TRIAL LAWYERS FOR PUBLIC JUSTICE

SECURING ACCESS TO JUSTICE

Fighting Class Action Abuse

By Leslie A. Brueckner and Arthur H. Bryant*

Part Four in a series.

Class action lawsuits are a powerful legal device. Properly used, they can do great justice. But lately class actions have been taking a beating. Abused by corporations trying to limit liability for massive wrongdoing, some class actions are being settled for peanuts, with the defendants obtaining a full release, the victims getting little or nothing, and class counsel receiving a hefty fee. Once viewed as a vehicle for the mass achievement of justice, class actions are now sometimes perceived as a tool for imposing injustice. The situation has gotten so bleak that some are pushing to eliminate class actions entirely – or at least substantially curb their use. Is this the right solution? In a word: No. The problem is class action abuse, not class actions.

Without class actions, many victims would be powerless to stop corporate and government misconduct in areas ranging from race and sex discrimination, disability rights, dangerous consumer products, and environmental degradation, to widespread fraud and deceit in consumer transactions. Especially in cases where large numbers of people have suffered small amounts of damages or require injunctive relief, class actions are often the only way that justice can be obtained. Thus, the key is to stop class action abuse – not to throw the baby out with the bath water.

To this end, seven years ago, TLPJ launched a major project dedicated to monitoring, exposing, and fighting class action abuse nationwide – our Class Action Abuse Prevention Project. As a national public interest law firm that prosecutes numerous class actions and is funded primarily by membership contributions from trial lawyers and *cy pres* awards, TLPJ did not take this step lightly. Nevertheless, we were so concerned about the harmful effects of class action abuse – both on class members' rights and on the public's perception of class actions – that we felt dramatic action was needed. The project has achieved many major successes – although more work still needs to be done.

TLPJ defeated a proposed settlement with MassMutual slated to pay zero to 6.5 million class members and over $11 million to class counsel.

TLPJ's Class Action Abuse Prevention Project

Through the Project, TLPJ seeks to enforce class members' existing legal rights by objecting to illegal or unfair class action settlements; develop the law by winning judicial recognition of additional protection against class action abuse; educate lawyers, the judiciary, and the public about class action abuse and possible ways to prevent it; and help others to do all of the above.

The Abuses We Target

While the following list is not all-inclusive, the primary abuses that concern us are:

- efforts to limit class members' rights to opt out of class actions for damages and pursue their own compensatory and/or punitive damages claims on an individual basis;
- attempts to use class actions to settle the "future" personal injury claims of people who are not currently injured – or, in some cases, may not yet even exist;
- "settlement-only" class actions that would and could never be litigated as class actions, but are being used to cap the defendant's liability through the class action device;
- settlements that release class members' damages claims in exchange for "coupons" that provide little or no meaningful relief to the class – and, in some cases, provide extraordinarily handsome fees to class counsel;
- unnecessary claims procedures, such as requiring credit card customers to file claims forms, instead of simply crediting their recoveries to their accounts; and
- improper secrecy provisions, including gag orders on class members or their counsel and attempts to conceal terms of a settlement or the amount of attorneys' fees.

The Project's Highlights

In the past seven years, we have had success fighting class action abuses and establishing new law to help others fight them as well. To cite just a few examples:

- In a series of *amicus* briefs, TLPJ challenged – and helped persuade the

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U.S. Supreme Court to reject – the proposed class action settlements of millions of present and future asbestos victims' claims in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corporation*, two cases that established new procedural protections that help to limit class action abuse.

- In *Walker v. Liggett Group, Inc.* and *Fletcher v. Liggett Group, Inc.*, in West Virginia federal court and Alabama state court, respectively, we ensured that tobacco victims nationwide could proceed with their claims against a cigarette company by defeating two proposed no-opt-out settlements that would have capped the company's liability and provided virtually no relief to the class.
- In *Graham v. Security Pacific Services*, in Mississippi federal court, we obtained substantial improvements to a proposed nationwide settlement of consumer fraud claims against Bank America that would have paid approximately $2 million to class members, $5.4 million to class counsel, and deprived all Mississippi class members of their right to opt out. It also would have required all class members to file claim forms to receive compensation, allowed any unclaimed funds to revert to the bank, and paid non-Mississippi class members only half as much as Mississippi class members. In response to our objections, the final settlement paid $7.9 million to the class, $1.92 million to class counsel, and allowed all class members to opt out. The funds were automatically distributed, no class members had to file claims forms, no money reverted to the bank, and class members from all states received the same relief.
- In *Kalhammer v. First USA Bank*, in San Francisco federal court, we defeated outrageous secrecy provisions and won huge improvements to a proposed nationwide settlement of claims that First USA cheated its credit card holders. The original settlement barred public disclosure of both the total settlement amount and total attorneys' fees, and prevented class counsel and class members – but not First USA – from talking to the press about the deal. It also provided current First USA cardholders with "rebate certificates" for five dollars or less, but gave nothing to former cardholders. According to experts, the rebate certificates would have yielded less than $400,000 in actual relief to the class.

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Photos by Herman Farrer

In response to our challenge, the settlement was amended to eliminate the secrecy, give automatic credits to the vast majority of the class, and require First USA to pay a minimum of $6 million.

- In *Wilson v. Massachusetts Mutual Life Insurance Company*, a nationwide class action filed in New Mexico state court, we defeated a proposed settlement of insurance claims that would have paid nothing to 6.5 million class members, paid two class representatives a total of $350,000, and paid class counsel a fee worth over $11 million. The settlement was so indefensible that it was withdrawn after TLPJ filed objections, before the Court even decided whether to approve it.
- In *Cash v. Farmland Industries*, in Kansas state court, we prevented an illegal proposed class action settlement that could have forced class members to sell their homes to and release all their present and future injury claims against the defendant. The proposed settlement also included a secret side deal for the named class representatives. Because of TLPJ's objections, the proposed settlement was abandoned and class members retained the right to keep or sell their homes and pursue their claims individually.
- In *Boehr v. Bank of America*, in Arizona federal court, we obtained dramatic improvements to a proposed nationwide settlement of credit card overcharge claims that would have given virtually no money to the class. Instead, the settlement would have allowed Bank of America to give millions of dollars to five charities – with the bulk of the cash going to the Bank's own "Consumer Education Fund." In response to TLPJ's objections, the agreement was reformed to provide that the money be distributed directly to the class, where it belonged.
- Most recently, in *In re Matter of Metropolitan Life Insurance Sales Practices Litigation*, TLPJ defeated an attempt by an insurance company (MetLife) to convince a Pennsylvania federal court that had approved a nationwide class action settlement involving MetLife to enjoin all of the individuals who had opted their claims out of the settlement from introducing key evidence in their individual, state-court cases against MetLife. In response to TLPJ's objections that the requested injunction would blatantly violate Rule 23, the Anti-Injunction Act, and the U.S. Constitution, a federal magistrate judge reversed his earlier recommendation that the injunction be granted. The district court agreed and denied the injunction outright. (That decision is on appeal to the Third Circuit, with TLPJ serving as counsel for the appellees).

Lessons We've Learned

In the seven years since we launched the Project, we have learned a great deal.

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LEGALLY SPEAKING

CLASS-ACTION LAWSUITS CAN BE AN IMPORTANT LEGAL TOOL

MICHAEL FERRY
LEGAL SERVICES OF EASTERN MISSOURI

Q:Why do courts allow class actions where the consumer members of the class get only a small recovery while the lawyers make millions?

That doesn't seem fair.

A:Your question raises two issues that should be looked at separately.

First, let's look at the small-recovery issue. It's quite true that in some kinds of cases, especially consumer cases, the individual recovery will be small. But that's exactly the kind of case in which a class action makes sense.

Suppose a dishonest computer expert working at a bank figured out how to steal $1 from each one of the bank's 1 million account holders (it's a big bank). The expert gets caught. What should he be charged with? 1 million counts of petty theft? Or one count of grand larceny?

Which choice most closely reflects the true nature of his scheme and the scope of his actions? Which one makes more sense in terms of court resources?

Some consumer class actions involve claims that are individually small, but when aggregated together, involve millions of dollars. If you make each of those consumers pursue his own claim for $1, or even $100, most of them won't. By the time they get done paying a lawyer and the court costs, they'll lose money and clog up the courts. So most of those cases never will be brought. The result: justice will not be done.

But if all of those small claims can be combined into one big case, then pursuing that case may make economic sense. The benefit to each individual class member may be small. But the benefit to the class as a whole may be large. The effect on the wrongdoer also may be large. The message will be made clear: cheating people in small ways is just as bad as cheating them in large ways.

"If a particular settlement is unfair, class members should object, and courts should act independently to prevent abuse."

Now to your second issue. When you ask whether lawyers for the class should make millions while individual class members get little, it seems to me you're comparing apples and oranges. The class lawyers aren't representing each individual, they're representing the class as a whole. So in looking at whether their fees are excessive, you should be looking at what they did for the class as a whole, or in appropriate cases, what they did for the marketplace. It would be absurd to say that a lawyer should get to charge someone $10,000 to pursue that person's claim for $10. But if a lawyer represents a class of 3 million people and gets them $10 each, the lawyer has recovered $30 million for the class. Is a fee of millions fair in that case? The answer will depend on a lot of things: how much time was spent, how much risk was taken, how hard was the work and many others. I don't think anyone can say the answer is clearly no.

Like any legal device, class actions can be abused. The abuse can come from plaintiff's lawyers willing to sell out the class for personal gain. It also can come from defendants who try to undercut cases brought against them by recruiting phony plaintiffs to sue them on behalf of a class, settling with the phony plaintiffs on easy terms and then arguing that the settlement has made the other cases moot.

But that doesn't mean we should stop allowing class actions. After all, we don't stop using contracts just because some businesses misuse them.

Instead, we should look at each case on its own merits. If a particular settlement is unfair, class members should object, and courts should act independently to prevent abuse. A public-interest law firm called Trial Lawyers for Public Justice (202-797-8600) has opposed class-action settlements it believed to be against the public interest, while at the same time vigorously supporting the responsible use of class actions as an important way of protecting consumers. ■

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First, our experience has convinced us that class actions achieve enormous good in this country. Their continued vitality could hardly be more important to the achievement of justice.

Second, while we and other opponents of class action abuse have made a real difference, class action abuse remains a serious problem. Although abuse occurs in only a small percentage of class action cases, it shouldn't take place at all.

Third, the driving force behind most class action abuse is the desire of wrongdoers to cap their liability. Defendants do not generally want cases to be litigated as class actions because they recognize that class actions, properly used, can be a powerful tool for vindicating victims' rights. They do, however, often want cases to be inappropriately settled as class actions because they realize that class action settlements can be an equally powerful tool for limiting or even eliminating their victims' rights.

Fourth, regardless of the defendants' motives or desires, abusive class action settlements cannot take place without the cooperation of class counsel. Unfortunately, some class action counsel are too willing to agree to a class settlement in exchange for a quick or hefty fee. And, regrettably, many more feel forced to agree to objectionable or inadequate settlement terms because they sincerely believe – rightly or wrongly – that the judge will not allow them to pursue the class' legitimate claims and that any recovery for the class (and a fee) is better than nothing for the class (and no fee at all).

Fifth, while plaintiffs, defendants, and their attorneys all contribute to class action abuse, judges have the power to prevent it. Unfortunately, some judges do not understand how they can stop class action abuse, others do not seem interested in stopping it, and others take actions that encourage it, such as certifying classes for "settlement purposes" that could never be litigated as class actions, approving settlements that contain woefully inadequate relief for the class, and/or signing off on huge attorneys' fee awards that create an enormous incentive for abuse.

Finally, while TLPJ is dedicated to fighting class action abuse, any knowledgeable class member, defendant, attorney or judge can make a difference in this area. Abusive settlements cannot take place without the participation of all parties, their counsel, and the judge – so any of these participants can help stop it. If you receive a notice of an objectionable class action settlement affecting you, object! Don't just rely on us or other public interest groups to fight class action abuse.

Conclusion

Recent events have highlighted how easy it is for our system of justice to be undermined. Most parties, lawyers, and judges involved in class action litigation understand the enormous social value it serves. To reinforce and preserve that value, we all need to work together to fight class action abuse. If we do, all of us and our system of justice will be better off. ■

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OUR MISSION

Trial Lawyers for Public Justice is the only national public interest law firm that marshals the skills and resources of trial lawyers to create a more just society.

Through creative litigation, public education, and innovative work with the broader public interest community, we:

- protect people and the environment;
- hold accountable those who abuse power;
- challenge governmental, corporate and individual wrongdoing;
- increase access to the courts;
- combat threats to our justice system;
- and inspire lawyers and others to serve the public interest. ■

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