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Federal Class Action Legislation: A Wolf in Sheep's Clothing

Special interests have mounted a major effort to pass legislation (S. 274) that would make it more difficult to bring class action lawsuits to enforce consumer protection, health, safety, and environmental laws. S. 274, and its House companion, H.R. 1115, would allow defendant corporations to remove most state class action lawsuits to federal court when doing so would be advantageous to them. Proponents, including HMOs, drug companies, the tobacco industry and automakers, portray the bills as a modest effort to end abusive class action settlements in state courts. In fact, they would actually leave many meritorious class actions languishing in a litigation limbo.

Class actions lawsuits are the only effective remedy when a large number of people are harmed but sustain small amounts of damages for which individual litigation would be inefficient. Class actions have resulted in *refunds to consumers* for fraudulent HMO, credit card and telecom billing practices; *free medical check-ups* for persons exposed to toxic substances; and most importantly, *changes to business practices* that cheated or threatened the health of consumers.

H.R. 1115 and S. 274 would allow corporate defendants to remove the vast majority of state class actions to federal court. The business community argues that federalization will benefit consumers because federal judges will give greater scrutiny to settlements, will stop duplicative class actions, and will end so-called "false federalism" in which one state's laws can override others'. Here are the facts:

The bills will limit remedies for victims of white-collar crime. The federal judges who hear cases covered by H.R. 1115 and S. 274 will apply state law. Federal judges, however, are less apt to extend state law to new situations, preferring to let evolution of the law occur in state courts. For example, medical monitoring is a new common law remedy providing medical testing for persons exposed to toxic substances whose injuries are latent. Federal judges in Virginia and Illinois have refused to certify class actions for medical monitoring, saying that state courts should rule on the question first. Sending class actions to federal courts could prevent states from interpreting their own law in the areas of consumer and environmental protection. Without state court interpretations, states' bodies of law will not develop solutions to 21st Century problems, or guide future conduct of businesses.

Justice will be considerably delayed -- if not denied -- for injured consumers. The federal courts' high judicial vacancy rate and increased caseload of traditionally state-court matters have led to considerable backlogs of civil cases. The number of federal civil cases pending for three years or more has *doubled* since 1999 to more than 34,000. Median disposition time for civil cases rose in 2001 and 2002. According to the U.S. Judicial Conference, the federal courts are short by 113 judges. Problems have reached crisis proportions in southwestern border districts, where judges' caseloads are quadruple the average for the rest of the nation. RAND notes that "if many state class actions

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were removed to federal court, some federal judges could be faced with significant numbers of new and complex lawsuits,” without being given the resources needed to cope with them. This would result not only in extended delays in obtaining benefits for class members, but also increase delays for individual plaintiffs in other cases.

The bills won’t result in the promised improvements. The bills’ sponsors insist that federal judges are “better equipped” to scrutinize settlements for fairness. But after conducting a comprehensive study of class actions, the RAND Institute’s experts found “no empirical basis” for this assertion. In fact, two of the most notorious collusive settlements, involving HMOs and tax refund loans, were filed in federal court and approved by federal judges. RAND also concludes that giving federal courts jurisdiction over state-law cases, as H.R. 1115 and S. 274 would do, would not solve the problem of duplicative class actions. Even if such cases were consolidated for pretrial purposes under the Multidistrict Litigation (MDL) statute, “the fact that an MDL judge cannot try cases that were not originally filed in her court may undercut her ability to regulate class action outcomes.” Finally, RAND experts say that the bills won’t end “false federalism” because the “legislation does not address this issue.”

H.R. 1115’s appeal provision will further delay cases. Several years ago, Rule 23 was amended to allow discretionary appeals of class certification decisions. H.R. 1115 would go further by giving an absolute right to appeal certifications, ensuring that *every* decision to certify a class action will be appealed by defendants. This would delay disposition of every class action by an average of 11 months, the median time it takes a U.S. Court of Appeals to decide a case. The delay will be even longer in some places—over 18 months in the Ninth Circuit. Defendants will be able to earn an additional year to year-and-one-half of interest on ill-gotten gains before they are required to refund them to consumers.

The procedural revisions in the bills are inferior to pending rules changes. H.R. 1115 and S. 274 purport to improve class action procedures to the benefit of consumers, but their sloppily-drafted provisions actually undermine the reform efforts of the Judicial Conference. The judiciary’s Advisory Committee on Civil Rules has proposed amendments attacking collusive settlements that go much further in protecting consumers. The Advisory Committee is a blue-ribbon panel of judges, academics, and experienced practitioners that has studied class action rules for a decade. Congress should defer to their non-partisan efforts to craft consensus procedural improvements.

H.R. 1115 and S. 274 unnecessarily intrude on state autonomy. According to the non-partisan American Law Institute (ALI), which has proposed a much more narrowly-tailored mechanism for coordinating interstate litigation than H.R. 1115 and S. 274, “traditional federal respect for state sovereignty argues strongly for state control over cases arising under state law and respecting local citizens. Deference to state interests may be especially compelling in litigation in which there is special local community interest.” Nonetheless, the bills would send such cases to federal court. ALI’s report continues: “The states always must be respected as politically separate and independent sovereigns. They should be encouraged to promote accountability in their judicial and administrative systems... States clearly are able to develop procedures for handling complex cases and in some situations those solutions may be preferable. Assigning local concerns to state courts may promote efficiency as well because local courts will be more familiar with state law and represent the best forums for the development and articulation of state law in emerging areas and in new factual contexts.” Both the federal judiciary and state chief justices oppose H.R. 1115 and S. 274.