

Let a Hundred Cases Wither

Proposal to require opt-in class actions would weaken consumers' weapon, freeing companies to cheat again.

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“Let a Hundred Cases Bloom,” wishfully proclaims the headline of Mark K. Moller’s *Legal Times* commentary arguing for opt-in rather than opt-out class actions (Feb. 21, Page 62). Moller likens a properly functioning court system to a free market (good) and opt-out class actions to central planning (bad).

This analogy may offer a fun thought experiment, but it’s ultimately silly. A little analysis shows that requiring plaintiffs to individually opt in to class actions, rather than including them unless they choose to opt out, will simply kill off a whole lot of class actions.

Moller’s argument is based on choice and competition. We should treat potential class members as “lawsuit consumers” for whom lawyers should compete, he argues. Forcing lawyers to sell themselves—and each potential class action—to every class member would spawn many smaller actions rather than a single massive case regarding any given controversy.

Whereas a single judge might botch the case, these multiple lawsuits would increase the chances of the courts getting it right for most people. One judge is no more likely to reach the proper result than Soviet central-planners were able to guess the correct price for wheat. But in a market system, if one judge errs, others may do better.

The more one thinks about this argument, the less convincing it becomes.

MISPLACED VALUE

First, it reflects a strange and overstated pessimism toward the

legal system. American judges are bound by statutes, regulations, case law, and the Constitution. It is hard to believe that they have as little chance of getting their decisions correct as did Soviet central-planners. But if they do, then why are we quibbling over the details of Federal Rule of Civil Procedure 23 rather than addressing much greater problems?

Just as the argument overstates the failings of the courts, it undervalues what class actions can do. For example, the worth of the one specific case discussed in the article—Aetna’s massive settlement of doctors’ claims that the insurance company systematically reduced, denied, and delayed payments—is made to sound like just another windfall for lawyers that hardly benefited class members. This is because the discussion focuses on monetary relief rather than the far more valuable prospective relief that doctors received.

On top of \$100 million in damages, the October 2003 settlement in *In re Managed Care Litigation* compels sweeping changes in Aetna’s billing practices that may, in the judge’s words, “eliminate the worst of the improper practices involved in managed care.” Among other provisions, the agreement requires Aetna to use medical community standards in determining “medical necessity,” mandates more transparency in claims processing, ends Aetna’s practice of automatically downgrading certain reimbursements after claims are filed, and permits doctors to enforce any law or regulation against Aetna even when the law provides no private right of action. The American Medical Association said at the time that the settlement should “raise the bar for the entire health insurance industry on fair and open business practices.”

These reforms are worth more than three times the value of the Aetna settlement’s monetary relief. Moller diminishes them by calling them mere “promises” and focuses on money damages instead.

WHO GETS THE CASES?

But aside from its outsized skepticism toward the courts and

its undervaluing of class actions, Moller's argument suffers from a much greater problem: It fails to prove its key assertion that an opt-in regime would generate dozens of class actions over a given controversy rather than just one or two, or that it would foster new competition among lawyers.

One imagines that if the United States were to implement an opt-in class action regime, a small handful of leading plaintiffs firms might simply corner the new market for opt-in class members. Who else would have the resources to solicit thousands of clients? Who would claimants trust with their claims aside from the firms with the strongest records of success? What solo practitioner or small firm would begin the process of collecting clients while knowing that other lawyers—even those who lack experience in the relevant law but are better at marketing themselves—could wind up attracting the bulk of the potential class?

In fact, given the myriad logistical and financial impediments to building a class action client by client by client, couldn't an opt-in rule result in fewer cases overall?

LITTLE CLAIMS LOSE OUT

This brings us to the most important problem with the opt-in plan: It will do the opposite of what its supporters claim. Rather than help consumers by allowing them to choose among dozens of class actions over a given controversy, an opt-in regime would harm consumers by eliminating a wide array of class actions altogether. This is evident from the role that choice plays in class action litigation today.

Under the current regime, class members already have some power to choose their own counsel. Whether they shop around—or whether lawyers compete for them—has little to do with whether or not a default rule places them in a given action.

Instead, the key is whether individual claims are worth fussing over. When class members have large claims, they can (and often do) opt out to litigate alone or in smaller groups. Sometimes lawyers even compete over them.

But when claims are small, class members rarely opt out. This is because rational people do not invest time in small claims. The claimants do not investigate their cases or hunt for lawyers, and lawyers usually do not find it feasible to seek out small-claims clients and pitch a case to each of them.

In short, when claims are large enough to support individual litigation (and class members are provided with effective notice of their rights), the default rule is mainly irrelevant. But when individual claims are small, the default rule controls.

CORPORATE HUSTLERS WIN

With this in mind, let's imagine we implement an opt-in rule as the default. For people with large claims who receive proper notice of an action, the rule has little effect. Those people already sometimes opt out and litigate alone or in non-class groups.

But for people with small claims, we see a big difference: The inertia that formerly benefited them now cuts against them, and their cases virtually disappear. They will not research their claims and hunt for lawyers, and lawyers will not attempt to build cases for them.

Say, for instance, that several hundred thousand credit-card holders are taken for \$50 in hidden fees that pay for no addi-

tional benefit. Rational cardholders will not find those \$50 claims worth the effort of bringing their own lawsuits or looking around for a pending class action. And rational lawyers will not attempt to build cases \$50 client by \$50 client, nor will they choose to fight a major corporate defendant on behalf of one or even a handful of clients for such a small reward.

Thus, without an opt-out class action rule, it is likely that no one will sue. The credit-card company will pocket millions in ill-gotten gains and, more important, will be undeterred from fleecing its customers in the future.

The Supreme Court recognized this problem in a 1985 opinion, *Phillips Petroleum Co. v. Shutts*, noting that most small claimants “would have no realistic day in court if a class action were not available” and that opt-in class actions would not suffice. “Requiring a plaintiff to request inclusion,” the Court explained, “would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit.”

A LONG-RUNNING BATTLE

This is all elementary, and it is part of the reason why the Federal Rules Committee created the opt-out class action for damages in 1966. Before that revision, damages claims could only be aggregated in what were called “spurious” class actions—spurious because, like the proposed opt-in actions, they were not class actions at all. They were large joinders.

Companies that are subjected to small-claims class actions have resisted this reform and tried to reverse it. In the past, they have been more straightforward about their intent. In 1996, for example, they proposed to the Federal Rules Committee a “just ain't worth it” rule that would have required a judge to toss out a class action whenever the judge felt that probable relief to class members did not “justif[y] the costs and burdens of class litigation.”

This was problematic for several reasons. Whose “costs and burdens” would be weighed? How could such an assessment be made at the outset of litigation, before the extent of the damages was known? But most troubling was that the proposed rule neglected to account for the value of prospective relief and deterrence of future misconduct, just as Moller does in his analysis of the Aetna settlement. Fortunately, the proposal failed.

The current packaging of the opt-in idea is more clever. Moller pitches opt-in class actions as a consumer protection plan. His argument and that of the proposed Right to Choose Your Lawyer Act show that opponents of consumers' legal rights have grown more savvy but are still playing the same game.

Unless one favors letting corporate defendants get away with misconduct, there is no reason to support such proposals. An opt-in regime would send a clear message to corporations: Feel free to bilk your customers so long as you do it in small amounts.

“Let a hundred cases bloom,” indeed. “Let a hundred cases wither on the vine” would be more apt.

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