



Senators Feinstein and Bingaman Offer Amendment
Giving Judges Guidance on Class Actions
February 7, 2005

Washington, DC – U.S. Senators Dianne Feinstein (D-Calif.) and Jeff Bingaman (D-NM) today offered an amendment to the Class Action Reform bill that would give judges guidance on how to manage their court dockets when classes include citizens of more than one state.

“We have developed a compromise amendment that would provide federal judges with guidance on how to proceed with these cases, while leaving the judges with the discretion they need to manage their court docket,” Senator Feinstein said. **“As a result, national class actions will be certified with a process for their handling.”**

In class actions where district courts have jurisdiction and concerning products or services marketed, sold, or provided in more than one state on behalf of a proposed class and in which the class includes citizens of more than one state, the amendment would:

- Prohibit the District Court from denying class certification on the grounds that the law of more than one state will be applied.
- Require each party to submit their recommendations for subclassifications among the plaintiff class based on substantially similar State law.
- Require the court to issue subclassifications to permit the action to proceed or, if the court determines that such subclassifications are an impracticable method, then it must attempt to ensure that plaintiffs’ State laws are applied to the extent practical.

The following is the prepared text of Senator Feinstein’s statement:

“I rise in support of S. 5, the ‘Class Action Fairness Act.’ This bill, like most, is not perfect. But I believe that it represents the best that can be done to solve what is a real problem in our legal system.

I have spent a lot of time on this issue – through Judiciary Committee hearings, many personal meetings with those on both sides of this issue, and research and analysis. My concern grew after a woman named Hilda Bankston testified before our Committee several years ago. Ms. Bankston owned a small pharmacy with her late husband, in Mississippi.

The Bankstons were sued more than 100 times for doing nothing other than filling legal prescriptions. The pharmacy had done nothing wrong, but they were the only drugstore in the county – a county that was so plaintiff friendly, I am told, that there are actually more plaintiffs than residents.

I'd like to read from a letter Ms. Bankston sent to Congress in support of this bill, because I think it is a good illustration of what we are trying to prevent by passing this legislation. Ms. Bankston wrote:

'For thirty-years, my husband, Navy Seaman Forth Class Mitchell Bankston, and I lived our dream, owning and operating Bankston Drugstore in Fayette, Mississippi. We worked hard and my husband built a solid reputation as a caring, honest pharmacist. . .

Three weeks after being named in the [first] lawsuit, Mitch, who was 58 years old and in good health, died suddenly of a massive heart attack. . .'

She continued,

'I sold the pharmacy in 2000, but have spent many years since retrieving records for plaintiffs and getting dragged into court again and again to testify in hundreds of national lawsuits brought in Jefferson County against the pharmacy and out-of-state manufacturers of other drugs. . . I had to hire personnel to watch the store while I was dragged into court on numerous occasions to testify.

I endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And, I spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it. . .

This lawsuit frenzy has hurt my family and my community. Businesses will no longer locate in Jefferson County because of fear of litigation. The county's reputation has driven liability insurance rates through the roof.

No small business should have to endure the nightmares I have experienced.'

Well, the amended Class Action Fairness Act goes a long way toward stopping forum shopping by allowing Federal courts to hear truly national class action lawsuits.

The Constitution itself states that the Federal judicial power 'shall extend...to controversies between citizens of different States.'

Yet an anomaly in our current law has resulted in a disparity wherein class actions are treated differently than regular cases and often stay in State court. The current rules of procedure have not kept up with the times, and the result is a broken system that has strayed far from the Framers' intent.

This bill is a well thought out, reasoned solution to this problem, and it does a number of things. First, the bill contains a 'consumer class action bill of rights' to provide greater information and greater oversight of settlements that might unfairly benefit attorneys at the expense of truly injured parties.

For instance:

- **The bill ensures that judges review the fairness of proposed settlements if those settlements provide only coupons to the plaintiffs;**
- **It bans settlements that actually impose net costs on class members;**
- **It requires that all settlements be written in plain English so all class members can understand their rights; and**
- **It provides that State attorneys general can review settlements involving plaintiffs.**

Second, the legislation creates a new set of rules for when a class action may be ‘removed’ to Federal court. These diversity requirements were modified in committee and again since then to make it clear that cases which are truly national in scope should be removed to Federal court. But equally important, the rules preserve truly State actions so those confined to one State remain in State courts.

The original bill says that all class actions where a substantial majority of the members of the class and the defendants are citizens of the State would be moved to Federal court.

An amendment I offered in Committee last time changed the vague definition in this section to split the jurisdiction into thirds. Now there is less ambiguity about where a case will end up and more cases remain in State court.

- **Now, if more than two-thirds of the plaintiffs are from the same State as the primary defendant, the case automatically stays in State court.**
- **If fewer than one-third of the plaintiffs are from the same State as the primary defendant, the case may automatically be removed to Federal court. Remember, this happens if one of the parties asks for removal. Otherwise, these cases, too, stay in State court.**
- **In the middle third of cases, where between one-third and two-thirds of plaintiffs are from the same State as the primary defendant, the amendment would give the Federal judge discretion to accept removal or remand the case back to the State based on a number of factors, defined in the bill.**

The bottom line is that under the new formulation of the bill, state cases are more likely to stay in state court, and *national cases are more likely to go to federal court*. The bill is not perfect. But I believe it represents the best fix to this problem I have seen.

Feinstein-Bingaman Amendment.

As the legislation has been debated Senator Bingaman has raised a real concern about whether certain national class action cases may be caught in a Catch-22 where they would be prohibited from having their cases heard in *either state or federal court – leaving the case to reside in oblivion.*

This problem has been best described by the Bruce Bromley Harvard Law Professor Arthur Miller in a letter he sent to Senator Bingaman on June 17, 2005 where he stated:

‘Under current doctrines, federal courts hearing state law based claims must use the “choice-of-law” rule of the state in which the federal district court sits. These procedural rules vary among states, but many provide that the federal court should apply the substantive law of the home state of the plaintiff, or the law of the state where the harm occurred. In a nationwide consumer class action, such a rule would lead the court to apply to each class member’s claim the law of the state in which the class member lives, or lived at the time the harm occurred. As noted, most federal courts will not grant class certification in these situations because they find that the cases would be ‘unmanageable.’’

Together, Senator Bingaman and I have worked to address this problem. The original solution proposed by Senator Bingaman *may be too broad* by negatively impacting consumers in states with strong consumer protection laws, such as my state of California.

Instead, we developed a compromise amendment that would *provide federal judges with guidance on how to proceed with these cases, while leaving the judges with the discretion they need to manage their court dockets.*

As a result, national class actions will be heard, and claimants in those cases will be more likely to receive the benefit of his or her own state’s law.

I urge my colleagues to join me and Senator Bingaman and vote in favor of this common-sense amendment.”

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