Class Action Reform Meets Challenge of Combining Fairness With Accessibility

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Over the past decade leading up to the legislative deliberation of the Class Action Fairness Act of 2003 (the "Act") last year, state court class action filings across the country rose an incredible 1,000 percent.[2] In certain state forums known for prompt class certification of speculative and often unsubstantiated claims, class action filings over the previous five years increased nearly 400 percent.[3] Businesses face losing millions of dollars each year to defend against the threat and filing of frivolous class actions.[4] These costs, which are ultimately pushed down to consumers through increased prices, could otherwise be invested in establishing new jobs, expanding business and creating new products.[5] The unpleasant truth is that most class action attorneys are well aware of certain state courts, which historically favor multi-state class action plaintiffs and allow unreasonable jury verdicts and abusive settlements to stand. These abuses of the class action mechanism during this time have ignited a heated debate over the most appropriate means of reforming America's class action system. At the center of the dispute, reform opponents are concerned with ensuring that the state court legal system is accessible to all plaintiffs who have suffered even a nominal injury but cannot afford the expense of pursuing corporate wrongdoers alone.[6] On the other hand, reform proponents support the creation of a revised class action system, which promotes fairness by reducing the prospect of abuse and which guarantees that a court of the most competent jurisdiction will resolve a legitimate class action dispute.

Opponents view reform measures as a means of protecting the corporate world by restricting consumer access to the legal system.[7] They further suggest that class action reform, as passed by the House last year, would hinder consumer rights and significantly reduce

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[2] *House Committee on the Judiciary Holds a Hearing on Class Action Lawsuits: Hearing on H.R. 1115 Before the House Comm. on the Judiciary*, 108th Cong. (2003) (statement of Rep. James Sensenbrenner (R-WI), Chairman, House Comm. on the Judiciary).

[3] *Id*.

[4] *See Class Action Reform*, available at http://www.uschamber.com/government/issues/reform/classaction.htm.

[5] *Id*.

[6] *See Unfairness Incorporated: The Corporate Campaign Against Consumer Class Actions*, available at http://www.citizen.org/congress/civjus/class_/articles.cfm?ID=9846 (Public Citizen Executive Summary).

[7] *See Class Action Reform: Is It Good for America?*, available at http://mercatus.org/capitolhillcampus/article.php332.html.

environmental protection and consumer safety.[8] While recognizing that class actions can serve a very important goal, reform proponents, nonetheless, believe that too little is being done to prevent suits with little or no merit from proceeding.[9] Proponents argue that the majority of these lawsuits end primarily with wealthier attorneys at the expense of absent class members, responsible defendants and the public at large.[10] Supporters of reform believe that removing large, multi-state class action lawsuits from state courts to federal venues will prevent "venue shopping" by trial lawyers looking for the most sympathetic judges.[11] The current class action system, proponents contend, simply does not provide for fairness and justice. Rather, "it is an extortion racket only Congress can fix."[12]

The Heart of the Dispute – Expanding Federal Jurisdiction

Congress answered the call for class action reform by drafting of The Class Action Fairness Act of 2003,[13] originally consisting of House Bill 1115 and Senate Bill 274, which has been recently renamed S. 2062. The House passed H.R. 1115 on June 12, 2003, while the Senate Judiciary Committee amended and approved Senate Bill 2062 and placed the bill on its legislative calendar for the current session.[14] The Act describes several important purposes for enacting the legislation, including the need to assure fair and prompt recoveries for class members with legitimate claims, to benefit society by encouraging innovation and lowering consumer prices, and to restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction.[15] Although the current Act contains three distinct, but necessary components, in furtherance of these goals, including: (1) a "Consumer Class Action Bill of Rights" which addresses the administration of class actions in federal courts; (2) reporting requirements on class action settlements; and (3) expanded federal diversity jurisdiction to insure that class actions with national implications can be heard in federal courts; it is the latter component that has drawn the ire of many class action reform opponents.[16]

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8 *Id.*

9 *See Class Action Reform: Is it Good for America?*, available at http://mercatus.org/capitolhillcampus/article.php332.html.

10 *Id.*

11 Kent Hoover, *Class Action Reform Passes Through House and Away From States*, San Francisco Business Times, June 23, 2003, at *3.

12 *See* Statement of Rep. Sensenbrenner, 108th Cong. (2003) (quoting Editorial Board, Washington Post, November, 2002).

13 The full text of the Class Action Fairness Act of 2003 (H.R. 1115) is available at http://www.thomas.loc.gov/cgi-bin/query/F?c108:4:./temp/~c108dH3i1s:e2264.

14 *See Class Action Bill Headed to Senate Floor*, available at http://www.gainonline.net/summary.asp?subject=400. *See also* S. 2062, 108th Cong. (2004) (renaming legislation as Class Action Reform Act of 2004).

15 S. 2062, 108th Cong. § 2(b) (2004).

16 S. 2062, 108th Cong. § § 3-6 (2004).

Rep. Rick Boucher (D-Va.) co-sponsored the legislation, in part, in an effort to combat the problem of allowing cases that are national in scope to be filed and decided before certain favored state court judges, who routinely find any controversy subject to certification as a class action.[17] In such an environment, Rep. Boucher and others strongly believe that defendants, as well as plaintiff class members, are denied their series of rights, because there is often a rush to certify classes, followed by a race to settle the cases.[18] In doing so, plaintiffs and defendants suffer a variety of harms. For example, to prevent removal of the state class action to federal court, the damages amount sued for may be routinely kept superficially below the current $75,000 federal jurisdictional threshold.[19] The class action complaint may also fail to assert a valid federal cause of action that could (and perhaps should) legitimately be raised, thereby denying the plaintiffs an opportunity to have these particular aspects of their claims genuinely litigated. Finally, defendants are often sued, not because of any wrongdoing, but because their presence in the case destroys complete diversity.[20]

The Act expands federal jurisdiction in an effort to insure that truly interstate class action cases with national implications are litigated in federal court.[21] Section 4 of the Act grants federal district courts original jurisdiction of any civil action in which the matter in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which any member of a class of plaintiffs is: (1) a citizen of a State different from any defendant; (2) a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (3) a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.[22] The Act also permits a federal district court, in the interest of justice, to decline to exercise jurisdiction over a class action in which greater than one-third but less than two-thirds of the members of all proposed classes in the aggregate and the primary defendants are citizens of the state in which

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17 *House Committee on the Judiciary Holds a Hearing on class Action Lawsuits: Hearing on H.R. 1115 Before the House Comm. on the Judiciary*, 108th Cong. (2003) (statement of Rep. Rick Boucher (D-VA), Member, House Comm. on the Judiciary).

18 *Id. See also Judiciary Vote First Step In Fixing Class Action System – Bi-partisan Legislation a Win for Consumers and Business*, available at http://www.uschamber.com/press/releases/2003/april/03-69.htm. (In a rush to settle class actions in favorable forums, plaintiffs may be harmed by abusive settlements in which class members "receive coupons or something else of little value while their lawyers receive huge legal fees").

19 *Id.* House Representative Bob Goodlatte (R-Va.), further articulated this point during the House Judiciary Committee hearing on H.R. 1115 on May 15, 2003, by explaining, "[t]he fact of the matter is that because of the diversity requirements of having to allege $75,000.00 per plaintiff, a class action lawsuit of a million plaintiffs, involving an average claim of $50,000.00, or a $50 billion lawsuit cannot be brought in federal court under our diversity rules, while a simple slip-and-fall involving a Virginia plaintiff and a Maryland defendant, alleging $75,000.00 in damages, can be. That's wrong, and that's what this legislation is designed to fix." *House Committee on the Judiciary Holds a Hearing on Class Action Lawsuits: Hearing on H.R. 1115 Before the House Comm. on the Judiciary*, 108th Cong. (2003) (statement of Rep. Bob Goodlatte (R-Va.), Member, House Comm. on the Judiciary).

20 *Id.*

21 S. 2062, 108th Cong. § § 2, 4 (2004). *See also* H.R. 1115, 108th Cong. § § 2, 4 (2003).

22 H.R. 1115, 108th Cong § 4(a) (2003).

the case was originally filed, based on a consideration of several factors designed to assess interstate interests.[23] These requirements help to resolve the discrepancies in diversity jurisdiction that have resulted from modern interpretation and application of the class action jurisdictional threshold. The legislation will minimize a plaintiff attorney's ability to avoid removal through strategic pleadings that eliminate full diversity, minimize the damages of the individual members and fail to benefit true victims.

The Battle Lines are Drawn

In light of the Act's expanded diversity jurisdiction component, significant legal arguments have been made for and against the Act as the vote on Senate Bill 2062 nears. Advocates against class action reform adamantly oppose expanded jurisdiction and argue that the legislation denies a plaintiff's access to state courts and limits its right to select the court system it prefers.[24] Opponents assert that the Act aims only at protecting the interests of "big business" and the insurance industry instead of ordinary citizens by removing class actions to federal forums, which apply class certification rules more strictly and dismiss class actions more frequently.[25] Of course, this assumption implies that state courts apply class certification rules more liberally and allow speculative claims to be moved forward more frequently; the precise problem the legislation aims to cure. Opponents also stress that federal courts experience heavy case loads compared to state courts, causing delays in which defendants generally can manage more easily than plaintiffs.[26] Finally, opponents argue that the new legislation is unconstitutional

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[23] H.R. 1115, 108th Cong. § 3 (2003). Those factors include: (1) whether the claims asserted involve matters of national or interstate interest; (2) whether the claims asserted will be governed by laws other than those of the state in which the action was originally filed; (3) in the case of the class action originally filed in a state court, whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction; (4) whether the number of citizens of the state in which the action was originally filed and all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and (5) whether one or more class actions asserting the same or similar claims on behalf of the same or other persons have been or may be filed. *Id.* at § § 3(A)-(E) (2003). *See also* S. 2062, 108th Cong § 4(a) (2004).

[24] *House Committee on the Judiciary Holds a Hearing on Class Action Lawsuits: Hearing on H.R. 1115 Before the House Comm. on the Judiciary*, 108th Cong. (2003) (statement of Brian Wolfman, Staff Attorney, Public Citizen Litigation Group) ("H.R. 1115 should… be called the Defendant's Choice of Forum Act, since it allows defendants, not plaintiffs, to pick the court system it prefers.").

[25] *See Unfairness Incorporated: The Corporate Campaign Against Consumer Class Actions*, http://www.citizen.org/congress/civjus/class_/articles.cfm?ID=9846 (Public Citizen Executive Summary).

[26] *Id*.

because it violates federalism principals in that the Act permits federalization of state claims involving plaintiffs and defendants from the same state.[27]

However, both federalism and the founding fathers' creation of diversity jurisdiction are furthered by the Act's expansion of federal jurisdictional requirements.[28] The Framers incorporated the concept of diversity jurisdiction in Article III of the Constitution, as many commentators believe, to provide a federal forum for major litigation involving only state law issues, in order to prevent the type of local biases that have resulted from state court class actions that too often award higher settlements to in-state victims and award excessive damages against out-of-state defendants.[29] Although perhaps unforeseen at that time, if Congress were drafting the legislation implementing Article III for the first time today, many commentators correctly believe that class actions would head the list of cases to be heard in federal court because of the involvement of interstate commerce and the presence of multi-state parties.[30] Often, small state court jurisdictions are the first to adjudicate a multi-state class action claim and impose their laws on class members from other states and on states themselves.[31] As a result, there is a legitimate concern that state judges can be inherently restrained by their accountability to local constituencies for reelection and, thus, fail to fairly certify and adjudicate multi-state class actions.[32] In reality, the unique circumstances of class actions as a modern mechanism have overreached the original vision of diversity jurisdiction underlying that provision's initial enactment.

Class action reform opponents' concern regarding the flood of cases into federal court is also misplaced. Under the new legislation, removal is not automatic, and defense attorneys will still have to rely on legal strategy and sound judgments to determine when removal is proper and in the best interest of the client. At any one time, there may also be dozens of copycat cases filed across the country involving class action litigation over a same single issue. Under the proposed legislation, those cases presumably would be in federal court and could be consolidated in a more efficient manner before a single federal judge, and, in doing so, reducing heavy dockets.[33]

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27 *See* Letter to Senators Frist and Daschle from professors of constitutional law, civil procedure, and other subjects, at law schools across the nation (June 3, 2003), available at http://www.citizen.org/.

28 *House Committee on the Judiciary Hold a Hearing on Class Action Lawsuits: Hearing on H.R. 1115 Before the House Comm. on the Judiciary*, 108th Cong. (2003) (statement of John Beisner, Partner, O'Melveny & Myers, LLP).

29 *Id.*

30 *Id.* ("[Class actions] typically involve the most people, the most money, and the most interstate commerce implications of any law suits in our judicial system.").

31 *House Committee on the Judiciary Holds a Hearing on Class Action Lawsuits: Hearing on H.R. 1115 Before the House Comm. on the Judiciary*, 108th Cong. (2003) (statement of Viet D. Dinh, Assistant Attorney General, Office of Legal Policy).

32 *See* Richard A. Oppel, Jr., *House Expected to Pass Bill to Rewrite the Rules on Class-Action Lawsuits*, New York Times, June 12, 2003, at § A, p. 31.

33 *See* Statement of Beisner, 108th Cong. (2003).

Conclusion

As the vote nears on Senate Bill 2062, the national debate will vigorously continue as never before. Opponents and supporters both agree that class action lawsuits, when used properly, have an important role in the American legal system. However, concerns over fairness, abuse and accessibility of the class action system flame the debate. With the Class Action Reform Act of 2003, Congress has met the challenge of insuring fair and proper use of the class action tool while protecting accessibility of the proper forum for class action plaintiffs.

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