as a \$246 billion enterprise.⁷⁶ “We’ve seen examples of both sides of the [tort reform] debate misstating numbers.”⁷⁷

One of the problems in trying to analyze the U.S. tort system is that there are no good numbers to go on because no one collects data from the over 15,500 courtrooms.⁷⁸ The Justice Department’s Bureau of Justice Statistics says jury awards in tort actions have actually fallen from \$65,000 in 1992, to \$37,000 in 2001.⁷⁹ But this

France offer their victims nationalized health care and lost wages are generally paid by the government or the victim’s employer. *Id.* “[I]t’s not like the cost disappears; it just becomes part of the tax base.” *Id.*

⁶⁹ *Id.*

⁷⁰ France et al., *supra* note 33, at 70.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Woellert, *supra* note 32, at 77.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Woellert, *supra* note 32, at 77.

⁷⁹ *Id.*

data was collected from only forty-five of the nation's 3,100 counties.⁸⁰ Furthermore, these numbers do not represent cases that settle or are reduced on appeal.⁸¹ Without reliable and far more complete data it is difficult to imagine how lawmakers are going to improve our tort system.⁸² At least one commentator has called for a government study to allow for a legitimate and factual debate on further tort reforms.⁸³ If, on the other hand, the real goal is simply to push laws through that support special interests, a thorough government study may be an unnecessary and perhaps counter-productive step.

The Class Action Fairness Act of 2005 may be generally "fair." Arguably, the "forum shopping" and "coupon settlement" abuses needed to be addressed. But the concern is that tort reformers are not done marching against consumers' ability to be compensated for tortuous injuries.⁸⁴ Trial lawyers and the consumers they represent must hope that the "class-action defeat is an aberration instead of just the first blow in a victorious Bush crusade against what Republicans portray as an out-of-control system of legal redress."⁸⁵ One plaintiff's lawyer commented, "Right now we can hold the votes we need in the Senate for really important stuff, but that's getting whittled away."⁸⁶

Napa Wineries Win Labeling Battle

Napa Valley vintners recently moved another step closer to securing the exclusive use of the prestigious "Napa" name for wines actually consisting of grapes grown in the Napa Valley. In March, the United States Supreme court announced that it would not review a California Supreme Court decision holding that a California statute did not violate the federal Constitution's Supremacy Clause by requiring that all wines using the word "Napa" on their label consist of no less than seventy-five percent Napa-grown grapes.⁸⁷ Napa

⁸⁰ Woellert, *supra* note 32, at 77.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Wollert, *supra* note 32, at 77.

⁸⁴ Woellert & Dunham, *supra* note 48, at 53.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Bronco Wine Co. v. Jolly*, 95 P.3d 422 (Cal. 2004), *cert. denied* 125 S. Ct. 1646 (2005).