HEADNOTES

CLASS ACTIONS

The "Fairness" in Class Action Litigation Act

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Congress is at it again, trying to kill the cure instead of the disease. The Fairness in Class Action Litigation Act of 2015 would prohibit federal courts from certifying proposed class actions unless plaintiffs can demonstrate through admissible evidence that each proposed class member suffered an injury of the same type and extent.

This bill, which passed the House and now awaits Senate action, was motivated by consumer class actions against makers of defective washing machines. Because the machines can cause black mold, customers wanted to recoup their economic losses—that is, the difference between what they paid for (nondefective machines) and what they got (machines that had grown or were likely to grow black mold).

Unwilling to admit that black mold wasn't so much a question of whether as when, the U.S. Chamber of Commerce helped the manufacturers fight these so-called no-injury cases. The chamber claimed that, because all washers hadn't yet grown mold, all buyers didn't yet have a claim, ignoring the reality that all machines were still defective, even if the problem hadn't manifested itself in every last one of them.

Tellingly, the chamber highlighted the washing machine cases and ignored economic-loss class actions involving product defects that caused horrific personal injuries, like the defective General Motors (GM) ignition switch and the Toyota unintended-acceleration cases. Had the chamber wanted, it could have made its point through the GM or Toyota cases (most GMs and Toyotas haven't yet exploded or suddenly accelerated), but where the consequence of faulty ignition switches or brakes could be death—and not merely economic loss—the chamber wisely kept its powder dry.

Then Congress got involved, with Representative Bob Goodlatte (R-VA) introducing the Fairness in Class Action Litigation Act of 2015. But the bill's same-type-and-extent requirement isn't as harmless as it might seem. This language could quickly and easily mutate into a requirement that proscribes courts from certifying class action complaints unless plaintiffs can affirmatively demonstrate, through admissible evidence, that all class members have suffered the exact same *amount* of damages.

In this manner, according to the bill's same-type-and-extent requirement, two Whirlpool washer owners who bought differently priced washers from different stores in different markets at different times would necessarily never have

Illustration by Sean Kane

Published in *Litigation*, Volume 42, Number 4, Summer 2016.

injury—or damages—of the same type or extent. After all, prices differ, resale values differ, energy costs differ, and usage rates differ. Accordingly, these washer owners could never be part of the same class of moldy washer victims. Indeed, no washer owners could ever be combined, unless they purchased the exact same product for the exact same price in a market that measured their overpayments identically. On this basis, economic-loss class actions based on faulty products would be eliminated altogether because Rule 23's relatively benign commonality requirement would become an impossible-to-clear class certification hurdle.

Next, by giving special, unfavorable commonality treatment to economic-loss claims, the bill would conflict with the Rules Enabling Act, 28 U.S.C. § 2072, which proscribes procedural rules from "abridg[ing], enlarg[ing,] or modify[ing] any substantive right[s]." So, for instance, if I'm bringing an individual case involving a defective product that hasn't injured me but that I can reasonably expect will, I can claim breach of warranty. Yet the bill would effectively preclude my breach-of-warranty claim as a class action by deploying a procedural mechanism—revised Rule 23—to limit my substantive rights—because the unassailable reality is that few product owners, or their lawyers, can afford to sue over a single defective product. So despite the chamber's insistence that class actions can't expand consumers' substantive rights, the chamber would gladly use the bill to constrict them. Apparently, what's good for the goose is not good for the chamber.

If all this talk of procedure doesn't agitate you, think of the bill's more sinister consequences. My dad has been practicing product liability law for 50 years. He spent most of his career aiding victims of exploding gas hot-water heaters. These heaters included defectively manufactured control valves that allowed sediment from crusty gas lines to flow through the control valves. When a water heater's pilot light blew out, the control valve was supposed to shut tight, keeping unconsumed gas from flowing into people's basements. But the sediment prevented closure, meaning the gas didn't stop. Many rural homes use liquid propane gas, which is heavier than air. For this reason, it sinks to the floor when released. When homeowners' hot water ran cold, and they naturally went to relight their water heaters' pilot lights, they had no idea they were standing in a sea of liquid propane gas. So when they lit the match—*BOOM!!!*

I've often discussed with my dad the efficacy of his having pursued an economic-loss class action, seeking the difference between the price of a properly working control valve versus a defective one, given that a class action for economic damages could have conceivably notified all consumers of their hidden dangers before any injuries had occurred. But in the 1970s, when these cases arose, economic-loss class actions were a concept that nobody even remotely considered because the class action rules were only a few years old. For this reason, a fanciful economic-loss class action lawsuit would have gone absolutely nowhere.

But now, given modern society's more proactive and preventive attitude, we're motivated to prevent injuries before they happen, aren't we? Well, maybe not, because the Fairness in Class Action Litigation Act would destroy lives by preventing consumers from holding companies accountable for defective products that haven't yet hurt them. How this helps businesses, I'm not sure. The bill will result in more lawsuits for more injury claims, which will increase insurance premiums for responsible product manufacturers. For consumers, the bill will mean higher prices. So across the board, the bill is not only morally wrong and textually overreaching; it is economically irresponsible.

It's scary that in 2016, such twisted lawmaking still exists. Perhaps when one of Goodlatte's constituents can't get a suitable price for his home because it contains defective appliances or, worse, another constituent suffers personal injury from a defective product, Goodlatte will see things differently. But by then, at least for victims, it will be too late. ■