The Consumer Class Action Bill of Rights: A Policy and Political Mistake

Laurens Walker
Essay

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INTRODUCTION

The controversial Class Action Fairness Act of 2005 has provoked widespread public discussion, chiefly because of jurisdictional provisions which will likely place the bulk of major class action litigation in federal court. But the rarely discussed Consumer Class Action Bill of Rights, section 3 of the Act, is, I argue, the most significant provision of the new law. The jurisdictional provision of the 2005 Act will have little independent effect, but the Bill of Rights, which invites public participation in class action settlements and regulates some settlement terms, will prove to be a costly policy and political mistake. Moreover, I argue that the effect of that mistake will be exacerbated by the otherwise

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4. The core of the Class Action Fairness Act consists of sections 3, 4, and 5. Section 3 includes both notice provisions and provisions regulating the content of some settlement terms. Id. Section 4 of the Act, titled “Federal District Court Jurisdiction for Interstate Class Actions,” expands federal question jurisdiction for class actions, and section 5, “Removal of Interstate Class Actions to Federal District Court,” facilitates the removal of class actions from state to federal court. Id. at 9-13.

insignificant jurisdictional provision of the legislation and will enable application of the Bill of Rights provisions to most major class action cases litigated in the United States. This Essay is the first to comprehensively examine the policy and political implications of this legislation.  

In Part I, I describe in detail the notice provisions of the Bill of Rights and continue by describing and evaluating the responses available to public officials. I estimate the probable role of the Attorneys General of the several states, the United States Attorney General, and officials of state and federal regulatory agencies. I predict a high degree of public participation in class action settlements, especially by the Attorneys General of the states. In Part II, I discuss the Bill of Rights' substantive regulation of some settlement terms. These include stringent provisions regarding "coupon settlements"  as well as general prohibitions on negative settlements  and geographic discrimination.  

In Part III, I provide context for understanding the notice and term regulation by discussing earlier efforts to shift the structure of federal class action in the direction of a public enforcement model. The chief example is furnished by Justice Department proposals during the administration of President Jimmy Carter which would have eliminated Federal Rule of Civil Procedure 23, the class action rule, and substituted, in part, a "public action" managed by the Attorney General of the United States. I contrast these proposals with more recent suggestions by commentators for enhanced private law enforcement in the class action format, and I discuss the comparative efficiency of private versus public enforcement.

In Part IV, I discuss the jurisdictional provisions found in sections 4 and 5 of the Class Action Fairness Act. Here, I explain the change to minimal diversity and the facilitation of removal to federal court.

6. Although adopted in 2005, apparently none of the Bill of Rights provisions have ever been considered in a published judicial opinion. The reason for this delay is that the Class Action Fairness Act applies only to cases commenced after the legislation was signed by the President on February 18, 2005. See § 9, 119 Stat. at 114. Surely soon, however, cases commenced after the effective date will reach the settlement stage and the judicial application process will begin. For early comment on the Bill of Rights, see Robert H. Klonoff & Mark Herrmann, The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements, 80 TUL. L. REV. 1695, 1697 (2006) (calling the Bill of Rights "a series of unrelated provisions that achieve little and raise more questions than they answer"); Rick Knight, The Class Action Fairness Act of 2005: A Perspective, FED. LAW., June 2005, at 46, 50-51 (questioning whether the Consumer Class Action Bill of Rights will yield any improvement in class action litigation); and James Tharin & Brian Blockovich, Coupons and the Class Action Fairness Act, 18 GEO. J. LEGAL ETHICS 1443 (2005) (discussing the merits and potential effects of the Consumer Class Action Bill of Rights provisions regulating coupon settlements).


8. See id. § 1713.

9. See id. § 1714.

based on a recent Federal Judicial Center comparative study of class actions in federal and state court, I predict that these provisions will result in litigation of most major class actions in federal court, but with little impact on the outcome of these cases. This Essay concludes that the Bill of Rights view toward public enforcement is a costly policy and political mistake. I argue that the shift will encourage malfeasance by public officials, and add to information search costs. A better solution would have been legislation providing more robust private enforcement by reducing the agency costs of class members. I also argue that both the national Republican and Democratic parties will pay a political price for their roles in the enactment of the Class Action Fairness Act and that only the Attorneys General of the States, regardless of political party, will benefit politically from the new legislation.

I. NOTICE REQUIREMENTS

A. THE BILL OF RIGHTS REQUIREMENTS

The first version of the Class Action Fairness Act was introduced in 1997 by democratic Senator Herb Kohl of Wisconsin. The original version had two principal provisions, a notice requirement and a "plain English requirement" specifying the style of all notices sent to class members in federal court. In subsequent versions the plain English requirement was dropped, but the notice provision became law as part of the Bill of Rights. The principal requirement is that each defendant participating in a proposed settlement of a federal class action must "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." The "appropriate State official" is defined as 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," then the

14. 28 U.S.C.A. § 1715(b). This notice of proposed settlement must be served "[n]ot later than 10 days after a proposed settlement of a class action is filed in court." Id.
15. Id. § 1715(a)(2).
State Attorney General is the "appropriate State official." An "appropriate Federal official" is defined as the Attorney General of the United States.

The Bill of Rights specifies the content of the notice as including: (1) a copy of the complaint and related materials; (2) notice of any scheduled hearings in the class action; (3) any proposed or final notification to class members regarding opt-out and settlement; (4) any proposed or final settlement; (5) any settlement or agreement made between class counsel and defense counsel; (6) any final judgment or notice of dismissal; (7) if feasible, the names of class members who reside in each state and the proportion of settlement proceeds by state; and (8) any written judicial opinions related to the other notice content.

The Bill of Rights goes on to provide that the district court may not approve any proposed settlement until ninety days after proof of service of the required notice, and further provides that if a notice is omitted, then a class member may refuse to be bound by the terms of the settlement. Importantly, the Bill of Rights continues by stating, "[n]othing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials," and no procedure for responding to a notice is established. Thus, the Bill appears to direct public officials to refer to current law to determine the options for a response.

Practice under the notice provisions is not at this time developed and as of this publication there are apparently no reported decisions. However, several matters are clear from the face of the statute. First, the requirement is meaningful because a binding settlement requires compliance. Few, if any, defendants would agree to settle without an

16. Id.
17. Id. § 1715(a)(1)(A). The statute also includes special notice provisions for cases in which either a federal, state, or other depository institution is a defendant in a class action suit. See id. § 1715(c). While practice under this special rule is not yet established, the Office of the Comptroller of the Currency has advised "national banks, their operating subsidiaries, and federal branches and agencies to notify the Office of the Comptroller of the Currency of proposed class action settlements involving activities regulated by the OCC, such as deposit-taking or lending practices, or practices associated with other bank products or services." Memorandum from Daniel P. Stipano, Deputy Chief Counsel on Class Action Fairness Act of 2005 to Chief Executive Officers, Compliance Officers, and Legal Counsel of All Nat'l Banks, Fed. Branches and Agencies, Dep'ts and Div. Heads, and All Examining Pers. (Apr. 21, 2006), available at http://www.mcglinchey.com/images/pdf/int42D.PDF.
18. 28 U.S.C.A. § 1715(b)(1)–(8). If it is not feasible to provide the names of class members who reside in each state and the proportion of settlement proceeds by each state, the statute allows for reasonable estimates to be substituted. See id. § 1715(b)(7)(B).
19. Id. § 1715(d).
20. Id. § 1715(e)(1). Service of an appropriate notice bars noncompliance with settlement. See id. § 1715(e)(2).
21. Id. § 1715(f).
22. See infra text accompanying note 39.
agreement binding on the entire plaintiff class. Second, providing notice will generally be burdensome for defendants, particularly in light of the scope of the requirement and the detailed information specified. Third, many public officials will learn about proposed federal class action settlements. The Attorney General of one or more states, often all fifty states, will learn about proposed federal class action settlements due to the default notification provision of the statute. The Attorney General of the United States will learn about all proposed federal class action settlements.

B. Probable Responses

The crucial question at this point is: How will state and federal officials respond when they receive the notices required by the Bill of Rights? To predict their reaction, I look at the response of officials to analogous opportunities. There is a history of activism by officials, particularly state officials, which suggests there will be a vigorous response to the Bill of Rights notices.

1. State Attorneys General

The key figures in determining state responses to a settlement notice will almost certainly be the State Attorneys General. The Attorney General is the default recipient of notice under the Bill of Rights and also functions as the chief legal officer of the state. During recent years, consumer protection has generated more interest among State Attorneys General than any other single issue. Political campaigns for the office now often involve promises of future actions on behalf of consumers or, in the case of incumbents, claims of past success in protecting consumers. The interests of individual State Attorneys General are often quickly multiplied by the common practice of cooperation by Attorneys General in the pursuit of common consumer protection concerns. This practice, known as "multistate litigation," began several

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23. See supra text accompanying note 16.
24. See supra text accompanying note 17.
26. See, e.g., David Van Os Democrat for Texas Attorney General, Why David Van Os?, http://www.vanosfortexasag.com/why/ (last visited Mar. 1, 2007) (challenger in Texas Attorney General race vowing to improve consumer protection by promising "to protect the Constitutional liberties of the people and to ensure that Texas belongs to the people as our Constitution intended, instead of to the corporations and insurance companies to whom our state has been handed by the mouthpieces of greed"); Mike Beebe for Governor, http://www.mikebeebe.com/about_mike.asp (last visited Mar. 1, 2007) (current Arkansas Attorney General, running for Governor, lauding his previous record of consumer protection by stating that, "[i]n his first two years as Attorney General, [his] Consumer Protection Division engaged in enforcement efforts that resulted in judgments or settlements of more than $13.5 million; helped prevent utilities from implementing more than $100 million in rate increases; and disbursed nearly $1 million in individual restitution from antitrust actions against pharmaceutical companies").
decades ago and has steadily gained in popularity. Reports of multistate litigation suits and settlements are routinely posted on the National Association of Attorneys General website.

A prominent example of State Attorney General activism is furnished by the career of Eliot Spitzer, former Attorney General of the State of New York and current governor of New York. Spitzer was narrowly elected Attorney General of the state in 1998, but after four years of well publicized aggressive action on behalf of consumers and, particularly, investors, Spitzer was reelected by a margin of nearly 36% of the vote and named Time Magazine’s 2002 “Crusader of the Year.” After four more years of activism, Spitzer was strongly favored to become the next governor of New York. The well known and still unfolding political career of Eliot Spitzer is a model for other State Attorneys General.

The obvious association between possible political advancement and law enforcement is reason for concern. For example, given that the staffs of the State Attorneys General are usually quite small, it is possible that the necessity of choosing among enforcement opportunities might be influenced by opportunities for favorable publicity rather than a comparative analysis of the need to deter future harm. Nevertheless, these developments over the last several decades suggest active participation by State Attorneys General in response to Bill of Rights notices is likely.

2. **United States Attorney General**

The designated federal recipient of a Bill of Rights notice is the Attorney General of the United States. The best federal analogy for the

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32. Id. at 6.


Bill of Rights notice provisions is a federal statute which requires notice to the Attorney General of the United States about a legal proceeding when the constitutionality of a federal statute is challenged. This provision, adopted in 1937, requires the court to provide the notice and explicitly permits the United States to intervene and become a party to the litigation, but does not require a response. The response of Attorneys General to notice under the 1937 statute has been moderately active. The record shows many cases where the United States has intervened, but there have been a number of cases where notice was given and no response was made. Perhaps this modest response rate reflects typically modest political ambitions by United States Attorneys General. In any case, the record suggests that the federal response to the Bill of Rights notice would likely result in occasional active participation in settlement review by the United States Attorney General.

C. PROCEDURAL OPTIONS

Senator Kohl, the legislation’s original sponsor, apparently anticipated that attorneys general would actively participate in settlement proceedings, commenting that “attorneys general can intervene in cases where they think the settlements are unfair.” But the 2005 legislation is itself silent about the form of official participation. Although informal participation by public officials is a theoretical possibility, as a practical matter it seems unlikely. One or more of the parties to the case are likely to object, depending on the predicted view of the officials, and often there will be occasions when all of the parties object—all being happy with their proposed agreement. Much the same can be said about government use of an amicus format. Beyond legal argument—rarely central in settlement—one or both of the parties is likely to object, claiming that there is no authority for such a rule.
Presumably, then, the first step toward a prediction about the likely form of response is answering a subsumed question: What responses by public officials are now permitted by federal procedure?

The most prominent option is intervention under Rule 24 of the Federal Rules of Civil Procedure. The consequence of intervention by public officials under Rule 24 would be full participation by the official as a party in the case and hence in the settlement process. Since all parties to litigation must consent to settlement before the case can be dismissed, public officials might, by intervention, gain a veto power over the settlement of all federal class actions. Rule 24 provides for two types of intervention—by right and by permission of the court.\(^4\) Intervention by right requires that a proposed intervener file a timely application showing that the applicant has an interest relating to the action which may be impaired because that interest is not adequately represented.\(^3\) Permissive intervention requires a timely application and demonstration that the proposed intervener has a common question of law or fact with the present action.\(^4\)

1. Intervention by Right

Intervention by right would likely be preferred by responding officials since, if demonstrated, participation must be allowed as a matter of law. The key question would be whether public officials notified under the Bill of Rights provision have the required interest in the class action litigation proposed for settlement.\(^4\) Rule 24(a) does not further define "interest,"\(^4\) but Professor Arthur Greenbaum has suggested that the question of official interest under Rule 24(a) can be usefully considered in several categories.\(^4\) Two of these categories are relevant here: (1) intervention to protect the public interest; and (2) intervention to

\(^{853,998-1001}\) (1989).

42. FED. R. CIV. P. 24(a)-(b).
43. Id. at 24(a).
44. Id. at 24(b).
45. Timeliness is highly dependent on the discretion of judges and some issues could potentially arise as to whether, in this context, the application to intervene has to be timely in relation to the inception of the lawsuit or timely in relation to the government officials' § 1715 notice. Greenbaum, supra note 41, at 932-35 ("The rule provides no precise standards by which to measure the timeliness of intervention. Rather, it is left to the discretion of the trial court, and must be evaluated within the context of each case."). The impairment requirement is construed liberally, with courts inclined to find impairment when an adequate interest is present. See id. at 949–50 ("[A]ny interest sufficient to warrant protection under Rule 24 that will be affected by the pending lawsuit will justify intervention... but if the action will not affect that interest adversely, intervention will not lie."). The inadequate representation requirement is liberally construed by the Supreme Court, but lower courts occasionally disallow intervention under this requirement. See Cindy Vreeland, Comment, Public Interest Groups, Public Law Litigation and Federal Rule 24(a), 57 U. CHI. L. REV. 279, 288 (1990).
46. FED. R. CIV. P. 24(a).
47. Greenbaum, supra note 41, at 938-47.
preserve a regulatory rule.\textsuperscript{48} The possibility of intervention to protect the public interest received strong endorsement from the United States Supreme Court in \textit{Cascade Natural Gas Corp. v. El Paso Natural Gas Co.}\textsuperscript{49} In that case, the Court held that California had a right to intervene in litigation concerning the divestiture of a pipeline corporation by a natural gas company doing business in California.\textsuperscript{50} Justice Douglas wrote that, "In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture."\textsuperscript{51} He continued, "It was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect."\textsuperscript{52}

The required interest of public officials is often discussed in terms of regulatory responsibility. For example, in \textit{Scotts Valley Band of Pomo Indians v. United States}, the City of Chico, California sought to intervene in a case brought by Native Americans to determine the status of real property partially located within the boundaries of Chico.\textsuperscript{53} The city contended that it had a "protectable interest in the action because of its taxing and regulating powers" associated with the real estate located in the city, but the district court denied intervention.\textsuperscript{54} The Ninth Circuit reversed the district court and agreed with the city that a right to intervene existed.\textsuperscript{55} Similar participation was afforded a federal regulatory interest in \textit{Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilding Ass'n}.\textsuperscript{56} In that case, the Court of Appeals for the Fourth Circuit held that the National Labor Relations Board had a right to intervene in a case brought by a shipbuilding company against a shipbuilder's association concerning a collective bargaining agreement.\textsuperscript{57}

2. \textit{Permissive Intervention}

If a public official can show that his or her interest has a question of fact or law in common with the present action, then the district court can,

\textsuperscript{48} Other categories offered by Greenbaum are intervention in areas of parallel regulatory overlap, and intervention in areas of parallel enforcement of jointly administered programs. However, even at an abstract level, it does not appear that either of these alternate classifications could be applied in this instance to government intervention because there does not appear to be any opportunity for parallel regulation or enforcement. See \textit{id.} at 947-48.

\textsuperscript{49} 386 U.S. 129, 135-36 (1967).

\textsuperscript{50} \textit{id.} The case had previously been considered by the Supreme Court, which held then that a merger violated the Clayton Act and ordered timely divestiture. See \textit{United States v. El Paso Natural Gas Co.}, 376 U.S. 651, 661-62. (1964).

\textsuperscript{51} \textit{Cascade}, 386 U.S. at 135.

\textsuperscript{52} \textit{id.} Although the case was decided under an earlier version of Rule 24, Justice Douglas indicated that the previous version was more restrictive than the current rule. \textit{id.}

\textsuperscript{53} 921 F.2d 924, 926 (9th Cir. 1990).

\textsuperscript{54} \textit{id.} at 927.

\textsuperscript{55} \textit{id.} at 928.

\textsuperscript{56} 646 F.2d 117 (4th Cir. 1981).

\textsuperscript{57} \textit{id.} at 122.
in its discretion, permit participation as a party.58 Here, again, the Supreme Court has offered encouragement regarding the prospect for intervention. In Securities Exchange Commission v. United States Realty & Improvement Co., the Court considered an application by the Securities and Exchange Commission to intervene in a bankruptcy case to oppose a reorganization plan.59 The Commission acted "in order to protect the interest of the public."60 The district court permitted intervention,61 the Second Circuit reversed,62 and the Supreme Court reversed the circuit court.63 Justice Stone wrote for the Court, "[W]e think it plain that the commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations, which should be subjected to its scrutiny from proceeding without it."64

The contemporary vitality of Rule 24(b)(2) as an option for public officials was confirmed in Newby v. Enron Corporation, where the Texas Board of Public Accounting sought permission to intervene in the case for the purpose of obtaining access to certain discovery protected by a court order.65 The Board was in the process of investigating suspected auditing defects involved in the failure of Enron.66 The district court, in its discretion, permitted intervention and the court of appeals affirmed, commenting, "Texas granted the Board broad powers of investigation to oversee the public interest in maintaining high standards of competence and integrity in the practice of public accounting."67

II. SETTLEMENT CONTENT REGULATION

The notice provisions of the Bill of Rights are accompanied by three

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58. FED. R. CIV. P. 24(b).
59. 310 U.S. 434, 441 (1940).
60. Id. at 445.
61. Id. at 443–44.
62. Id. at 444.
63. Id. at 461.
64. Id. at 460.
65. 443 F.3d 416, 417 (5th Cir. 2006).
66. Id. at 419.
67. Id. at 424; accord Davis v. S. Bell Tel. & Tel. Co., 149 F.R.D. 666 (S.D. Fl. 1993) (permitting the Attorney General of Florida to intervene as an additional representative of the as yet uncertified class in an antitrust action brought by customers of a utility). There are, of course, a number of cases in both categories which have denied intervention. See, e.g., United States v. Tex. E. Transmission Corp., 923 F.2d 410, 416 (5th Cir. 1991) (affirming the denial of a motion to intervene by the Commonwealth of Pennsylvania in a suit brought by the EPA because, "the consent decree adequately protected state interests and... permissive intervention would result in undue delay."); Benford v. Am. Broad. Co., 98 F.R.D. 42 (D. Md. 1983) (denying a request for permissive intervention by a congressional committee); Commonwealth Edison Co. v. Allis-Chalmers Co., 257 F. Supp. 252, 257 (N.D. Ill. 1962) ("The Court has carefully weighed and examined all the factors involved and is of the opinion that to permit intervention by the State will unduly delay and prejudice the adjudication of the rights of the original parties.").
additional provisions which establish substantive limitations on the terms of federal class action settlements, apparently the first such Congressional regulation in history. Although these limitations are far from comprehensive, taken together they do contribute to the shift toward public participation fostered by the notice requirements because Congress participates by dictating some of the terms.

A. COUPON SETTLEMENTS

A coupon settlement is an agreement which provides class members a discount on a future purchase from the defendant rather than cash in exchange for dismissal of the case. Only class members who are willing to do business again with the defendant receive any benefit and all other class members typically receive no compensation. Indeed, some defendants in coupon settlement cases may benefit by increased sales generated by the discounts. These features have prompted critics to suspect collusive settlements in which defendants readily agree to pay substantial attorney fees to class counsel in exchange for an opportunity to close a number of claims either at low cost or occasionally for profit.

The Bill of Rights constrains this practice in three ways. First, the Bill requires that contingent fees in coupon settlements must be based on the value of redeemed coupons, a measure which links the interests of class counsel positively to coupon redemption. Second, the Bill of Rights invites the use of expert opinion on the actual value of redeemed coupons and requires a hearing and written judicial determination that any coupon settlement is fair. Finally, the Act permits the court to require the donation of unused coupons to charity and bars reference to donated coupons in awarding attorney fees. In short, Congress has strongly discouraged coupon settlements, if not actually prohibited them. However, courts and commentators have pointed out that at least in some circumstances coupon settlements can result in an efficient resolution in class action litigation. But Congress has not, and probably could not, take legislative account of such particular circumstances.

70. See, e.g., id. at 109-12.
71. 28 U.S.C.A. § 1712(a). Non-contingent attorneys fees must also have court approval. Id. § 1712(b).
72. Id. § 1712(d).
73. Id. § 1712(e).
74. See Tharin & Blockovich, supra note 6, at 1445 ("If structured correctly, coupon settlements can work. Coupon settlements benefit class members when the coupon's face value exceeds the class member's claim and the discount coupon is used to purchase the defendant's product or service. If the coupon is transferable and a vibrant secondary market exists, the class member benefits when he sells his coupon for more than his underlying claim."); see also In re Mex. Money Transfer Litig., 164 F. Supp. 2d 1002, 1018 (N.D. Ill. 2000) (citing sources); Miller & Singer, supra note 69, at 113-14.
B. OTHER TERMS

The Act also prohibits judicial approval of a settlement under which any class member is required to pay fees to class counsel that would result in a net loss to the class member, unless the court makes a written finding that non-monetary benefits outweigh the projected class benefit. This provision is apparently the result of a notorious settlement in Kamilewicz v. Bank of Boston, in which members of a plaintiff class suffered a net loss in the settlement of an action for fraud related to escrow account charges. The recovery per class member was small, and the prior distribution of attorney fees in the amount of at least $8.5 million resulted in a charge being levied on the accounts of class members. In fact, some class members paid as much as 4000% of their settlement value in attorney's fees, though the amounts involved were small. Curiously, Senator Kohl's statement introducing the first version of the Class Action Fairness Act was largely directed to a description of the experience of a constituent who was a member of the Kamilewicz class, but the legislation he proposed did not directly treat negative settlements. Also, the Bill of Rights provides that a court may not approve a settlement which discriminates between class members based solely on geographic location. This section was apparently fostered in part by testimony about "home cooking" in settlements providing favorable treatment for local plaintiffs.

III. THE CLASS ACTION ENFORCEMENT MODEL

The notice and term regulation provisions of the Bill of Rights are a successful effort to alter the class action enforcement model by diminishing the traditional private nature of the model and introducing active public participation. Although rarely addressed in the literature, the Anglo-American legal system has traditionally viewed settlement as a matter exclusively under the control of the parties and involving the court, at most, in entering an order dismissing the case upon application of both parties. However, the Bill of Rights continues a trend begun in

75. 28 U.S.C.A. § 1713.
76. 92 F.3d 506, 508–09 (7th Cir. 1996).
77. Id. While the Seventh Circuit declined to determine the exact amount of the fee award, they concluded that it was likely somewhere between $8.5 and $14 million and was, thus, a material amount. Id.
83. Typically, if not universally, such an order is entered by the court without question or comment. This practice is so fundamental to the system that it is simply assumed, not specified, and this helps determine the high degree of party control widely recognized as a distinctive characteristic
1938 with the original version of Rule 23 and is analogous to a failed effort by the Carter Administration in the late 1970s to transfer ownership of some class action claims to the federal government and thus severely limit the traditional private character of class actions. More recently, there have been important proposals to shift the class action model in the opposite direction by enhancing private participation in federal class actions. These changes and proposed changes in the class action model implicate the theoretical debate concerning private versus public law enforcement.

A. THE 1938 CLASS ACTION MODEL AND JUDICIAL APPROVAL

Before the adoption of the Federal Rules of Civil Procedure in 1938, class actions were available in the federal courts pursuant to a series of equity rules dating back at least to 1842. The several versions of the rule and related practice contained no explicit requirement that a settlement be approved by the court and the model was largely private. The original version of Rule 23, which replaced the equity rule and extended class actions to common law practice, significantly shifted the private model by providing in Rule 23(c) that “[a] class action shall not be dismissed or compromised without approval of the court.” This change, contrary to the prior equity practice, opened the door to public participation, at least through judicial review of proposed resolutions of class actions.

B. CARTER ERA PROPOSALS

President Jimmy Carter’s election campaign included a promise to reform class action practice, and in 1977 the United States Justice Department sent a plan to Congress. The proposal was complex, but the central feature was public control of some previously private class action claims. The proposal would have eliminated Federal Rule 23(b)(3), which established the “damage” class action, and replaced it with a statutory

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88. FED. R. CIV. P. 23(c) (1938), reprinted in H.R. Doc. No. 75-460, at 28 (1938).
division of cases into "public actions" and "class compensatory" actions.91 Public actions were defined as cases involving a large number of small commercial claims.92 In any public action the Attorney General of the United States would be notified.93 The Attorney General might then take over the case, refer the case to an agency to prosecute, refer the case to a State Attorney General, or allow current counsel to prosecute the case on behalf of the United States.94 Supporters claimed that public control would enhance protection of consumer interests while critics argued that a large and expensive bureaucracy would be necessary to manage the public actions.95 Ultimately, Congress rejected the plan, leaving judicial approval of settlements under Rule 23 the limit of public involvement in class action litigation.

C. AGENCY COSTS

More recently the debate about federal class actions has featured a discussion of "agency costs" and proposals which would significantly enhance private enforcement in the class format. Professor John C. Coffee began this movement with an important article published in 1986 in which he argued that high agency costs are common in class action litigation.96 Agency costs exist because the members of a class, including the class representative, often have little ability or incentive to monitor their attorney.97 Coffee explained that the often small stake of individual class members typically renders the cost of supervising class counsel prohibitive.98 The result, Coffee argued, is an enhanced role for class counsel much greater than the traditional role of counsel and consequent occasional failures by counsel to represent the best interests of class members.99

A number of remedies have been suggested, all of which seek to enhance private management of class litigation by changing the incentives and roles of private actors. One particularly important proposal was described by Professors Jonathan Macey and Geoffrey

91. See, e.g., H.R. 464.
92. See id.
93. See id.
94. The Attorney General would also be notified if there were a settlement. Id.
97. Id. at 628-29.
98. Id. at 629-30.
99. Id.
Miller in a 1991 article. Macey and Miller proposed that class action claims be sold at auction with the proceeds distributed to class members. According to Macey and Miller, auction would solve the agency problem of class actions because the winning bidder would become the claim's sole owner, and would thus have an incentive to maximize the return on the claim by closely monitoring counsel. Additionally, Macey and Miller argued, the auction model would reduce transactions costs and increase efficiency by directing the claim to the individual who values it most. A weak version of this proposal was employed by Congress in 1995 in the Private Securities Litigation Reform Act which states that the court shall appoint as lead plaintiff the member or members of the class determined to be the most capable of adequately representing the class. The statute goes on to provide that the most adequate plaintiff will presumptively be the plaintiff with the largest financial interest in the relief sought by the class.

D. PRIVATE VERSUS PUBLIC ENFORCEMENT

The policy context for evaluating the Bill of Rights is the older and larger debate about the virtues of private versus public enforcement of legal standards. At least since Montesquieu and especially Bentham, the topic of efficient law enforcement has attracted the attention of theorists. Today, the goal of efficient enforcement is widely, if not universally, accepted and the fundamental arguments for (or against) the two alternatives are well known.

The case for public enforcement recognizes that there are situations where private enforcement may under-deter prospective harmful behavior. For example, the source of the current harm may be difficult to identify and hence be very costly to determine. Private citizens would find identification of the cause prohibitively costly. In this situation, public officials can be compensated to investigate and take enforcement action if appropriate. On the other hand, the source of the harm may be well known but the costs of hiring an attorney and filing suit may be greater than the predicted amount of any individual recovery. Here

101. Id. at 106–08.
102. Id. at 108–09.
104. Id. § 77z-1(3)(B)(I)(bb).
105. The primary source for the discussion which follows is Keith N. Hylton, When Should We Prefer Tort Law to Environmental Regulation?, 41 WASHBURN L.J. 515, 515–30 (2002).
again, public enforcement is necessary, this time to pay the transaction costs in order to deter future harmful behavior. Also, some defendants will require punishment more severe than typical damage awards in order to provide sufficient deterrence. In such a case, public enforcement can provide a sufficient punishment. Overall, the case for public enforcement is strong, but plainly limited to a number of specific factual circumstances.

With respect to private enforcement, the favorable case focuses on the potential malfeasance of public enforcement officials and the costs of public information search. With respect to malfeasance, the authority and identity of public officials provides low cost targets for interest group lobbying, or even bribery. But private citizens are too numerous to be easy targets for improper influence, and therefore private enforcement vastly reduces the risk of malfeasance. With respect to information search, private enforcement offers low costs because private citizens in the course of their daily lives will routinely detect harmful behavior. This contrasts sharply with the expense of employing and outfitting public officials to detect harmful behavior. Overall, the argument for private enforcement is strong and plainly general in character, as compared to the limited case for public enforcement. The case for private enforcement rests on the sheer number of individuals and the resulting avoidance of malfeasance and high search costs. The large number of individuals is a general condition. The case for public enforcement rests on elaboration of specific circumstances known to occur, but not always existing. The case is therefore limited.

The argument for private enforcement suggests that the private model should be preferred when general procedures are established. Indeed, this general preference is reflected in the general character of Anglo-American law enforcement which has always been presumptively private. On the other hand, the theory suggests that a shift to public enforcement ought to employ a specification of the limited circumstances where efficiency can be achieved. The choice of a model for federal class action procedure is a choice of general character since the application of Rule 23 is general and not limited to specific situations. Similarly, the Bill of Rights notice and term limit provisions are general since they too apply to all federal class actions. Therefore, according to the theory, a private class action model should be preferred.

108. Id. at 520–28.
109. This analysis, of course, suggests that the Carter era proposals discussed above, see supra text accompanying note 84, may well have been more efficient than the 2005 legislation since the earlier proposal was more narrowly focused by specific category, i.e., cases involving a number of small commercial claims. See supra text accompanying note 92.
IV. Jurisdictional Provisions

The jurisdictional provisions of the Class Action Fairness Act have received considerable attention in early comment. Essentially, the act expands original diversity jurisdiction in class actions and provides a special removal procedure that facilitates use of the expanded jurisdiction. The exact scope of the new jurisdiction was much debated in Congress and fostered several complex exceptions designed to keep local action in state court.

A. Jurisdiction

Section 4 of the Class Action Fairness Act expands federal diversity jurisdiction over any class action with one hundred or more class members in which the aggregate claims of class members exceeds $5 million and diversity exists between at least one class member and one defendant. Congress’s use of a “minimal diversity” standard thus abandons the traditional statutory requirement of perfect diversity and stretches diversity to the boundary of Article III. The expanded jurisdiction is available in any action filed under Federal Rule 23 or any similar state provision. There are important exceptions in the Act to this expansion of diversity, chief of which are available when the primary defendants are local state citizens. Essentially, in this situation, if one-third or fewer of the plaintiff class members are local citizens, expanded federal jurisdiction will be available. If one-third to two-thirds are local, expanded federal jurisdiction is discretionary, and if more than two-thirds of the class are local citizens, expanded federal jurisdiction is prohibited.

Section 5 of the Class Action Fairness Act provides removal options which will facilitate use of the expanded diversity jurisdiction. For example, the current requirement that removal must occur within one year of filing is deleted for litigation covered by the Class Action Fairness Act. Also, defendants may remove regardless of being a local defendant.

110. See, e.g., Symposium, Class Action in the Gulf South and Beyond, 80 Tul. L. Rev. 1591 (2006).
112. The requirement stems from an early construction of the diversity statute. See Strawbridge v. Curtis, 7 U.S. 267, 267 (1806) (construing the Judiciary Act of 1789, 1 Stat. 73 (1789)).
114. Id. § 1332(d)(A)(i)(I).
115. Id. § 1332(d).
116. Id. This third category also provides an alternative technique for identifying a local defendant, apparently useful in the event the “primary defendants” are not local state citizens. See id. § 1332(d)(3). The more general identification of local defendants based on the state citizenship is also available. Id. § 1332(d)(A)(ii)(II)(cc). Expanded jurisdiction is not available in any class action brought against states or state officials. Id. § 1332(d)(5)(A). Also excluded are class actions brought under the federal securities laws and actions involving the “internal affairs” of local corporations. Id. § 1332(d)(9).
117. Id. § 1453(b).
citizen, which is contrary to general removal provisions, and any one defendant may remove a class action without the consent of all defendants, which is generally required. Contrary to general removal practice, an appeal opportunity is allowed by the legislation, subject to several specified time requirements obviously intended to prevent strategic efforts to delay trial court actions.

B. Federal Judicial Center Study

During consideration of the Class Action Fairness Act but before passage, the Federal Advisory Committee on Civil Rules asked the Federal Judicial Center, the education and research agency of the federal courts, to undertake a comparative study of class actions focusing on the validity of any assumption about differences in treatment in state and federal courts. The method chosen by Thomas Willging and Shannon Wheatman was a survey of attorneys in a random sample of recently terminated cases in state and federal court. They sent detailed questionnaires to 2132 attorneys in 1235 class action cases and received 728 responses, which was a sufficient response to test the statistical significance of any differences. The sample included typical class action subject matter such as personal injury and civil rights claims.

The most important questions posed by Willging and Wheatman were why attorneys in class action cases chose a state or federal forum and whether the choice produced different results. The answers were quite clear. First, Willging and Wheatman found that attorneys in class action believe that the choice of state or federal forum is important, with plaintiffs' attorneys generally preferring state court and defendants' attorneys generally preferring federal courts. The conclusion with respect to defendants' attorneys is both important here and striking: "In their responses to our survey, defendant attorneys described an almost totally favorable legal environment for their clients in the federal courts—a convergence of judicial receptivity, predispositions, and favorable substantive and procedural rules." Second, Willging and Wheatman concluded that in fact the choice mattered very little. "State forums were not typically more favorable for plaintiffs, and federal forums were not typically more favorable for defendants." The results of the study

118. Id.
119. Id. § 1453(c).
120. Id. Like the jurisdictional provisions, the removal section also does not apply to federal securities actions and state law claims relating to the internal affairs of corporations. Id. § 1453(d).
122. Id. at 600–02.
123. See id. at 634–40.
124. See id. at 653.
125. Id. at 654.
suggest that the bulk of major class action litigation will now take place in federal courts because defense attorneys strongly believe the federal forum is favorable and will therefore routinely use the expanded jurisdiction to remove class actions. However, the study suggests, that this removal practice will not result in different outcomes, only more class action litigation in federal court.

CONCLUSION

The Consumer Class Action Bill of Rights will, I predict, open the door to active involvement by numerous state and federal public officials in the federal class action settlement process which is central to federal class action litigation. If the federal class action docket is expanded, as seems likely as a result of the Class Action Fairness Act jurisdictional provisions, the notice and term regulations of the Bill will gain added significance, because those provisions would apply then to most major class actions brought in the United States. Indeed, this expansion of notice and term limit provisions on class action settlements will likely be the only significant effect of the jurisdictional provisions.

Together these two seemingly disparate aspects of the Class Action Fairness Act will bring about the most significant shift toward public enforcement in the class action format since the adoption of the original Rule 23 in 1938 and the requirement of judicial approval of class action settlements. This shift will result in increased malfeasance by public officials, likely in this context to take the form of enhancing political self interest. The shift will also result in increased information search costs in the form of notice costs and expenses associated with subsequent official investigation and participation in the settlement process. A better solution would have been legislation shifting the class action process in the opposite direction toward a private enforcement model by reducing the agency cost problem described by commentators and enhancing private monitoring. Although public participation might also reduce agency cost problems of class members, alternatives are available which achieve the same result without inviting malfeasance in the form of politically motivated intervention. The case for this solution is well established and the theoretical predictions of such a change are clear: more efficient law enforcement in the class action format. A well functioning private enforcement model would avoid the possible malfeasance of public officials and benefit from low information search costs.

This solution would also have avoided a political mistake made by both the national Republican and Democratic parties. Supporters of the Republican Party will some day be very disappointed in the shift toward public participation in class action litigation. They will wonder why the party traditionally opposed to government intervention came to open the
door to government participation in most major class action settlements. Democrats will be puzzled when recalling their party's vigorous opposition to the same legislation. They will wonder why the party traditionally willing to employ government intervention came to oppose government participation in most major class action settlement. Indeed, the only political winners are likely to be the State Attorneys General, regardless of party, for whom the Bill of Rights provides a platform for political advancement at both the state and the national level.