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By Jerome Ringler

The Unfairness of the Class Action Fairness Act

FEBRUARY 18, 2005, IS A LEGAL MILESTONE that, years hence, may be remembered for various acts of political folly, misconceptions, and targeted hostility toward select members of the legal profession. That date marks the enactment of the Class Action Fairness Act of 2005 (CAFA), a statute heralded by President Bush and Congress as an antidote to that enemy within, that culprit responsible for all that is purportedly wrong with America—trial lawyers. This legislation owes its origins, in part, to the prevailing assumption that plaintiffs' attorneys, myself included, exert an unnecessary cost on corporations, that we routinely initiate "frivolous" lawsuits against innocent defendants, and that we must be stopped. I understand this misplaced rage, but I also know this particular piece of legislation is unwise and unnecessary. The act complicates things, leaves a number of serious legal issues unanswered, forces both sides to reconsider certain tactics, and may actually leave the court system with even more cases to adjudicate.

I would be remiss if I did not make some defense of class action litigation. If litigants had to individually argue these sorts of cases the result would be nothing short of chaotic. Cases would overwhelm judges and staff, costs would skyrocket, and, hard as it is to imagine, politicians would further condemn lawyers as a group.

What these elected officials—Democrats and Republicans alike—really object to is that too many class action lawsuits are successful. It should come as no surprise that principal supporters of CAFA are large corporations (and political contributors) that find themselves accused of wrongdoing. But this legislation did not emerge spontaneously; it is the product of a sustained campaign against attorneys who, through preparedness and presentation of evidence, successfully represent clients with a legitimate claim against a corporation, government agency, or private individual.

The real question is: How will CAFA reconfigure the legal landscape? The act is relatively straightforward, insofar as it targets attorneys who receive large fee awards, mitigates "unjustified" awards among plaintiffs, and clarifies language about various legal rights. While I certainly second the idea that transparency should govern the relationship between attorney and client, the act's attempt to restrict large fee awards is one of many troubling (and unintentionally ambiguous) aspects of this legislation. The act's economic unfairness originates from a grave misperception: that plaintiffs' attorneys make too much money, thus compelling a congressional response. Are plaintiffs' attorneys, then, the first of many professionals to face this brand of congressional scrutiny? How much longer until Congress decides that doctors or actors or athletes—or defense attorneys—make too much money? Actually, according to Public Citizen, median attorneys' fees were only 21.9 percent of the recovery—not more money than all class members combined received, as claimed by the Chamber of Commerce's Institute for Legal Reform.

The act also destroys a sacrosanct principle among conservatives—federalism. Since, under CAFA, federal jurisdiction attaches whenever there is diversity of citizenship between any plaintiff and any defendant and when there is more than $5 million at stake, these new rules expand federal power and actually increase the total number of class action lawsuits. Indeed, the reason the act was passed is because of the advantages state courts confer, at least for most plaintiffs' attorneys, versus the more narrow opportunities on the federal level. Simply stated, it is hypocritical to brandish the Constitution and publicly recite the Tenth Amendment while simultaneously erasing important rights among the individual states.

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Most federal courts already deal with too many cases. As early as 2003, the U.S. Judicial Conference, a committee of federal judges across the political spectrum, asked Congress to ensure "that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed." CAFA defies that request, ignoring a bipartisan plea from a coequal branch of government. Even William H. Rehnquist, a longtime proponent of states' rights, criticized the act's approach. "As the Judiciary's workload continues to grow," he cautioned, "the current budget constraints are bound to affect the ability of the federal courts efficiently and effectively to dispense justice."

Far from inaugurating a new era of fewer lawsuits and greater judicial independence, CAFA is a classic example of the law of unintended consequences and legal chaos. For the sad truth is that, while wrongfully shifting (and thus abrogating) power from the individual states to the federal judiciary, this act overwhelms judges at almost every level. The biggest potential loser in all of this is, sadly (and not as a cliché), the American people. As consumers, they deserve the right, long respected by the states and their respective courts, to seek—as a class—a redress of grievances against individual, corporate, or governmental defendants. The act changes this dynamic for the worse. Plaintiffs must either assemble themselves along state lines (one class for, say, California, another for New York), which can be a logistical challenge, or enter federal court, which is certainly not better. Years hence we may look upon this act as one of those inevitable, albeit regrettable, phenomena that marry a false enemy (plaintiffs' lawyers) with demands for congressional action. Rather than await future vindication, it is our duty to expose the act's flaws now. ■

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