



Legislative Bulletin.....February 17, 2005

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S. 5—Class Action Fairness Act

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$7 million a year (\$35 million over 5 years)

Total Change in Revenue: \$0

Total Change in Mandatory Spending: 0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 2

Number of *Bills* Without Committee Reports: 1

Number of *Reported* Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

S. 5—Class Action Fairness Act (Senator Grassley)

Order of Business: The bill is scheduled to be considered on Thursday, February 17th, subject to a structured rule (H.Res. 96) allowing one amendment in the nature of a substitute (summarized below). **H.Res. 96 will be considered on Wednesday, February 16, 2005.** On February 10, 2005, the Senate passed S. 5 by 72-26:

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00009 Last Congress, the House passed a similar bill, H.R. 1115, by a vote of 253-170: <http://clerk.house.gov/evs/2003/roll272.xml> To read the RSC Legislative Bulletin for H.R. 1115 in the 108th Congress, visit this website: <http://johnshadegg.house.gov/rsc/LB61203.pdf>

Summary: S. 5 would reform current law related to class-action lawsuits, allowing for such suits to be removed to federal court, as follows:

Federal Jurisdiction: Provides that Federal District Courts shall have original jurisdiction over class action lawsuits (excluding actions concerning certain securities and internal affairs of corporations) when the amount in controversy exceeds \$5 million (excluding interest and costs) and when:

- any member of the class of plaintiffs is a citizen of a state different from any defendant;
- any member of the class of plaintiffs is a foreign country or a citizen or subject of a foreign country and any defendant is a citizen of a state; or
- any member of the class of plaintiffs is a citizen of a state and any defendant is a foreign country or a citizen or subject of a foreign country.

Federal courts would have the discretion to decline jurisdiction over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiffs and the primary defendants are citizens of the state in which the action was originally filed based on consideration of—

- “whether the claims asserted involve matters of national or interstate interest;
- “whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states;
- “whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction;
- “whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- “whether the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and
- “whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.”

Federal courts would have to decline jurisdiction over a class action in which greater than two-thirds of the members of all proposed plaintiffs are citizens of the state in which the action was originally filed or in which the alleged principle injuries (and the related legal actions) occurred in a single state.

Federal district courts would not have jurisdiction when:

- the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief;
- the size of plaintiff class is less than 100; or

Mass actions: Mass actions would be treated similarly to standard class actions described above. Mass actions are civil actions in which monetary relief claims of 100 or more persons

are proposed to be tried jointly on the grounds that the plaintiffs' claims involve common questions of law or fact.

Removal of Class Actions to Federal Court: Permits any defendant or any class member to remove a class action from state court to federal court, provided the action meets the requirements set forth for federal court jurisdiction (see above). An appeal of such removal would have to be filed within 7 days, and the court of appeals would have 60 days (subject to extension) to render judgment on the validity of the appeal.

Coupon Settlements: If a proposed settlement in a class action includes coupons to a class member, the portion of any attorney's fee award that is attributable to the award of the coupons would be based on the value to class members of the coupons that are redeemed. An attorney's fee in coupon-only or coupon-plus-injunctive-relief settlements could be based in part on the time spent on the action—but only with court approval.

The court would have to hold a hearing and make a written finding that a proposed settlement is “fair, reasonable, and adequate” for class members prior to the approval of any proposed settlement under which class members would receive coupons or would otherwise be required to expend their own money to obtain the benefits of the settlement.

Prohibition Against Financial Loss of a Class Member: Prohibits any settlement under which any class member is obligated to pay the class lawyer more than the class member received under the settlement, unless the court makes a written finding that non-monetary benefits to the class member outweigh the financial loss to the class member.

Prohibition Against Geographic Discrimination: Prohibits a settlement that provides greater sums to some class members based on their geographic proximity to the court.

Notification and Final Approval: Requires that, not later than ten days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement give notice of the proposed settlement (consisting of details listed in the bill) to the appropriate state official of each state in which a class member resides and the appropriate federal official. An order of final approval of the settlement could not be issued earlier than 90 days after such notice is provided. A class member could refuse to abide by the settlement if it can be shown that such notice is not properly filed.

Report: Within 12 months after enactment of this legislation, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, would have to prepare and transmit to Congress a report on the state of class action settlements.

Effective Date: This legislation would apply to any civil action commenced on or after the enactment of this legislation.

Additional Background Related to Federal Jurisdiction: Article III of the Constitution protects out-of-state litigants against the prejudice of local courts by allowing for federal

jurisdiction when the plaintiffs and defendants are citizens of different states. However, under current law, federal jurisdiction for a class action does not exist unless every member of the class is a citizen of a different state from every defendant (which is impossible in class actions in which, for example, citizens from all 50 states make up the class), and every member of the class is seeking damages in excess of \$75,000.

Amendment in the Nature of a Substitute Made in Order under the Rule (H.Res. 96):

Convers (D-MI): Retains some of the base bill’s provisions on original jurisdiction and removal to federal court, but:

- Excludes class action cases brought by state attorneys general from removal to federal court.
- Excludes class action cases brought under a state or local law prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, disability, or other such classification from removal to federal court.
- Excludes class actions or collective actions brought to obtain relief under a state or local law for failure to pay the minimum wage, overtime pay, or wages for all time worked, failure to provide rest or meal breaks, or unlawful use of child labor from removal to federal court.
- Treats a so-called inverted corporation (“a foreign corporation which acquires a domestic corporation in a corporate repatriation transaction”) as a domestic corporation for the purposes of the bill’s class action provisions (and thus prevent certain class actions involving corporations from being removed to federal court).
- Limits the court's ability to seal or make class action records subject to a protective order.
- Does not include the mass actions language in the base bill.
- Prohibits a federal judge from denying certification of a class on the basis that more than one state law applies.
- Retains much of the base bill’s language on coupon settlements, on protections against losses by the class members, on defendants’ notifications of settlements, on the required report to Congress on class actions, and on the effective date.

Committee Action: S. 5 was not referred to any House committee; the bill is being held at the desk.

Cost to Taxpayers: CBO estimates that S. 5 would authorize about an additional \$7 million annually (for the increased costs of federal district courts to handle more cases). Though the bill would not *directly* affect mandatory spending or revenues, CBO anticipates that enacting it could increase the need for additional federal judges. Because the salaries and benefits of district court judges are considered mandatory in the federal budget, adding more judges would increase direct spending. But separate legislation would be necessary to authorize an increase in the number of district judges.

Does the Bill Expand the Size and Scope of the Federal Government?: CBO notes that, “Under S. 5, most class-action lawsuits would be heard in a federal district court rather than a state court.”

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes—two private-sector mandates. S. 5 would impose a private-sector mandate by potentially limiting the size of awards that attorneys could receive in certain class action settlements (as detailed in the “coupons” section of the summary above). S. 5 would also require defendants to serve notice to the appropriate state officials and the appropriate federal official within 10 days after a proposed settlement is filed in court. However, CBO estimates that the real-world costs of both of these mandates “would be small.” S. 5 contains no state- or local-government mandates.

Constitutional Authority: Although a committee report for S. 5 is not available, last Congress the House Judiciary Committee, in House Report 108-144 for H.R. 1115, cited constitutional authority in Article I, Section 8 (but did not cite a specific clause) and Article III, Section 1 (the establishment of the federal judiciary). Article III, Section 2 extends federal judicial power to “Controversies...between a State and Citizens of another State; -- between Citizens of different States,...and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.”

Administration Position: A Statement of Administration Policy (SAP) for S. 5 states that, “The Administration strongly supports the enactment of S. 5 as an important step in reforming class action litigation.” To read the complete SAP, visit this website:
<http://www.whitehouse.gov/omb/legislative/sap/109-1/s5sap-h.pdf>

Outside Organizations: The U.S. Chamber of Commerce strongly supports S. 5 and has indicated it will likely be scored as a key vote for 2005. The American Trial Lawyers Association has indicated its opposition to the bill and in a press release stated, “The class action bill passed by the Senate is a shameful attack on Americans’ legal rights.”

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