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Class Action Fairness Act: Delay Is In the Details

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The Class Action Fairness Act: Delay Is In the Details

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The newly-enacted and long-awaited Class Action Fairness Act of 2005 aims to promote "prompt recoveries for class members with legitimate claims" and to "benefit society by encouraging innovation and lowering consumer prices."2 But will the Act really result in speedier and less expensive resolution of class actions, as Congress intends? Or will it spawn delay and greater cost? Unfortunately, the latter seems more likely. The already overburdened federal court system will not easily absorb the demands of additional complex class actions. The Act will change—but not eliminate—disputes over the propriety of federal court jurisdiction. And the new legislation may also make class action settlements more time-consuming, expensive and difficult. All of these factors may lead to further delay and increased costs.

OVERBURDENED FEDERAL COURTS

The Act will enable federal direct purchaser claims and related state indirect purchaser and consumer protection law claims to be adjudicated together, in one forum. While this concentration could in theory result in administrative efficiencies, those efficiencies may never materialize if federal courts lack the time and resources to manage their increased caseloads effectively. Even before the Act's passage, more than 5000 class actions were pending in federal courts around the country,[3] and new class actions were being filed at the rate of more than 2000 a year.[4] Of the more than 286,000 civil cases pending in federal courts, nearly 36,000—12.6 percent—had been pending three years or longer.[5] Without additional resources, the backlogs can only be expected to increase.

JURISDICTIONAL DISPUTES

The Senate Report confidently asserts that "the jurisdictional standards of [the Class Action Fairness Act] will simplify—not complicate—a court's jurisdictional inquiries" and dismisses as "absolutely groundless" any contention that the Act might "complicate and delay the final resolution of jurisdictional inquiries."[6] The Report notes that the Act's liberal diversity provisions will eliminate "time-consuming" fraudulent joinder disputes and that it will be "much easier" to determine the amount in controversy because individual claim amounts can be aggregated to reach the $5 million jurisdictional threshold.[7]

At the same time, however, the Act will create a host of new and different—but perhaps equally fertile—grounds for litigation. Indeed, in some cases federal jurisdiction may turn on the meaning of such inherently vague terms as:

- "the primary defendants,"[8]
- "distinct nexus,"[9]
- "substantially larger,"[10]
- "substantial number,"[11]
- "significant relief,"[12]
- "significant basis,"[13] and
- "principal injuries."[14]

Parties will undoubtedly clash over the meaning of these terms, none of which is defined in the Act.

Ambiguities aside, determining jurisdiction under the Act may be a complex, drawn-out process, requiring parties and courts to grapple with the contours of the asserted claims, the membership of the proposed class, and the relative culpability and importance of the defendants at an early stage of the litigation. Indeed, one linchpin of the required jurisdictional analysis is an assessment of the citizenship and number of "members of all proposed plaintiff classes in the aggregate."[15] This subject will undoubtedly require at least "limited discovery" and "some fact-finding."[16]

The Senate Report states that "jurisdictional determinations should be made largely on the basis of readily available information," and suggests that the parties enter into "factual stipulations."[17] Opposing parties, however, will not always stipulate to jurisdictionally dispositive facts.[18] Without fairly extensive discovery, in many cases it simply will not be possible to determine with any degree of confidence even the approximate number and citizenship of "the members of all proposed plaintiff classes in the aggregate."

The Senate Report asserts that "[a]llowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of federal jurisdiction over class actions."[19] In other words, the harder it is to determine the number and citizenship of all proposed class members, the more the drafters thought the district court should simply exercise jurisdiction.

But this will not necessarily happen. Although the Act itself does not assign burdens of proof, the Senate Report explicitly advocates a *presumption* of jurisdiction, stating that "it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (*e.g.*, the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state)."[20] How are courts to reconcile this with the long-standing principles that federal courts are courts of limited jurisdiction,[21] that a presumption *against* federal jurisdiction exists,[22] and that courts must strictly construe statutes conferring jurisdiction and resolve any doubts against jurisdiction?[23]

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Other jurisdictional provisions may also contribute to delay. For example, the Act specifically exempts class action defendants from the usual one-year time-limit for removal.[24] Thus removal may become possible at a relatively late stage, as facts become known (or as parties are added and dropped) over the course of a state court litigation.

The Act also provides for interlocutory appellate review of remand decisions.[25] Although the appellate court must generally complete any such review within 60 days, this time period may be extended "for any period of time" by mutual agreement of the parties, or by up to 10 days "for good cause shown."[26]

ROADBLOCKS TO SETTLEMENT

The Act may affect the timing and value of class action settlements, drawing out the process and making them more expensive.[27] For instance, the Act's new notice provisions may lengthen the approval process. These provisions—which apply to all class actions in federal court—require each defendant participating in a proposed settlement to serve a notice of the proposed settlement on both "the appropriate Federal official" (generally the Attorney General of the United States) and "the appropriate State official" (generally the state attorney general) for each state in which a class member resides.[28]

For the most part, the contents of the notice are straightforward—they include such items as a copy of the complaint, the settlement agreement, any other contemporaneous agreements, and the proposed or final class notice. But the settling defendant must also provide (1) "if feasible, the names of class members who reside in each State" (or else "a reasonable estimate of the number of class members residing in each State") and (2) "the estimated proportionate share of the claims of such members to the entire settlement."[29] In many instances—such as when the class includes persons or entities who purchased from other defendants—this information may not be readily accessible to the settling defendant.

If a settling defendant needs additional time to assemble the contents of its notice—as is often likely to happen—the parties must delay filing the settlement with the court. The Act requires the notice to be served "[n]ot later than 10 days after a proposed settlement of a class action is filed in court."[30] This timing is rigid; there is no room for flexibility.

The Act may result in additional delay not only between the date a settlement is reached and the date it is filed with the court, but also from that point forward, to the date of final approval. To give the appropriate federal and state officials an opportunity to object, the Act provides that "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after" they are served with the mandated notice.[31] Although nothing in the Act *requires* courts to wait until the end of this 90-day period to direct notice of the settlement to the members of the class, nothing prohibits it either, and courts may find it the safest course. Otherwise, an objection by federal or state officials could lead to an amendment requiring the resending of class notice, at considerable expense.

The Act's restrictions on coupon settlements[32] may also make settlements more expensive and harder to reach, particularly early in litigation. While the Act does not prohibit coupon settlements, it limits the attorney's fees that class counsel can recover as a result. In particular, an attorney's fee award must be based on either "the value to class members of the coupons that are redeemed"[33] or "the amount of time class counsel reasonably expended working on the action."[34] If a proposed settlement provides for injunctive relief as well as coupons to class members, then the fee award may be based on a combination of these two factors.[35] But no longer can a court approve fees based on the value of the coupons *to the defendant* or the value of the coupons that are *issued*.

One effect of this change will be to make early coupon settlements exceedingly rare, if not extinct. When negotiating a coupon settlement, it is impossible to know what the ultimate rate of redemption will be. Why would class counsel agree to be compensated on the basis of a circumstance largely beyond their control? They are much more likely to prefer the certainty of a fee award based on "the amount of time class counsel reasonably expended working on the action." Of course, the more time they invest, the higher the potential fee award. And so the Act reduces the incentives for class counsel to negotiate a coupon settlement early in the litigation.

Some might view this as a good thing. Indeed, one concern underlying the Act was the possibility of collusive settlements between class counsel and defendants. As the Senate Report noted:

> *[T]he Committee has become aware of numerous class action settlements approved by state courts in which most—if not all—of the monetary benefits went to the class counsel, rather than the class members those attorneys were supposed to be representing. These settlements include many so-called "coupon settlements" in which class members receive nothing more than promotional coupons to purchase more products from the defendants.*[36]

But the Act did not condemn coupon settlements per se, implicitly recognizing that in some instances they can be "fair, reasonable and adequate for class members."[37] Coupon settlements can also be more economical for defendants. The Act—perhaps inadvertently—makes them less so, by setting up incentives that will effectively limit their availability to later stages of litigation, after class counsel have put in enough time to justify a substantial fee award.

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CONCLUSION

The Class Action Fairness Act will not necessarily lead to faster or better results for class members or defendants. The Act may exacerbate some of the problems it was intended to solve.

[Endnotes]

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[2] Act § 2(b)(3).

[3] *See* Administrative Office of the U.S. Courts, *Judicial Business 2004* at Table X-4 (U.S. District Courts – Class Action Civil Cases Pending, by Nature of Suit and District, as of Sept. 30, 2004) (available at www.uscourts.gov/judbus2004/contents.html).

[4] *See id.* at Table X-5 (U.S. District Courts – Class Action Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending Sept. 30, 2004).

[5] *See id.* at Table C-6 (U.S. District Courts – Civil Cases Pending, by District and Length of Time Pending, as of Sept. 30, 2004).

[6] S. Rep. No. 109-14, at 68.

[7] *Id.* at 69-70.

[8] *See, e.g.*, 28 U.S.C. § 1332(d)(3). The dictionary defines "primary" as "first or highest in rank, quality or importance; principal," The American Heritage College Dictionary 1086 (3d ed. 1993), but the Act's drafters appear to have had something less precise in mind. According to the Senate Report:

> *[T]he Committee intends that "primary defendants" be interpreted to reach those defendants who are the real "targets" of the lawsuit – i.e., the defendants that would be expected to incur most of the loss if liability is found. Thus, the term "primary defendants" should include any person who has substantial exposure to significant portions of the proposed class in the action . . . .*

S. Rep. No.109-14, at 43.

[9] 28 U.S.C. § 1332(d)(3)(D).

[10] *Id.* § 1332(d)(3)(E).

[11] *Id.*

[12] *Id.* § 1332(d)(4)(A)(i)(II)(aa).

[13] *Id.* § 1332(d)(4)(A)(i)(II)(bb).

[14] *Id.* § 1332(d)(4)(A)(i)(III).

[15] *See, e.g., id.* § 1332(d)(3).

[16] S. Rep. No. 109-14, at 44.

[17] *Id.*

[18] Creative and industrious plaintiffs' counsel will attempt to find ways around the strictures of the Act by, for example, filing a series of class actions in jurisdictions around the country, adding one or more local defendants in each jurisdiction, and restricting the class definition to residents of that jurisdiction. *See* 28 U.S.C. § 1332(d)(4). Counsel may also try to artfully plead class actions or mass actions involving 99 or fewer plaintiffs, in which case the Act's jurisdictional provisions would not apply. *See id.* § 1332(d)(5)(B).

[19] S. Rep. No. 109-14, at 44.

[20] *Id.* at 43.

[21] *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

[22] *See, e.g., Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799).

[23] *See, e.g., United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1216 (10th Cir. 2003).

[24] 28 U.S.C. § 1453(b).

[25] *Id.* § 1453(c).

[26] *Id.* § 1453(c)(3).

[27] For further discussion of the effects of the Act on settlements, *see* Charles B. Casper, *Settlements Under the Class Action Fairness Act,* in this symposium.

[28] *Id.* § 1715(a) & (b).

[29] *Id.* § 1715(b)(7).

[30] *Id.* § 1715(b).

[31] *Id.* § 1715(d).

[32] The Act does not define the term "coupon settlements." Would the term be construed to include, for example, a promotional offer not reflected in a "coupon"?

[33] The Act specifically contemplates that this issue may require expert testimony. 28 U.S.C. § 1712(c). Upon the motion of any party, a court has discretion to "receive testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed." *Id.*

[34] 28 U.S.C. § 1712(a) & (b)(1).

[35] *Id.* § 1712(c).

[36] S. Rep. No.109-14, at 15.

[37] 28 U.S.C. § 1712(e). ◆