



US law restricts citizens' chances to go after big corporations in court

... and the Republicans show flexibility in their dedication to states' rights.

BY RICHARD A. BRISBIN, JR.

Will Washington's new legislation governing class action lawsuits mean the end to huge settlements by big tobacco and major polluters?

That's the charge made by the critics of the *Class Action Fairness Act* of 2005, passed in February by the United States Congress at the urging of President George W. Bush.

Supporters of the Act say it will only spell the end to frivolous lawsuits by lawyers who take a percentage cut of every award to their clients. Opponents say it will severely restrict action against industries that pollute and sell products that cause injury and death to consumers.

The Act limits the power of the states' judiciaries in class action lawsuits. These are suits about a common injury brought on behalf of large numbers of unrelated plaintiffs. The plaintiffs in such lawsuits often claim that a commercial product or financial service has caused injury to consumers.

The most important thing about a class action suit is that every person who has suffered from a product or service in the manner defined in the lawsuit identified in the lawsuit – not just those who file the lawsuit – is entitled to a share in the compensation. In some cases that affected a large part of the population, industry was forced to pay huge settlements.

The new "fairness" Act was strongly endorsed by business associations and corporations and its passage illustrates

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how the Bush administration is redesigning the American system of judicial federalism. There has been a shift in the boundaries provided for in the constitution between the separate federal and state judicial systems and this shift benefits private sector interests.

Class action lawsuits as social policy

In 1938 the United States Supreme Court first adopted Federal Rules of Civil Procedure that permitted plaintiffs injured by the same event to join together as classes in suits.

In civil rights suits during the 1950s and 1960s, African Americans successfully used these class action provisions to challenge racially discriminatory governmental policies.

In 1966 the Supreme Court revised the Rules. The revision permitted federal lawsuits to secure government recognition of constitutional rights for racial and religious minorities, the mentally ill, and recipients of governmental services.

Soon lawyers filed state class actions alleging a wide range of common injuries from business financial practices, manufactured products such as asbestos, tobacco, firearms, pharmaceuticals, and autos, and the environmental degradation caused by corporate dumping of pollutants in streams and on land. Class action suits became an institution in America, an institution that was regulating industry and causing the creation of social policy.

Pushing cases to the federal court

The *Class Action Fairness Act* is a "sea change" in US law. It reshapes American judicial federalism, private class actions, and corporate power.

The act changes the right of plaintiffs in class action suits to choose where their case will be heard. This is called "diversity jurisdiction" in the legal system. When drafting the United States Constitution of 1787, the Framers avoided political controversy by establishing a dual court system. The existing systems of state courts received jurisdiction over crimes within their borders and most civil disputes. The federal courts acquired jurisdiction over crimes and civil conflicts to which the federal government was a party or that arose on federal lands or occurred across state or international boundaries.



New courthouses aside, will the Federal Court have room to take on class action suits?

Two centuries ago, Congress permitted the federal courts – as well as state courts – to hear “controversies between citizens of different states” or what has become known as diversity of citizenship cases by passing the *Federal Judiciary Act* of 1789. The aim was to prevent “home cooking” or the prejudice of state courts against out-of-state parties.

Moreover, the Supreme Court determined that the defendants in diversity cases could “remove” their cases from state to federal court only by showing the dispute arose under federal constitutional or statutory law or there was “bad faith” or discrimination against them by a state court.

The *Class Action Fairness Act* significantly enhances the role of the federal courts to decide cases involving citizens of different states. With a few exceptions, it requires federal courts to consider any class action if more than one-third of the class members are from more than one state. This situation is likely with most cases concerning injuries caused by manufactured products.

Also, the Act makes it much easier for the corporate defendants in class actions to petition to remove their cases to federal courts. The defendant need not show judicial bad faith, only minimal diversity of citizenship among members of the class, one hundred members in the class, and an aggregate of \$5 million at issue in the suit. This change makes it possible for firms to avoid having their suit considered by state court juries drawn from communities with a large poor, minority, or politically liberal population that might be disinclined to support corporate interests.

These changes increase the authority of federal judges to consider conflicts and set policy when “have-not” injured parties and rights claimants sue state and local governments and corporations.

As if that weren’t enough, the Act changes the rules on multiple-party suits. It establishes a new form of “mass action” in American legal practice. For 100 or more plaintiffs who do not qualify as a class for a class action suit, if they are arguing the same issues of law and fact, their lawsuit now counts as a “mass action” case. The Act says that in a mass action case, any individual defendant claiming \$75,000 or more has to have his or her case held in federal court, while those claiming under \$75,000 would be left to litigate in a state court. Defendants can use this law to “divide and conquer” those suing them in such cases. Cases in which plaintiffs suffer minimal losses, such as small overcharges for a product, will often be too costly to litigate. As well as once again increasing the authority of federal courts, this provision might reduce the legal costs for corporations.

The act also changes how lawyers for the plaintiffs are paid. Attorneys for class plaintiffs are usually paid by “contingency fee”. But how this contingency fee is calculated has now been changed by the act. The lawyer is paid a percentage – usually twenty to forty percent – of the monetary award in cases they win. If they lose, they are not paid.

The act also has the potential to change remedies for injuries. Beside compensation for injuries, in American state courts judges or juries can additionally award the plaintiff “punitive damages” as penalty against the defendant that

supposedly will teach this defendant and others not to engage in the harmful activity in the future.

Punitive damages, rarely limited by state law, are a discretionary award that can extend into the hundreds of millions of dollars. They provide an economic incentive to file class actions when the compensatory damage would be the relatively small cost of a consumer product such as a contraceptive device or a recording on compact disc. In cases heard by federal courts, however, some laws limit punitive damage awards and the Supreme Court has established guidelines to control such damage awards. Federal jurisdiction of class actions therefore sometimes can permit corporate defendants to avoid large and costly punitive damage awards.

The political divide

Behind the legal changes made by the Act lurks a bitter political division. American business, especially through the interest group the United States Chamber of Commerce, has regarded class action litigation and pro-consumer decisions of judges as against business interests. Business sees in such decisions increasing insurance costs, expenditures on risk management, restrictions on the exploitation of natural resources, and legal fees. It claims these costs diminish the competitiveness of American firms in a global economy and cost American jobs.

Business has sought to advance its interests through its contributions to candidates, largely those of the Republican Party, and lobbying to restrict class actions and revise other legal rules that increase insurance costs. Minorities, consumer, and environmental interests and their attorneys have sought to counter business influence through contributions to and political alliances with federal and state legislators of the Democratic Party. The passage of the *Class Action Fairness Act of 2005* signifies a victory for business interests in this conflict.

Ironically, however, the Act is a Republican-supported shift of duties and power to the federal judiciary. Since the 1930s, the Republican Party has stood as a defender of the states and decentralized government. It has opposed a greater role for the federal government and sought more freedom for American business from federal regulation. Its spokesmen, such as House Majority Leader Tom DeLay, often rail against an “activist” federal judiciary. Nonetheless, the *Class Action Fairness Act* allows business to federalize litigation and create new activities for the federal judiciary, a judiciary that Chief Justice William Rehnquist – a conservative Republican – already considers to be in a “funding crisis.”

The lesson of the Act is that federalism is far from being an immutable principle of American constitutional governance. Instead, federalism is often trotted out as a symbol to justify certain partisan political objectives. But threats to federalism and the centralization of power in the federal government, such as those that often concern American business and the Republicans, sometimes just disappear. The time they disappear is usually when they might hamper the ability of business to make money. That has happened with this Act’s expansion of federal judicial power and resulting reduction of state judicial responsibilities. ☺