

THE EFFECTS OF FEDERAL TORT REFORM LEGISLATION ON THE POWER OF THE STATE ATTORNEYS GENERAL

Erik W. Weibust

As one critic recently opined, the “job [of the state attorney general] is to pursue fraud, go after violations of criminal law and crack down on wrongful behavior that is cited in existing state codes ... We’ve got enough plaintiff lawyers to handle the tort side.”¹ Though this sentiment is shared by many proponents of tort reform, the fact remains that state attorneys general have traditionally used their *parens patriae* power to initiate what looks to many like tort claims on behalf of their citizenry. In some instances, state attorneys general will even hire private attorneys to handle such actions on a contingency-fee basis. However, there are significant differences between *parens patriae* cases and traditional private tort actions. The question thus arises as to what effect, if any, federal tort reform legislation has on the power of state attorneys general to pursue such claims. This paper addresses this question by examining the power of state attorneys general, and analyzing one such piece of federal tort reform legislation. Section I analyzes the power of the state attorney general to file suit on behalf of its citizens; and Section II examines the sole existing piece of federal tort reform legislation, the Class Action Fairness Act of 2005 (“CAFA”), and its effects on the power of the state attorneys general.

¹ Caroline Mayer, “Attorneys General Crusade Against Corporate Misdeeds: States Often Sue When the Federal Government Won’t,” Washington Post, Feb. 19, 2003 (quoting Victor E. Schwartz, General Counsel of the American Tort Reform Association).

I. The Power of the State Attorney General to File Suit on Behalf of its Citizens

A. *Parens Patriae*

The role of the state attorney general has traditionally been to enforce existing state statutes; to promulgate rules and regulations; to defend state agencies in legal proceedings; and to generally protect its citizens.² It is this last, very broad function that will be discussed in this section; the role of the attorney general to protect the health, safety, and welfare of its citizenry.

The state attorney general finds its power and duty to pursue suits on behalf of its citizenry in a legal doctrine called *parens patriae* (“*parens*”). Though it literally translates to “parent of country,”³ *parens* is defined by Black’s Law Dictionary as both “the state in its capacity as provider of protection to those unable to care for themselves,” and “a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen.”⁴ *Parens* is a common law doctrine that broadly allows a state to defend its sovereign and quasi-sovereign interests, such as protecting the health, safety, and welfare of its citizens.⁵

In most situations, state attorneys general will pursue common law *parens* cases under the auspices of, or in conjunction with, existing state statutes in order to obtain standing, or to overcome certain legal hurdles such as statutes of limitation or the requirements of Rule 23 of the Federal Rules of Civil Procedure.⁶ For example, in addition to meeting the constitutional requirements for standing in federal court (injury, causation, and redressability), a plaintiff must

² See e.g., National Association of Attorneys General, *Duties of Your Attorney General*, <<http://www.naag.org/ag/duties.php>> (accessed May 7, 2005).

³ See, Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982).

⁴ Black’s Law Dictionary (8th ed., West 2004).

⁵ See, Snapp, 458 U.S. 592.

⁶ The Rule governing class action lawsuits.

overcome additional prudential barriers such as the prohibition against third-party standing.⁷ This means that in order to obtain standing in federal court, “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”⁸ That being said, *parens* creates an exception, thus allowing governmental entities, such as a state attorney general, to overcome the prohibition on third party standing and file suit on behalf of its citizens.⁹ Another example is the Hart-Scott-Rodino Antitrust Improvements Act of 1976¹⁰ which gives “an explicit right to state attorneys general to bring suit in federal court as *parens patriae* for injuries arising out of a violation of the Sherman Act.”¹¹ Such claims are afforded similar protections to those provided under Rule 23 of the Federal Rules of Civil Procedure, but need not meet Rule 23’s requirements,¹² which can be burdensome on antitrust class actions.¹³ Finally, the actions being taken by state attorneys general against the lead paint industry illustrate the importance of using *parens* in conjunction with existing state law. In Rhode Island, for instance, the state attorney general is seeking to hold the lead paint industry accountable for cleaning up all remaining lead paint in buildings in the state under a public nuisance theory, and has filed suit against the industry pursuant to *parens*.¹⁴ The state attorneys general’s use of *parens* is particularly important in the lead paint cases because the alleged harm

⁷ Erwin Chemerinsky, *Federal Jurisdiction*, 83 (4th ed., Aspen 2003)

⁸ Id.

⁹ Id. at 111 (citing Missouri v. Illinois, 180 U.S. 208 (1901)).

¹⁰ See, 15 U.S.C. § 15c (1976).

¹¹ “Symposium: Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct: Delivering Remedies: The Role of the States in Antitrust Enforcement,” Harry First, 69 Geo. Wash. L. Rev. 1004, 1009 (2001).

¹² Such as commonality of claims or adequacy of representation.

¹³ 69 Geo. Wash. L. Rev. at 1013.

¹⁴ See, State of Rhode Island v. Lead Industries Association, et. al., 2001 R.I. Super. Lexis 37 (2001).

occurred many years ago and the statutorily based suits would otherwise have been barred by the statute of limitations.

Another reason that *parens* cases are commonly brought in conjunction with existing state statutes is that although *parens* can get a state attorney general into court, doing so does not negate the state's legal burdens, such as proving that the defendant breached a legal duty.¹⁵ Indeed, *parens* "helps articulate the state's legal interest. It does not define the defendant's legal duties."¹⁶ Once in court, the state attorney general must prove wrongdoing, and establishing that there has been a violation of a state statute does just that. For instance, in the tobacco cases, the states alleged that misbehavior by the tobacco companies both harmed its interest in protecting the health, safety, and welfare of its people (a *parens* claim), as well as the state's own interest in recovering tobacco-related medical costs.¹⁷ That is to say, the states sued both on behalf of their citizens and on their own behalf, alleging a breach of certain legal duties in violation of state law.¹⁸ Additionally, the Hart-Scott-Rodino Act provides standing for a state attorney general, but he or she still must prove a violation of the Sherman Act.

In order to create a statutory cause of action based in *parens*, many states have found it useful to codify *parens*. An example of this is Mass. Gen. Laws. Ch. 93A, which declares unlawful any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." The statute goes on to state that "[w]henver the attorney general has reason to believe that any person is using or is about to use any method, act, or

¹⁵ "State Attorney General Actions, the Tobacco Litigation and the Doctrine of Parens Patriae," Richard Ieyoub and Theodore Eisenberg, 74 Tul. L. Rev. 1859, 1883 (2000).

¹⁶ *Id.* (citing Texas v. American Tobacco Co., 14 F.Supp. 2d 956, 965-74 (E.D. Tex. 1997), as an example of a state alleging breach of legal duties in addition to *parens* in its tobacco litigation complaints).

¹⁷ Ieyoub and Eisenberg, 74 Tul. L. Rev. 1859 at 1864.

¹⁸ *See, eg., American Tobacco Co.*, 14 F.Supp. 2d at 765-74.

practice declared ... unlawful [by this statute], and that proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person ...” Statutes such as this tend to preclude tort relief, though they allow for statutory fines which can equally as burdensome on the defendant.¹⁹ Moreover, such statutes many times create private causes of action very similar to private tort actions.²⁰

B. Outsourcing the Power of the Attorney General to Private Counsel

State attorneys general will sometimes hire private plaintiff’s attorneys, on a contingency-fee basis, to pursue cases on their behalf, and thus on behalf of the state’s citizens. Each state has its own process for making that decision; in some states the attorney general has the power to do so by its own volition, while in other states, such as Arkansas, the state legislature must give its approval and the Governor must sign off on the decision.²¹ In all such cases, however, private attorneys are paid a percentage of the damages that are meant for the citizens of the state, which angers many critics. Another major criticism is that class action attorneys don't do enough to ensure compliance with the regulation after a settlement is signed and they are paid their fees.²²

For example, private attorneys were hired on a contingency-fee basis by most states in the tobacco cases in the 1990’s. Massachusetts was one such state. According to Tom Green, the First Assistant Attorney General under former Massachusetts Attorney General Scott

¹⁹ For instance, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra*, provides for “treble damages sustained to the property of ‘natural persons’ residing in their respective states.” 69 Geo. Wash. L. Rev. at 1009.

²⁰ See, e.g., Mass. Gen. Laws. 93A, §9. The question of whether private suits brought under such statutes are affected by federal tort reform legislation is an interesting one, but this paper addresses only the effect on the state attorneys general to bring suits under *parens*.

²¹ 151 Cong. Rec. S1157, S1165 (daily ed. Feb. 9. 2005).

²² Bruce Mohl, *Reilly Turns to Private Enforcement of Item Pricing*, Boston Globe (Boston, MA) E1 (June 27, 2004).

Harshbargar, and a lead negotiator in the multi-state tobacco settlement, the tobacco companies had litigation budgets upwards of \$500 million each year, while the total budget for the Massachusetts Attorney General's office was only around \$14.5 million.²³ Hiring private law firms was a way of remaining competitive while not using additional taxpayers' funds, according to Green. Five law firms were hired, three local and two national, to work side by side with assistant attorneys general and Harvard professor Lawrence Tribe, who worked on the case *pro bono*. Green pointed out, however, that state attorneys general rarely use private law firms on a contingency-fee basis, and do so primarily for collection cases, where the money being sought would not otherwise be collected. Needless to say, the private law firms hired by Massachusetts and other states were paid large fees out of the settlements; overall they have received over \$13.6 billion, with some firms allegedly receiving as much as \$22,500 per hour.²⁴

Another example of state attorneys general outsourcing power to private class action attorneys is the recent consumer protection action taken by Massachusetts Attorney General Thomas Reilly against Walgreens, in which the drugstore chain agreed to pay nearly \$1.6 million to settle charges that it violated state item pricing regulations.²⁵ The settlement was negotiated by private class action attorneys, "who essentially enforced the state's item-pricing regulation for Reilly."²⁶ Reilly said that the arrangement was not planned, but evolved over time and has

²³ \$14.5 million represents the annual budget for the entire Massachusetts attorney general's office, including all civil and criminal divisions. The budget for the tobacco litigation was only a fraction of that number.

²⁴ Susan Beck, "Trophy Fees: A behind-the-scenes account of the controversial awarding of \$13 billion to the plaintiffs' tobacco bar," *The American Lawyer*, Dec. 2, 2002.

²⁵ Bruce Mohl, *Reilly Turns to Private Enforcement of Item Pricing*, *Boston Globe* (Boston, MA) E1 (June 27, 2004); See also, ConsumerAffairs.com, *Walgreens to Pay \$1.65 Million in Massachusetts Class Action*, <http://www.consumeraffairs.com/news04/walgreens_itempricing.html> (accessed May 7, 2005). The item pricing regulation discussed is 940 Code Mass. Regs. 3.13 (1993), which was promulgated by the Massachusetts Attorney General pursuant to Mass. Gen. Laws. Ch. 93A § 2(c), *supra*.

²⁶ Id.

worked out well for both sides.²⁷ Private class action attorneys in Massachusetts have already received \$2.65 million for working on previous item pricing cases against Home Depot and Wal-Mart and will likely receive another \$550,000 from the Walgreens settlement. Consumers, however, will receive nothing due to the difficulty in determining who was injured by the three companies, so the settlements will send about \$3.9 million to charities and about \$425,000 to Reilly's office. The charities include the Massachusetts Bar Association, the American Cancer Society, the American Heart Association, the Juvenile Diabetes Research Foundation, the National Consumer Law Center, the Roscoe Pound Institute of Washington, the New England Patients' Rights Group, Public Citizen, and the Greater Boston Jewish Coalition for Literacy, many of which, critics complain, have little or nothing to do with consumers.²⁸

C. Conclusion

In summary, a state attorney general has the power, and in fact the duty, to protect the health, safety, and welfare of its people. Suits brought on behalf of its citizenry in order to protect these interests are most commonly brought by a state attorney general using its common law *parens* power in conjunction with existing state statutes. These suits are similar in nature to private tort actions (and many times provoke same visceral reactions by critics), but they are not the same and should not be confused. The distinction becomes even more blurry when state attorneys general outsource their power to private class action attorneys on a contingency-fee basis. The current Congress has indicated that it is in favor of broad reaching tort reform and has, in fact, recently passed tort reform legislation. Section II analyzes this legislation and its impact on the power of the state attorneys general to bring cases on behalf of their citizens.

²⁷ Id.

²⁸ Id.

II. The Class Action Fairness Act of 2005

A. The Act

To date, Congress has only passed one piece of tort reform legislation; the Class Action Fairness Act of 2005 (“CAFA”).²⁹ The Act begins by stating Congress’s findings that although “[c]lass action lawsuits are an important and valuable part of the legal system,” there have been a number of abuses of the system over the past decade that have tended to harm class members who have legitimate claims, and undermine public respect for the judicial system.³⁰ Class members often receive little or no benefit due in part to exorbitant attorney’s fees, and cases of national importance are being tried in state court, where judges are “making judgments that impose their view of the law on other States and bind the rights of the residents of those States.”³¹ The purpose of the Act is to:

“(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.”³²

Two of the major abuses of the system that CAFA seeks to remedy are forum shopping and coupon settlements. In order to reduce forum shopping – “a practice in which plaintiffs’ attorneys file class actions in the jurisdiction with the most beneficial legislation or in a jurisdiction whose citizens have a history of assessing large damage awards; rather than filing in

²⁹ Pub. L. No. 109-2, 119 Stat. 4 (2005). See “Attachment A.”

³⁰ Id.

³¹ Id. at 5.

³² Id.

the jurisdiction with the greatest connection to the controversy at issue”³³ – the Act provides for removal of class actions to federal district court, with certain exceptions. Specifically, “CAFA confers on federal district courts original jurisdiction over class actions in which (1) the *aggregate* value of the claims exceeds \$5,000,000, (2) there are at least 100 class members, and (3) any member of the plaintiff class is a citizen of a state different from any defendant.”³⁴

The most notable exception to CAFA are cases in which greater than two-thirds of the plaintiff class are citizens of the state in which the action was originally filed and the primary defendants are citizens of the state in which the action was originally filed.³⁵ Federal courts would not have jurisdiction over such cases. The Act also does not apply to securities claims and state law claims involving the internal affairs or governance of a corporation or other form of business.³⁶ Finally, federal district courts have the discretion to decline jurisdiction over cases in which “greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.”³⁷ Class actions are defined as:

“any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.”³⁸

³³ See, Cooley Goodward, LLP, *Class Action Fairness Act of 2005* <<http://www.cooley.com/news/alerts.aspx?ID=000038817320>> (March 1, 2005).

³⁴ Id. (emphasis in original)

³⁵ Pub. L. No. 109-2, 119 Stat. at 9-10.

³⁶ Id. at 11.

³⁷ Id. at 10.

³⁸ Id. at 5.

In order to curtail coupon settlements – “class action settlements in which class counsel are awarded substantial fees, but class members receive only coupons of limited value”³⁹ – the Act provides that, “the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.”⁴⁰ Moreover, any coupon settlements must be approved by the court, “only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.”⁴¹

The Act also provides for protection against net loss settlements and discrimination based on geographic location, and amends Rule 23 of the Federal Rules of Civil Procedure “to require notification to the appropriate state or federal officials to allow them to evaluate the fairness to all class members of a proposed class action settlement, as well as to assess compliance with applicable regulatory policies.”⁴² “Appropriate state officials” includes the state attorneys general, meaning that CAFA confers upon the state attorneys general the power, and in fact the duty, to evaluate the fairness of any class action settlement, and to ensure that all regulatory policies are followed.

B. CAFA’s Impact on the Power of the State Attorneys General

Though on its face CAFA does not appear to strip any power away from state attorneys general to bring suits on behalf of their citizens, prior to its passage many in Congress worried

³⁹ See, Cooley Goodward, LLP, *Class Action Fairness Act of 2005*
<<http://www.cooley.com/news/alerts.aspx?ID=000038817320>> (March 1, 2005).

⁴⁰ Pub. L. No. 109-2, 119 Stat. at 6.

⁴¹ Id.

⁴² Id.; See also, Greenberg Traurig, LLP, *New Federal Legislation: The Class Action Fairness Act of 2005*
<<http://www.gtlaw.com/pub/alerts/2005/0302.asp>> (March 2005).

that the broad definition of “class actions” would encompass suits brought by state attorneys general, and thus limit their power. Indeed, there was a lengthy debate in Congress on an amendment offered by Arkansas Senator Mark Pryor⁴³ in which he sought “to exempt class action lawsuits brought by the attorney general of any State from the modified civil procedures required by” CAFA.⁴⁴ His position was that “State attorneys general should be exempt from [CAFA] and be allowed to pursue their individual State's interests as determined by themselves and not by the Federal Government.”⁴⁵ The amendment, which was ultimately defeated,⁴⁶ would have changed the definition of “Class Action” to the following (changes in italics):

“(2) CLASS ACTION- The term ‘class action’ means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action. *The term ‘class action’ does not include any civil action brought by, or on behalf of, any State attorney general or the chief prosecuting or civil attorney of any county or city within a State.*”⁴⁷

Senator Pryor pointed out that although most state attorneys general have the power to bring cases on behalf of their citizens pursuant to *parens*, “[i]n some instances, such actions have been brought with the attorney general acting as the class representative for consumers in the State.”⁴⁸ His concern was echoed by numerous other Senators, as well as 46 state attorneys

⁴³ Prior to being elected to the United States Senate in 2002, Senator Pryor served as Arkansas’ Attorney General.

⁴⁴ 151 Cong. Rec. at S1157. Representative John Conyers offered a similar amendment in the House of Representatives on February 17, 2005. See 151 Cong.Rec. at D141-01.

⁴⁵ 151 Cong. Rec. at S1157 (quoting Senator Pryor).

⁴⁶ See Id. at 1165; 151 Cong.Rec. at D141-01 (Senator Pryor’s amendment was tabled on February 9, 2005 by a vote of 60 to 39, and Representative Conyers’ amendment was defeated on February 17, 2005 by a vote of 247 to 148).

⁴⁷ H.R. Comm. on Rules, *Class Action Fairness Act of 2005: Hearings on H.R. 96*, 109th Cong. (Feb. 15, 2005).

⁴⁸ 151 Cong. Rec. at S1159 (quoting Senator Pryor).

general who sent a letter to the leadership in Congress supporting Senator Pryor's amendment.⁴⁹

They reiterated that their cases are usually brought pursuant to *parens*, but that “[i]n some instances, such actions have been brought with the Attorney General acting as the class representative for the consumers of the state,” and further stated:

“We take no position on the Act as a general matter and, indeed, there are differing views among us on the policy judgments reflected in the Act. We join together, however, in a bipartisan request for support of Senator Mark Pryor's potential amendment to [CAFA], or any similar legislation, clarifying that the Act does not apply to, and would have no effect on, actions brought by any State Attorney General on behalf of his or her respective state or its citizens.”⁵⁰

It is clear that the attorneys general were worried about losing power; however, it appears that their biggest concern was not that CAFA would necessarily limit their power per se, but rather that it could be misinterpreted in such a way to do so.⁵¹ Though such a concern is not entirely without merit, critics have pointed out that “any law that has ever been written is capable of being misinterpreted. That is why we have the court system.”⁵²

The major objection to the amendment, and perhaps the reason it was ultimately defeated, was that it was unnecessary in that “the attorneys general have authority under *parens patriae* statutes enacted by the many state legislatures to represent the citizens of their State. They are the lawyer for everybody in the State.”⁵³ *Parens* actions are not the same as class actions and are therefore not covered by this legislation. “There is no certification process, there are no representative class members named in the complaint,

⁴⁹ Id. at §1158; See, “Attachment B.”

⁵⁰ Id.

⁵¹ Id.

⁵² Id. at S1161 (quoting Senator Cornyn).

⁵³ Id. at S1160. (quoting Senator Specter).

and plaintiffs' attorneys who stand to gain millions of dollars in fees. Rather, they are unique lawsuits authorized under State constitutions or State statutes that are brought on behalf of the citizenry of a particular State.”⁵⁴ Allowing such an amendment would, opponents argue, lead state attorneys general to deputize private attorneys to bring their class action suits, or otherwise abuse or manipulate the exception. Indeed, Senator John Cornyn⁵⁵ and others argued that the amendment “would create a potential loophole big enough to drive a truck through, that could cause substantial mischief that is intended to be prevented by this very bill.”⁵⁶

Another objection to the amendment is that it is unnecessary because CAFA “has been carefully crafted to distinguish between truly local suits and those that involve national issues. Thus, if an attorney general brings a class action, and that class action involves matters of truly local concern, it will certainly fall under one of the bill's exceptions.”⁵⁷ For instance, cases in which more than “two-thirds of the plaintiff class are citizens of the state in which the action was originally filed and the primary defendants are citizens of the state in which the action was originally filed” are exempt from CAFA. As Senator Orrin Hatch opined,

“[I]f the lawsuit is aimed at an out-of-State corporation for conduct that affects citizens in multiple States, or if the lawsuit is interstate in nature, then that suit should be removed to Federal court. Removal of such a case is particularly appropriate because there would likely be similar suits brought in a number of courts, and one of the central purposes of this legislation is to promote judicial

⁵⁴ Id. at S1163 (quoting Senator Hatch)

⁵⁵ Senator Cornyn was Texas' Attorney General prior to being elected to the United States Senate in 2002.

⁵⁶ 151 Cong. Rec. at S1161 (quoting Senator Cornyn).

⁵⁷ Id. at S1164 (quoting Senator Hatch).

efficiency and fairness by allowing copy-cat class actions to be coordinated in one Federal proceeding.”⁵⁸

Thus, if a state attorney general finds it necessary to pursue a class action case on behalf of its citizens, as opposed to a *parens* action, it may do so in state court provided the class is made up primarily of citizens of its state – a truly local class.

C. Conclusion

The actual effect of CAFA on the power of state attorneys general to bring suits on behalf of their citizens, barring any misinterpretation, appears to be minimal at best. The only actions that would be affected would be cases in which the state attorney general acts as a class representative for consumers in the state – not suits brought pursuant to *parens*. The debate over Senator Pryor’s amendment makes it very clear that this bill is not intended to effect cases brought under *parens* or directly on behalf of a particular state. “[State] attorneys general are not required to use class actions to enforce their State laws and protect their citizens. To the contrary, their main weapon has been, and continues to be, the *parens patriae* action authorized under State statute.”⁵⁹

In reality, CAFA might actually empower state attorneys general, particularly if the federal courts are less sympathetic to plaintiffs’ claims and don’t provide the remedies sought. Much like the weakening of the federal regulatory agencies’ power during the 1980’s which led to state attorneys general bringing large multistate cases, if the federal courts are unresponsive to class actions, the state attorneys general could increase the number of cases brought under *parens*. Though the damages might not be as high, companies would still be hit with hefty fines and class action attorneys could still be

⁵⁸ Id.

⁵⁹ Id. at S1164 (quoting Senator Hatch).

hired for such cases on a contingency-fee basis. Moreover, CAFA actually confers the power upon state attorneys general to evaluate the fairness of any settlement and to assess compliance with applicable regulatory policies, which should ease the concerns of critics who worry that class action attorneys don't do enough to ensure compliance with the regulation after a settlement is signed and they are paid their fees.

III. CONCLUSION

In summary, states attorney general have the power to defend the state's sovereign and quasi-sovereign interests, such as protecting the health, safety, and welfare of its citizens, pursuant to the common law doctrine of *parens patriae*. Such cases brought by state attorneys general on behalf of their citizenry are generally brought in conjunction with existing state statutes, both to obtain standing where the state might not otherwise have it and to overcome certain legal hurdles, and because although *parens* can get a state attorney general into court, doing so does not negate the state's legal burdens, such as proving that the defendant breached a legal duty. Indeed, in some instances state attorneys general will outsource this power to private class action attorneys on a contingency-fee basis. Though it is done rarely, and many times in order to save taxpayers money, the practice is strongly criticized because it so closely mirrors private class action tort lawsuits and because the private attorneys are taking home large percentages of damages that would otherwise go to aggrieved citizens. In fact, *Parens* actions in general have been strongly criticized because they are seen as another, somewhat unregulated, avenue to recover large settlements from corporations.

In response to the increasing criticism of large class action lawsuits in general, Congress passed the Class Action Fairness Act of 2005, which removes many large class action lawsuits to federal court, and out of more friendly state forums which are known for assessing large damage awards. Though CAFA does not apply to *parens* cases on its face, and the legislative history makes it clear that it is not intended to apply to actions brought by state attorneys general in their capacity as *parens patriae*, many current and former state attorneys general are opposed to the Act. Their stated reason for opposition is that CAFA could be misinterpreted to include cases brought under *parens*, though it is more likely that they are opposed to the general direction Congress is heading in the area of class action lawsuits. Ostensibly, CAFA is just the first piece of federal tort reform legislation, and future legislation might, in fact, limit the power of the state attorneys general.

If Congress wishes to limit the power of state attorneys general, it is clear that it must be very explicit in doing so. Because *parens* may only be exercised by the government, most tort reform, particularly as it relates to class action lawsuits, will be insufficient to weaken the power of the state attorneys general. Moreover, it is clear from the legislative history of CAFA that any attempt to do so will be opposed strongly by members of both the Democratic and Republican parties, many of whom were state attorneys general themselves prior to being elected to Congress. More likely, Congress will place caps on damages and attorneys fees, remedies that are more directly focused on the perceived problems with our legal system, but which will nonetheless have the effect of limiting the damages available under *parens* cases as well as private class actions. It would be hard, and potentially politically damaging, to make the argument that the state

should not be allowed to protect the health, safety, and welfare of its citizens, though it is much easier, and will generally score political points, to attack private class actions brought by trial lawyers, who, as the argument goes, seek only to line their own pockets.

It is difficult to look into the future and guess what legislation Congress will pass, and to do so would be pure conjecture. For the time being, however, the power of the state attorneys general has not been limited or usurped in any meaningful way by federal tort reform legislation, nor is there any indication that Congress intends to do so.

ATTACHMENT A

UNITED STATES PUBLIC LAWS 109th Congress - First Session Convening January 7, 2005

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PL 109-2 (S 5)
February 18, 2005
CLASS ACTION FAIRNESS ACT OF 2005

AN ACT To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

<< 28 USCA § 1 NOTE >>

(a) SHORT TITLE.--This Act may be cited as the "Class Action Fairness Act of 2005".

(b) REFERENCE.--Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.--The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction for interstate class actions.

Sec. 5. Removal of interstate class actions to Federal district court.

Sec. 6. Report on class action settlements.

Sec. 7. Enactment of Judicial Conference recommendations.

Sec. 8. Rulemaking authority of Supreme Court and Judicial Conference.

Sec. 9. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.--Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have--

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where--

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

*5 (C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are--

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES.--The purposes of this Act are to--

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

<< 28 USCA prec. § 1711 >>

(a) IN GENERAL.--Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114--CLASS ACTIONS

"Sec.

"1711. Definitions.

"1712. Coupon settlements.

"1713. Protection against loss by class members.

"1714. Protection against discrimination based on geographic location.

"1715. Notifications to appropriate Federal and State officials.

<< 28 USCA § 1711 >>

"§ 1711. Definitions

"In this chapter:

"(1) CLASS.--The term 'class' means all of the class members in a class action.

"(2) CLASS ACTION.--The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

"(3) CLASS COUNSEL.--The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(4) CLASS MEMBERS.--The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(5) PLAINTIFF CLASS ACTION.--The term 'plaintiff class action' means a class action in which class members are plaintiffs.

*6 "(6) PROPOSED SETTLEMENT.--The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

<< 28 USCA § 1712 >>

"§ 1712. Coupon settlements

"(a) CONTINGENT FEES IN COUPON SETTLEMENTS.--If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

"(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.--

"(1) IN GENERAL.--If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

"(2) COURT APPROVAL.--Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

"(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.--If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief--

"(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

"(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

"(d) SETTLEMENT VALUATION EXPERTISE.--In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

"(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.--In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

*7

<< 28 USCA § 1713 >>

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

<< 28 USCA § 1714 >>

"§ 1714. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1715. Notifications to appropriate Federal and State officials

"(a) DEFINITIONS.--

"(1) APPROPRIATE FEDERAL OFFICIAL.--In this section, the term 'appropriate Federal official' means--

"(A) the Attorney General of the United States; or

"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) APPROPRIATE STATE OFFICIAL.--In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

"(b) IN GENERAL.--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of--

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

*8 "(3) any proposed or final notification to class members of--

"(A)(i) the members' rights to request exclusion from the class action; or

"(ii) if no right to request exclusion exists, a statement that no such right exists; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

"(6) any final judgment or notice of dismissal;

"(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

"(c) DEPOSITORY INSTITUTIONS NOTIFICATION.--

"(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS.--In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) STATE DEPOSITORY INSTITUTIONS.--In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

"(d) FINAL APPROVAL.--An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.--

"(1) IN GENERAL.--A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

"(2) LIMITATION.--A class member may not refuse to comply with or to be bound by a settlement agreement or consent *9 decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

"(3) APPLICATION OF RIGHTS.--The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) RULE OF CONSTRUCTION.--Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials."

<< 28 USCA prec. § 1651 >>

(b) TECHNICAL AND CONFORMING AMENDMENT.--The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Action.....1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.--Section 1332 is amended--

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection--

"(A) the term 'class' means all of the class members in a class action;

"(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

"(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which--

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

*10 "(A) whether the claims asserted involve matters of national or interstate interest;

"(B) 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;

"(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

"(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

"(E) 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

"(F) 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.

"(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

"(A)(i) over a class action in which--

"(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

"(II) at least 1 defendant is a defendant--

"(aa) from whom significant relief is sought by members of the plaintiff class;

"(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

"(cc) who is a citizen of the State in which the action was originally filed; and

"(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

"(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

"(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

"(5) Paragraphs (2) through (4) shall not apply to any class action in which--

"(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

"(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

***11** "(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

"(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

"(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

"(B)(i) As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

"(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which--

"(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

"(II) the claims are joined upon motion of a defendant;

"(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

"(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

"(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court *12 pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

"(ii) This subparagraph will not apply--

"(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

"(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

"(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court."

(b) CONFORMING AMENDMENTS.--

<< 28 USCA § 1335 >>

(1) Section 1335(a)(1) is amended by inserting "subsection (a) or (d) of" before "section 1332".

<< 28 USCA § 1603 >>

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.--Chapter 89 is amended by adding after section 1452 the following:

<< 28 USCA § 1453 >>

"§ 1453. Removal of class actions

"(a) DEFINITIONS.--In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1).

"(b) IN GENERAL.--A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"(c) REVIEW OF REMAND ORDERS.--

"(1) IN GENERAL.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

"(2) TIME PERIOD FOR JUDGMENT.--If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

"(3) EXTENSION OF TIME PERIOD.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if--

"(A) all parties to the proceeding agree to such extension, for any period of time; or

"(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

"(4) DENIAL OF APPEAL.--If a final judgment on the appeal under paragraph (1) is not issued before the end of the period *13 described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

"(d) EXCEPTION.--This section shall not apply to any class action that solely involves--

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder)."

<< 28 USCA prec. § 1441 >>

(b) TECHNICAL AND CONFORMING AMENDMENTS.--The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions."

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.--Not later than 12 months after the date of enactment of this Act, 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, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.--The report under subsection (a) shall contain--

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that--

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.--Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

<< 28 USCA § 2074 NOTE >>

Notwithstanding any other provision of law, the amendments to rule 23 of the Federal Rules of Civil Procedure, which are *14 set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

<< 28 USCA § 2071 NOTE >>

SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

<< 28 USCA § 1332 NOTE >>

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act..

Approved February 18, 2005.

PL 109-2, 2005 S 5

ATTACHMENT B

NATIONAL ASSOCIATION
OF ATTORNEYS GENERAL,
Washington, DC, February 7, 2005.

Hon. BILL FRIST,
Senate Majority Leader, U.S. Senate, Dirksen Building, Washington DC.

Hon. HARRY REID,
Senate Minority Leader, U.S. Senate, Hart Building Washington, DC.

DEAR SENATE MAJORITY LEADER FRIST AND SENATE MINORITY LEADER REID:

We, the undersigned State Attorneys General, write to express our concern regarding one limited aspect of pending Senate Bill 5, the "Class Action Fairness Act," or any similar legislation. We take no position on the Act as a general matter and, indeed, there are differing views among us on the policy judgments reflected in the Act. We join together, however, in a bipartisan request for support of Senator Mark Pryor's potential amendment to S. 5, or any similar legislation, clarifying that the Act does not apply to, and would have no effect on, actions brought by any State Attorney General on behalf of his or her respective state or its citizens.

As Attorneys General, we frequently investigate and bring actions against defendants who have caused harm to our citizens. These cases are usually brought pursuant to the Attorney General's *parens patriae* authority under our respective consumer protection and antitrust statutes. In some instances, such actions have been brought with the Attorney General acting as the class representative for the consumers of the state. It is our concern that certain provisions of S. 5 might be misinterpreted to hamper the ability of the Attorneys General to bring such actions, thereby impeding one means of protecting our citizens from unlawful activity and its resulting harm.

The Attorneys General have been very successful in litigation initiated to protect the rights of our consumers. For example, in the pharmaceutical industry, the States have recently brought enforcement actions on behalf of consumers against large, often foreign-owned, drug companies for overcharges and market manipulations that illegally raised the costs of certain prescription drugs. Such cases have resulted in recoveries of approximately 235 million dollars, the majority of which is earmarked for consumer restitution. In several instances, the States' recoveries provided one hundred percent reimbursement directly to individual consumers of the overcharges they suffered as a result of the illegal activities of the defendants. This often meant several hundred dollars going back into the pockets of those consumers who can least afford to be victimized by illegal trade practices, senior citizens living on fixed incomes and the working poor who cannot afford insurance.

We encourage you to support the aforementioned amendment exempting all actions brought by State Attorneys General from the provisions of S. 5, or any similar legislation. It is important to all of our constituents, but especially to the poor, elderly and disabled, that the provisions of the Act not be misconstrued and that we maintain the enforcement authority needed to protect them from illegal practices. We respectfully submit that the overall purposes of the legislation would not be impaired by such an amendment that merely clarifies the existing authority of our respective States.

Thank you for your consideration of this very important matter. Please contact any of us if you have questions or comments.

Sincerely,

Mike Beebee, Attorney General, Arkansas; Mark Shurtleff, Attorney General, Utah; Gregg Renkes, Attorney General, Alaska; Fiti Sunia, Attorney General, American Samoa; Terry Goddard, Attorney General, Arizona; Bill Lockyer, Attorney General, California; John Suthers, Attorney General, Colorado; Richard Blumenthal, Attorney General, Connecticut; Jane Brady, Attorney General, Delaware; Robert Spagnoletti, Attorney General, District of Columbia; Charlie Crist, Attorney General, Florida; Thurbert Baker, Attorney General, Georgia; Mark Bennett, Attorney General, Hawaii; Lawrence Wasden, Attorney General, Idaho; Stephen Carter, Attorney General, Indiana.

Tom Miller, Attorney General, Iowa; Greg Stumbo, Attorney General, Kentucky; Charles Foti, Attorney General, Louisiana; Steven Rowe, Attorney General, Maine; Joseph Curran, Attorney General, Maryland; Tom Reilly, Attorney General, Massachusetts; Mike Cox, Attorney General, Michigan; Mike Hatch, Attorney General, Minnesota; Jim Hood, Attorney General, Mississippi; Jay Nixon, Attorney General, Missouri; Mike McGrath, Attorney General, Montana; Jon Bruning, Attorney General, Nebraska; Brian Sandoval, Attorney General, Nevada; Kelly Ayotte, Attorney General, New Hampshire; Peter Harvey, Attorney General, New Jersey.

Eliot Spitzer, Attorney General, New York; Roy Cooper, Attorney General, North Carolina; Wayne Stenehjem, Attorney General, North Dakota; Pamela Brown, Attorney General, N. Mariana Islands; Jim Petro, Attorney General, Ohio; W.A. Drew Edmondson, Attorney General, Oklahoma; Hardy Myers, Attorney General, Oregon; Tom Corbett, Attorney General, Pennsylvania; Roberto Sanchez Ramos, Attorney General, Puerto Rico; Patrick Lynch, Attorney General, Rhode Island.

Henry McMaster, Attorney General, South Carolina; Lawrence Long, Attorney General, South Dakota; Paul Summers, Attorney General, Tennessee; Rob McKenna, Attorney General, Washington; Darrell McGraw, Attorney General, West Virginia; Peg Lautenschlager, Attorney General, Wisconsin; Patrick Crank, Attorney General, Wyoming.