Class Action "Judicial Hellholes": Empirical Evidence Is Lacking

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Acknowledgments

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Introduction

Business lobbyists and their political allies have created the perception that America's class action system has run amok. They point their fingers at "judicial hellholes" and "magnet jurisdictions" that, they claim, are running roughshod over businesses. Their proposed solution is federal legislation, the so-called Class Action "Fairness" Act, which will allow defendants to divert most class actions filed in state courts to federal courts, where many cases will not get certified, thereby locking consumers out of the court room.

This report analyzes the factual basis for the claims made by the Chamber of Commerce and others that the class action system has been distorted by problem jurisdictions. Public Citizen conducted an exhaustive search for written materials – fact sheets, reports, congressional testimony, law journals, newspaper articles – that verify these claims.

While it is tempting to be influenced by bumper-sticker labels that feed into preconceived notions about the legal system, this report shows that empirical evidence is extremely thin with respect to state court jurisdictions that are "judicial hellholes" for class actions. Moreover, if one or two court systems are a problem, that is no justification for rewriting class action rules across the country that will dramatically reduce the legal rights of consumers and workers.

Paucity of Evidence About "Judicial Hellholes"

The following is the basis upon which the business community rests its claims that state courts are so problematic for class action litigation.

- **American Tort Reform Association's "Judicial Hellholes" Reports**

  Of the 3,141 government units (counties, parishes and boroughs) in the United States with their own court systems, the American Tort Reform Association (ATRA) in 2004 identified only nine as "judicial hellholes," areas of the country where courts are "unfair" to defendants.[1] ATRA further identified four as "dishonorable mentions." ATRA's 2004 "report" is based on survey results from its membership – small and large companies; trade, business and professional associations and nonprofit organizations. In the 54-page report, there are only five references to class action concerns:

  - In Madison County, Illinois, the most often discussed "hellhole," the court is willing to certify classes on a nationwide basis. In addition, class action filings have increased from 2 in 1998 to 106 in 2003.[2] In 2004, however, the number of class action filings decreased by over 30 percent.[3] Additionally, the Illinois Supreme Court is currently considering proposals from the business community to amend the state's class action rules and institute mandatory case management practices and requirements, which would affect cases in Madison County.
  - In St. Clair County, Illinois, class action filings increased from 2 in 2002 to at least 24 in 2004.[4]
  - One justification for labeling the entire state of West Virginia as a judicial hellhole is that in Roane County, West Virginia, the first two class actions in the court's history were filed in the past two years.[5]
  - In Orleans Parish, Louisiana a class of government employees was certified in a suit alleging the building in which they worked contained mold, which caused health problems. This is the only class action "problem" identified for this jurisdiction.[6]
  - Florida appellate courts have decertified two tobacco class actions in the last two years.[7] While the report holds up these decisions as evidence of a flawed civil justice system, it could just as easily be argued from a defendant's point of view that the system "works" in south Florida because the "correct" decision was eventually reached.

  In ATRA's 2003 report, twelve judicial hellholes were identified, along with three dishonorable mentions.[8] The following concerns about state class actions were articulated:

  - In Madison County, Illinois, the same evidence appearing in the 2004 report was cited.[9]
  - In Jefferson County, Texas, the number of class action filings doubled between 1998 and 2000.[10] However, Texas made changes sought by defendants to its class action

system that same year (see next section) and Jefferson County did not appear in ATRA's 2004 report.

- In the 22nd Judicial Circuit of Mississippi the allowance of "mass joinders" was cited.[11] Although the state of Mississippi does not have a class action rule, its allowance of mass actions (individual tort cases consolidated by the court for efficiency purposes) was often cited as a problem that should be addressed by federal legislation. However, Mississippi passed legislation altering its civil justice system in 2004, including a restriction of their joinder rules sought by defendants. The state was reported to be "in recovery" in ATRA's 2004 report.
- In Orleans Parish, Louisiana, the same evidence appearing in the 2004 report was cited.[12]
- In West Virginia, the report simply noted that a state Supreme Court justice married a prominent class action attorney.[13]
- In Miami-Dade County, the same evidence appearing in the 2004 report under South Florida was cited.[14]
- In Hampton County, South Carolina, the state Supreme Court's decision to overturn a class action certification decision earned the state a "dishonorable mention" label.[15] Again, from a defendant's point of view this is a good thing, not a reason to allege the county as a "judicial hellhole."
- In New Mexico concern over the *possible* expansion of liability in modal class actions (litigation stemming from the fact that consumers paid more on insurance policies because they selected among different payment modes) earned the state a "dishonorable mention" label.[16]

• The United States Chamber of Commerce and Its Institute for Legal Reform

The Chamber of Commerce has led the lobbying effort for federal class action legislation. It frequently sends written materials to federal legislators urging passage of the bill "because of the significant increase in national class action lawsuits filed in state courts – particularly magnet court jurisdictions such as Madison County, Illinois."[17] A search of the Chamber's website could find no other jurisdictions identified as "magnets" for class action lawsuits.

The Chamber's Institute for Legal Reform annually releases its state liability systems rankings – which includes a list of the "best" and "worst" states for the treatment of class actions. In 2004, the bottom five class action states were: West Virginia, Alabama, Louisiana, California and Illinois.[18] The rankings are based on Harris Interactive survey data that surveyed in-house counsel of America's businesses. Survey results of this kind should be approached with great caution as the respondents in the survey group have a clear bias – in fact, many of the companies surveyed are probably leading the charge for federal class action legislation. Additionally, the questions are often leading with a desired answer clearly indicated.

- **John Beisner, the Business Community's Chief Lobbyist**

  John Beisner, a class action defense attorney at O'Melveny & Myers LLP, is the most visible proponent of federal class action legislation. He frequently testifies in Congress on behalf of the business community. In his most recent testimony before the House Committee on the Judiciary, he stated that improper supervision of class actions "is a problem only with a select number of state courts."[19] He proceeded to discuss only one problem court: that of Madison County, Illinois. He also referenced a report that he co-authored in 2001 that appears to be "authoritative" on the subject of magnet jurisdictions.[20] The report focuses on the courts of:

  - Madison County, Illinois, which is also the focus of the arguments made by ATRA and the Chamber;
  - Jefferson County, Texas, whose class action system was altered by pro-defendant legislation that passed the Texas legislature in 2003 amending certain class action procedures in order to reduce the number of suits; and
  - Palm Beach County, Florida, which goes unmentioned in more current claims about "magnet jurisdictions."

- **Independent Sources**

  Internet searches on Westlaw, Lexis and Google using the terms "magnet jurisdiction" and "judicial hellhole" identified many writings (articles, reports, opinion pieces, etc.) but those publications did not specify where such magnets or hellholes exist (with the regular exception of Madison County) or provide any factual basis that either supports or explains what would justify using such a label. To double check our results we also searched using the terms "class action," "problem jurisdiction," "unusual jurisdiction," etc. Again, the results failed to reveal the existence of other jurisdictions labeled "magnets" or "judicial hellholes" as far as class action litigation is concerned.

  Only one in-depth analysis of the magnet jurisdiction issue was found, and it appeared in June 2000 in the "Class Actions in the Gulf South Symposium" published by the Tulane Law Review. Professor Geoffrey Miller concluded that Texas' rate of class action litigation was below the national average whereas Louisiana's was higher.[21] Professor Linda Mullenix, however, concluded that the Alabama, Louisiana and Texas Supreme Courts had been retreating in their class action jurisprudence.[22] She found that these state courts have read federal decisions restrictively "to overturn or repudiate class certifications that would have been approved prior"[23] – in other words, helping defendants and limiting consumers' legal rights. Since the publication of these two articles, many of the states in question have legislatively or judicially restricted their class action systems.

Numerous States Have Changed Their Class Action Rules at the Request of Defendants

Even if the class action bill's proponents are correct that there are class action problems for defendants that should be addressed, recent actions in Alabama and other states refute their assertion that this must occur at the federal level. In fact, the experiences in numerous states show that states are capable of monitoring and changing their own judicial systems without federal intervention.

- **The Alabama Experience**

Prior to 1997, Alabama had been considered a favorable place for plaintiffs to file class actions, largely due to a process called *ex parte*, or "drive-by," certification. "Drive-by" certification is the name given to conditional class certifications granted so quickly by a judge that the defendant may not have been given notice of the potential class action. In practice, this meant that classes were being certified without providing defendants an opportunity to present arguments as to why certification should not be granted. Since class certification is an important decision that can affect the outcome of a case, certifying classes without the defendant's input is prejudicial and needed to stop.

To deal with this problem, in 1997 the Alabama Supreme Court made six decisions that clarified the requirements necessary to certify class actions; five of them overturned lower courts' conditional and *ex parte* class certification orders and stated that "drive-by" certifications are not allowed. For example, the Court in *Ex Parte Citicorp Acceptance Company, Inc.* stated that:

> The practice, apparently adopted by some Alabama judges, of conditionally certifying class actions before service of process and without affording a defendant an opportunity to be heard on the theory that the defendant will later have an opportunity to demonstrate why the class should not have been certified hardly seems consistent with Rule 23, Alabama Rules of Civil Procedure, that the proponent of class certification must carry the burden to prove that the requirements of Rule 23 are met. In fact, the practice seems to stand the rule on its head.[24]

Alabama's judiciary is not the only branch of the state government that responded to defendants' complaints about state class actions. The legislature passed a law in 1999 sought by defendants allowing interlocutory appeals (automatic appeals that a judge must grant before the rest of the case is tried) in all class certification rulings. That same year, legislation was passed establishing pro-defendant procedures and considerations for class action certification.

- **Other States That Have Altered Their Class Action Systems**

  Several other states have altered their class action systems. Many of these, like Alabama, have amended their rules to allow interlocutory appeals of class certification decisions. Such appeals are very harmful to plaintiffs with meritorious claims because it will delay the case, halt discovery and expand the federal appellate docket. Although Public Citizen does not support – nor does the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States[25] – the allowance of interlocutory appeals of class certification decisions, we respect each state's right to fashion its own class action rules, and that this is an area where the federal government should not interfere.

  The following is a comprehensive summary of recent legislative alterations to state class action systems:

  - **Colorado** – Law enacted in 2003 allows interlocutory appeals of class action certifications.

  - **Florida** – Law enacted in 2000 limits the amount a defendant can be required to pay to secure the right to appeal punitive damages awards in class actions to the lesser of 10 percent of the defendant's net worth or $100 million.

  - **Georgia –** Law enacted in 2003 detailed procedures for class action cases. Factors under which a court may decline to exercise jurisdiction in a cause of action of a nonresident occurring outside the state are specified.

  - **Kansas** – Law enacted in 2004 allows interlocutory appeals of class action certifications.

  - **Louisiana** – Law enacted in 1997 amended the state's class action rule by providing objective definitions of class action terms and detailed procedures for class action cases. These changes have resulted in fewer class action lawsuits in the state.

  - **Mississippi** – Law enacted in 2004 changed the state's venue and joinder rules, requiring that a substantial connection exist between the lawsuit and the county where it is filed and that venue be proper for each plaintiff in a mass action.

  - **Missouri –** Law enacted in 2004 allows interlocutory appeals of class action certifications.

  - **Ohio –** Law enacted in 1998 allows interlocutory appeals of class action certifications.

  - **Oklahoma –** Law enacted in 2004 requires courts to conduct evidentiary hearings to determine fair and reasonable fees for attorneys in class actions.

- **Texas –** Law enacted in 2003 allows interlocutory appeals of class action certifications and stays on all proceedings during the appeal. The method for awarding attorney fees was changed from a contingency fee basis to one based on the time and cost expended.

Conclusion

The business community's use of two jurisdictions – Madison and St. Clair counties in Illinois – as the rationale for completely upending the class action system that has been in place for at least 66 years is a fraud perpetrated on the public just as surely as are the many successful scams that unscrupulous companies have foisted on consumers. The entire class action system should not be condemned based on a few anecdotes and claims about two counties out of 3,141. Furthermore, the federal government shouldn't interfere with the states' traditional role in shaping their own judicial systems.

Endnotes

[1] American Tort Reform Foundation, "Judicial Hellholes 2004."
[2] Id. at 15.
[3] Brian Brueggemann, "Asbestos, Class Action Suits Decline in Madison County," *Belleville News-Democrat*, December 26, 2004.
[4] Id. at 19.
[5] Id. at 24.
[6] Id. at 26.
[7] Id. at 29.
[8] American Tort Reform Association, "Bringing Justice to Judicial Hellholes 2003."
[9] Id. at 4.
[10] Id. at 6.
[11] Id. at 7.
[12] Id. at 8.
[13] Id. at 10.
[14] Id. at 13.
[15] Id. at 17.
[16] Id. at 19.
[17] R. Bruce Josten, "U.S. Chamber of Commerce Urges Support of the Class Action Fairness Act," Letter from United States Chamber of Commerce to United States Senate, July 6, 2004.
[18] Harris Interactive Inc., "State Liability Systems Ranking Study," March 8, 2004.
[19] Testimony of John H. Beisner, Esq., Hearing on H.R. 1115: The Class Action Fairness Act of 2003, May 15, 2003.
[20] John H. Beisner and Jessica Davidson Miller, "They're Making a Federal Case Out of It…In State Court," Center for Legal Policy at The Manhattan Institute, September 2001.
[21] Geoffery P. Miller, "Class Actions in the Gulf States: Empirical Analysis of a Cultural Stereotype," 74 TLNLR 1681 (June 2000).
[22] Linda S. Mullenix, "Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?," 74 TLNLR 1709 (June 2000).
[23] Id. at 1779.
[24] 715 So. 2d 199 (1997) (quoting *Brewer v. Campo Electronics Appliances & Computers, Inc.*).
[25] Anthony J. Scirica, Chair of the Committee of Practice and Procedure of the Judicial Conference of the United States, Letter to the Honorable F. James Sensenbrenner, Jr., May 12, 2003. For complete text of letter, visit http://www.citizen.org/documents/scan_cw02.pdf.