IADC Newsletter

June, 2002
No. 6

Drug, Device and Biotech

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The IADC

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Overlapping Multiple-State Class Actions: Federal Legislation May Be on the Way

By Bruce R. Parker and David S. Gray

The injustices created by nationwide class action litigation are well documented and all too familiar to the defense bar. Although constitutional and fairness principles argue for federal courts to handle such cases, the plaintiffs are often able to defeat removal. The defendant then faces a Hobson's choice: litigate a high-exposure case in a hostile state venue or settle.

Two developments in 2002 cast a ray of hope that this serious problem may finally be addressed by federal legislation. The first development is passage in the House of Representatives of a bill that, if similarly passed by the Senate, would remediate many of the problems created by overlapping state class actions. The second is a position adopted by the Judicial Conference Civil Rules Advisory Committee that advocates federal legislation to address class action reform. This is the first time that an organized body of the Federal Judicial Conference has supported a recommendation for enacting legislation that creates minimal diversity jurisdiction for class actions.

HR 2341, the "Class Action Fairness Act," was passed by the House on March 13, 2002 and referred to the Senate. The Senate version of HR 2341 is S 1712. The House legislation would shift most nationwide class actions from a few magnet state courts to federal courts, increase judicial scrutiny of questionable settlements in all federal class actions, and set forth more class member-friendly provisions in announcing class action developments. During Floor debate, however, the House adopted an amendment proposed by Rep. Jerrold Nadler (D-N.Y.) that precludes parties in a federal class action from sealing court records, including documents disclosed during

discovery (the "Nadler Amendment"). Because the Nadler Amendment unfairly prejudices defendants faced with meritless class actions and has nothing to do with the Act, supporters of the Act have criticized this Amendment. Thus far, S 1712, presently under consideration by the Senate Judiciary Committee, does not include the Nadler Amendment. Hearings on S 1712 are tentatively set for July 2002.

Putting the emphasis back on the federal courts

HR 2341 addresses the problems created by overlapping state class actions by moving the epicenter of nationwide class action litigation to federal courts. It does this by modifying diversity jurisdiction. Many circuit courts do not allow defendants to aggregate all damages demanded in a class action and require complete diversity between the litigants. For purposes of class action litigation only, HR 2341 sets the bar for diversity jurisdiction at an aggregate amount of $2 million, thereby dissuading plaintiffs' counsel from compromising their clients' claims to defeat removal. HR 2341 loosens the amount of diversity needed between the parties by allowing the parties to remove a class action if any member of the putative class is a citizen of a different state than any defendant.

HR 2341 also changes the manner in which litigants may remove a case. For example, current law requires an Alabama state court to handle a nationwide class action filed by named plaintiffs from Alabama against a Vermont manufacturer and the Alabama store where some of the named plaintiffs purchased the product at issue. HR 2341 would extend the power to remove to all members of the putative class and create an exception to the rule that all parties on either side must agree to remove the case. Furthermore, HR 2341 removes the "wait-and-see" arrow from the class action plaintiffs' quiver by deleting the one-year limitation on motions for removal.

HR 2341, however, does not "federalize" class actions. Class action litigation that primarily implicates state interests would remain in state court. HR 2341 carves out four exceptions to the rule that class actions involving diverse parties and damages of $2 million or more may be removed:

(1) the substantial majority of the putative class and the primary defendants are citizens of the State where the complaint was filed and the claims asserted will be governed primarily by local state law;
(2) the primary defendants are States, State officials, or State governmental entities; or
(3) the putative plaintiff class members are less than 100.

By allowing most state class actions to remain state courts, these exceptions allow coordinated plaintiffs' attorneys to file state law class actions in every jurisdiction so long as they limit the class to citizens of that jurisdiction.

Likewise excluded from HR 2341 are many securities actions, such as those seeking relief under the Private Securities Reform Act of 1995.

Empowering Class Members to Make More Intelligent Choices About Proposed Settlements.

HR 2341 would also increase class members' rights. With disturbing frequency, nationwide class actions drag unwitting and unnamed class members into compromising their individual rights. Some, if not virtually all, class members discard "legalese"-riddled notices as junk mail and never appreciate the shocking amount of attorney's fees awarded. To alleviate these problems, HR 2341 sets forth the Consumer Class Action Bill of Rights:

1. **"Coupon" or non-cash settlements.** Defendants often settle class actions by providing coupons or similar non-cash restitution to plaintiffs and paying millions to class counsel in fees. HR 2341 would require federal district courts to hold a hearing on any proposed coupon settlement and approve it only after making written findings that it is fair, reasonable, and adequate for class members.

2. **Net loss settlements.** HR 2341 precludes federal courts from approving settlements in which class members suffer a net loss unless it finds that the non-monetary benefits outweigh the monetary loss.

3. **Discrimination based on location.** To avoid the unseemliness of a local class member receiving more than a non-local class member, HR 2341 prohibits class action settlements that discriminate based on geography.

4. **Bounties.** Named plaintiffs sometimes receive more than unnamed class members for no other reason than they are named plaintiffs. HR 2341 would prevent federal district courts from approving such settlements unless the difference represents the additional time and costs expended by named plaintiffs to fulfill their responsibilities.

5. **Plain English for settlement notices.** To deter class members from discarding important notices and disregarding important print advertisements, HR 2341 details how class members must be notified about class actions and proposed settlements. HR 2341 would also mandate how members of a class may be notified about their rights to opt out of a class action or proposed settlement in television or radio advertisements.

More information about the legislative history and the actual text of the Act can be accessed at http://thomas.loc.gov.

The Nadler Amendment

Most of the amendments made in the House, such as authorizing a study on current class action practice, have been well received. The sole exception is the Nadler Amendment, which would preclude a court from sealing records in a class action, including documents disclosed in discovery, unless it finds that:

(1) the sealing is narrowly tailored, consistent with the protection of public health and safety, and is in the public interest; and
(2) f the action by the court would prevent the disclosure of information, that disclosing the information is clearly outweighed by a specific and substantial interest in maintaining the confidentiality of such information.

To many, the Nadler Amendment undermines the Act by taking away a significant bargaining chip from class plaintiffs to expose the defendant's internal information. A meritless class action would present the defendant with a new Hobson's choice: disclose internal information with little hope of protecting this information once the class action is defeated, or settle before discovery. Furthermore, the Nadler Amendment has nothing to do with the purposes of HR 2341: the Nadler Amendment does not level the playing field between the litigants or empower class members to make intelligent choices.

There are some important differences between HR 2341 and S 1712. The primary difference is that S 1712 currently does not contain the Nadler Amendment provisions. In addition to deleting the Nadler Amendment, S 1712 differs

from HR 2341 in two other material respects. First, S 1712 would insert a notification requirement for proposed settlements. No later than 10 days after the proposed settlement is filed in court, most defendants would have to provide notice to the United States Attorney General and the state officials who have primary regulatory authority over the defendant. State officials in each jurisdiction where class members reside must receive this notice. No federal court may approve a proposed settlement until 90 days after the necessary officials are served. S 1712 would allow class members to circumvent a settlement by proving that either of these officials did not receive notice.

Second, although HR 2341 would have codified the recent changes to F.R.Civ.P. 23 to permit immediate appeals of class certification orders, S 1712 deleted this section. S 1712 additionally extends HR 2341's provisions to all proposed settlements that may affect the rights of some or all class members and permits removal by a class member before certification.

Civil Rules Advisory Committee

On April 24, 2002, the Advisory Committee on the Federal Rules of Civil Procedure provided the second ray of light for reform in nationwide class action litigation. This committee expressed its support for nationwide class action reform in a Memorandum to the Standing Committee on the Rules of Practice and Procedure and the Committee on Federal-State Jurisdiction. Specifically, the Advisory Committee recommended that these two committees support the concept of diversity jurisdiction in large, multi-state cases. The Advisory Committee tempered its recommendation by suggesting that any resulting legislation leave the jurisdiction for "in-state" class actions "undisturbed." Although the impact of the Committee's recommendation remains to be seen, it comes at a fortuitous time with legislation pending in Congress that, if passed, would remediate many of the problems created by multiple overlapping state class actions.

Conclusion

Aside from the Nadler Amendment, HR 2341 and S 1712 address many of the injustices experienced by defendants in nationwide, multi-state class action litigation. To be sure, this legislation and the significant statements of the Advisory Committee on the Federal Rules of Civil Procedure are noteworthy steps in the right direction. By allowing class counsel to defeat removal by limiting classes to a single state's citizens and the class members' claims to below the jurisdictional minimum, however, HR 2341 and S 1712 may create a new problem. Although class actions are intended to coordinate similar claims in many different jurisdictions, these reforms actually may encourage the fragmentation of nationwide class action litigation into multiple state-specific class actions. Only by allowing defendants to aggregate the claims of all class members to meet the minimum for diversity jurisdiction, regardless of whether the cases primarily involve a single state's citizens, would these procedural loopholes in class action litigation be closed.