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New Jersey No 'Judicial Hell Hole'

State judiciary's restraints may spare it full impact of Class Action Fairness Act

By Tim O'Brien

For plaintiffs' lawyers who use the state courts to force large corporations to settle national class actions, life just got tougher.

With the signing of the Class Action Fairness Act of 2005 by President Bush on Feb. 18, such cases will wind up in federal court, where defendants tend to do better.

The impact will be felt in the places that were the targets of the law, such as Madison and St. Clare counties in Illinois and Jefferson County, Texas. Those "judicial hell holes," and others in Alabama and Mississippi, are the favorite venues for some in the plaintiffs' bar because of consumer-friendly juries and elected judges who routinely certify national classes and apply their state law and/or the laws of other states.

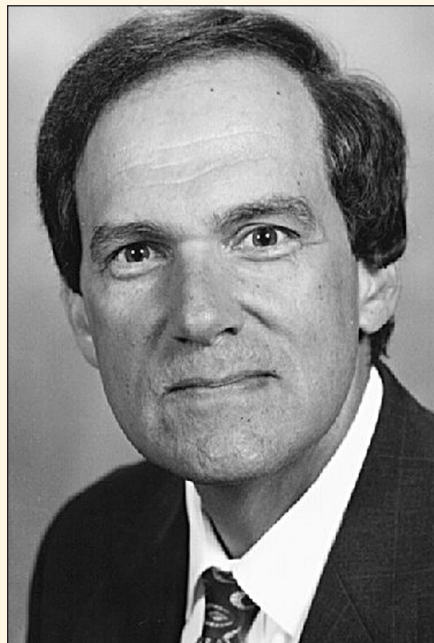
The impact of the legislation won't be felt so dramatically in New Jersey, where state court judges have shown restraint in certifying nationwide classes and applying New Jersey law to residents of all 50 states.

"New Jersey has a good state court system ... it's not considered a judicial hell hole," says Jeffrey Greenbaum, a former co-chair of the American Bar Association's Class Actions and Derivative Committee.

Greenbaum, a partner with Newark's Sills Cummis Epstein & Gross, says, "Our state court judges often will not certify a national class and won't apply New Jersey law to out-of-state plaintiffs, but they will certify only state residents."

Plaintiffs' class-action practitioner

Lisa Rodriguez agrees. "Practically speaking, there has been a judicial reticence, and [state] courts are not certifying huge national classes, especially judges in New Jersey, where they won't certify other than for state residents," says Rodriguez, with Trujillo, Rodriguez & Richards of Philadelphia and Haddonfield.



LOCAL CLASS: Jeffrey Greenbaum is among those who believe the Class Action Fairness Act will lead the plaintiffs' bar to limit class-action cases to a single state's residents.

Greenbaum and Rodriguez also agree that the law — pushed for by business and Republican leaders since President Bush took office in 2001 — will lead the plaintiffs' bar to plead class-action cases with just state residents or residents of one other state as

well. That's because the law allows for cases to stay in state courts if two-thirds or more of the plaintiffs are from the forum state. However, the federal judge hearing a motion to remove the case to federal court would have discretion to kick it back to the state.

The Class Action Fairness Act was introduced just after Bush took office. Led by the U.S. Chamber of Commerce, business groups argued that federal diversity jurisdiction over class actions had to be expanded to cover large interstate cases where many millions were at stake.

Backers of the bill cited the multitude of national class actions filed in "magnet counties," as well as the large plaintiffs' legal fees being agreed to by defendant companies and judges in settlements. In particular, the awarding of coupons to thousands of plaintiffs often worth just a few dollars, while their lawyers collected millions in fees, drove the congressional argument on the business side.

Countering those arguments were consumer advocates who cited the abuses of corporations in myriad unfair fees and charges that, though relatively small, add up to many millions because there are tens of thousands of victims.

"Is this the most anti-consumer piece of legislation they could write?" says plaintiffs' attorney Terry Bottinelli. "The little guy with a small claim needs class actions ... they serve a purpose and my concern is that everyone is on the same playing field."

Not only are state court procedures friendlier to plaintiffs, but federal judges are less likely to make expansive or novel interpretations of state law, leaving that to state judges, says Bottinelli, of Hackensack's Herten, Burstein, Sheridan Cevasco, Bottinelli, Litt, Toskos & Harz.

The legislation failed several times during Bush's first term. It passed the House in March 2002, only to fail by one vote in the Senate in the fall of 2003. After six months of negotiations and compromise, the bill was reintroduced in the Senate in 2004 but died again last July when Democratic senators attached unrelated provisions.

Right after Bush's swearing in in January, the measure was reintroduced in the Senate and this time it swept through, 72-26. The House followed suit, 279-149. New Jersey Democratic Sens. Jon Corzine and Frank Lautenberg voted no, while the state's congressional delegation split along party lines.

Forum Shopping Discouraged

Key provisions of the bill are geared to cutting down on forum shopping. Any class action with 100 or more class members seeking more than \$5 million in damages must be heard in federal court when fewer than a third of the plaintiffs are from the same state as the primary defendant. State courts may have jurisdiction on a class action seeking more than \$5 million only when the primary defendant and more than a third of the plaintiffs are from the same state. If more than two-thirds of the plaintiffs are out-of-staters, the case must be heard in federal court.

Regarding coupon settlements, the legal fee awarded to the plaintiffs' team will no longer be based on the total potential value of the coupons, but on the value of redeemed coupons. Moreover, judges will now be permitted to use court-appointed experts to evaluate the true worth of any coupon settlement.

If basing the fee on the redemption of coupons is not feasible, the judge can use hourly rates, and plaintiffs' lawyers can seek multipliers.

Plaintiffs' attorney Rodriguez says she's pleased with the coupon provision. "We try to avoid them because, quite frankly, they usually don't satisfy the needs of the consumers." But, she adds, "coupons can sometimes be a sweetener or a closer."

"This law will cause a drastic

reduction in state law-based class actions under consumer fraud laws," says Jessica Davidson Miller, who writes on federal class action legislation. Miller, counsel with the Washington, D.C., office of O'Melveny & Myers, says the legislation came about because "Madison County is willing to certify a national class and to apply their state law to all plaintiffs, while a federal judge won't certify such a case."

Miller says that a week before the president signed the bill, 85 class actions were filed in St. Clare County and neighboring Madison County, which has two towns and 60,000 residents.

Miller, who represents business, points to the law's home-state exception, under which a defendant's home state is defined as where the corporation is incorporated or where it has its main place of business. Under the exception, if two-thirds of the class are from the defendant's home state, the case would not be subject to federal jurisdiction.

Miller says the exception's purpose "is to ensure that federal courts have jurisdiction over clearly interstate cases, while state courts retain exclusive jurisdiction over primarily local matters."

Miller agrees with other defense lawyers who say New Jersey won't be affected dramatically. Andrew Berry of McCarter & English in Newark calls the New Jersey state bench "a civilized jurisdiction, not a judicial hell hole."

Berry adds that while the state's courts have seen their share of class actions, "most of them really had a strong nexus to New Jersey. The over-the-top forum shopping never happened in New Jersey." When federal judges have the option of retaining a case or remanding it back to state court — when state residents represent one-third to two-thirds of the class — most will remand, Berry says.

Lowenstein Sandler partner Douglas Eakeley agrees the impact will "not be that drastic" in New Jersey because state court judges are reluctant to certify multistate classes. He says

the typical state court class action, even when the defendant is a New Jersey-based Fortune 500 company, involves in-state plaintiffs suing over torts peculiar to them, such as a loss of utility power during a heat wave.

Upsurge in Federal Filings?

There are some who fear the federal courts will now be hit with many more cases. They cite cases being filed in magnet counties around the country against Fortune 500 companies based in New Jersey. Going forward, those cases would have to be filed in federal court in New Jersey because the defendant is located there. And those cases, says one federal judge who did not wish to be identified, tend to be complex, requiring hearings to determine the validity of scientific evidence as well as long causation hearings.

All agree on one thing. The law will take years to sort itself out, with a lot of litigation over the proper forum as well as choice-of-law issues. And most agree that the gamesmanship on both sides will continue, with new strategies being tried as plaintiffs' lawyers continue to be creative in pleading state court actions and defense attorneys continue to be equally creative in trying to remove cases to federal court.

One result, lawyers on both sides say, could be more class actions against regional or smaller companies whose customer base is large enough to make the case economically viable yet local enough to have more than two-thirds of the class's in-state residents.

What probably won't be in New Jersey courts is a case like *Talalai v. Cooper Tire & Rubber Co.*, L-008830-MT, approved for settlement in 2002 by Superior Court Judge Marina Corodemus after she certified a class that included customers from six states who had bought millions of defective tires.

The case, based on the New Jersey Consumer Fraud Act, survived defense motions to dismiss. The settlement value, including nonmonetary corporate actions, was estimated at more than \$1 billion. The plaintiffs' attorneys' fee was \$30 million. ■