

# Report on the **ABA TASK FORCE ON CLASS ACTIONS**

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## **ABA Task Force on Class Actions**

In the Fall of 2001 ABA President Robert Hirshon convened a task force on class action litigation. In general, ABA task forces are created to “explore emerging issues in the practice of litigation and work to strengthen the profession.” The task force on class actions was created specifically to examine class action jurisdictional issues and review proposed federal legislation that will expand federal jurisdiction over class actions. The task force is to make recommendations to the House of Delegates concerning these jurisdictional issues and other class action matters. Its mission, according to task force chairman Edward Sherman, is to find common ground between the defense and trial bars.

The class actions task force is comprised of fifteen attorneys experienced in class action litigation, as well as two members from the Federal bench:

### **Chairman**

- Edward F. Sherman- Dean of Tulane Law School, 1996-2001. Edward Sherman previously spent nineteen years on the faculty of the University of Texas School of Law. He specializes in civil procedure, alternative dispute resolution and complex litigation.

### **Members**

- William Conroy- Campbell, Edwards & Conroy; Wayne, PA (ABA member-at-large). William Conroy focuses on product liability defense litigation. He has represented Ford Motor Company, Honda Motor America and Hyundai Motor America. He is also a member of the Defense Research Institute, the Federation of Defense and Corporate Counsel and the International Association of Defense Counsel.
- Leo Jordan- Cozen, O'Connor; Dallas, TX (ABA Tort and Insurance Practice Section). Leo Jordan concentrates in litigation, bad faith defense and insurance coverage. He is a member of the Texas Association of Defense Counsel.
- Thomas Minton- Jiranek, Goldman & Minton; Baltimore, MD (Tort and Insurance Practice). Thomas Minton's emphasis is on class actions and consumer and personal injury cases. He has been lead class counsel in several consumer fraud class actions. Mr. Minton won the Public Justice Achievement Award in 1994 from the Trial Lawyers for Public Justice for work as lead counsel for a plaintiff class in a consumer class action.

- Rich Wallis- Microsoft Corp.; Seattle, WA (ABA Antitrust Section). Microsoft has been the subject of a number of private class actions raising allegations similar to the state attorney general lawsuits.
- Jeff LeVee- Jones, Day, Reavis & Pogue; Los Angeles, CA (ABA Antitrust Section). Jeff LeVee focuses on class action litigation with an emphasis in antitrust and has defended telecommunication companies, pharmaceutical manufacturers and health care providers.
- David Cathcart- Gibson, Dunn & Crutcher; Los Angeles, CA (ABA Labor and Employment Section). David Cathcart represents employers in all phases of labor and employment law. He is chairman of the American Employment Law Counsel and the Legal Committee of the Employers Group. He is also Management Chair of the ABA Equal Employment Opportunity Committee.
- Richard Seymour- Lieff, Cabraser, Heimann & Bernstein; Washington DC, (ABA Labor and Employment Section). Richard Seymour was plaintiff's counsel in a 1998 gender discrimination class action suit against Home Depot. The class consisted of 25,000 female employees and applicants and settled for \$87.5 million. He was also counsel in a 1999 racial discrimination suit against United Parcel Service which settled for \$12 million.
- Elizabeth Stong- Wilkie, Farr & Gallagher; New York, NY (ABA Commission on Women in the Profession). Elizabeth Stong concentrates in securities, corporate governance and commercial litigation. She has defended companies such as American Home Products Corp., Empire Blue Cross & Blue Shield, Chrysler Corp. and Smith Barney Inc.
- Tom Allman- BASF Corp.; Mount Olive, NJ (Business Law). Tom Allman has been senior counsel at BASF since 1994. Previously he was partner at Taft, Stettinius & Hollister from 1972 to 1993. He concentrated in commercial and tort litigation.
- Robert Clayton- Milling, Benson & Woodward; New Orleans, LA (ABA Health Law Section). Milling Benson provides defense litigation services to clients with respect to a wide variety of health care and labor and employment law issues. In addition to his affiliation at the firm, Robert Clayton is a labor law professor at Tulane Law School where he lectures on wrongful discharge and enforcement of Title IX, Americans with Disabilities Act and OSHA.
- John Beisner- O'Melveny & Myers; Washington DC (ABA Health Law Section). John Beisner specializes in defense of purported class actions and mass tort matters, defending numerous corporations in over 400 class actions. He frequently testifies on class action and claims aggregation issues before the House and Senate Judiciary Committees.
- Dinita James- Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis; Tampa, FL (ABA Litigation Section). Dinita James defends employers in anti-discrimination suits and in other labor and employment related disputes.

- Jeffrey Greenbaum- Sillis, Cummis, Radin, Tischman, Epstein & Goss; Newark, NJ (ABA Litigation Section). Jeffrey Greenbaum's emphasis is in accountant's liability, attorney's liability, class actions, directors' and officers' liability, securities fraud, RICO litigation and shareholders derivative suits. The firm handles primarily defense-related work.
- Lawrence Bacu- US Justice Dept. (ABA Commission on Racial and Ethnic Diversity in the Profession).
- Judge Jed Rakoff- US District Court for the Southern District of NY (ABA Judicial Division). Judge Rakoff was appointed to the Federal bench in 1995 by President Clinton. He is currently presiding over a Federal accounting fraud suit against WorldCom Inc. His recent decisions include a June 2002 decision holding that the Federal death penalty statute violates the Fifth Amendment. He also awarded Universal Music Group \$250 million against music sharing company mp3.com in September 2000.
- Judge Lee Rosenthal- US District Court for the Southern District of TX (ABA Judicial Division). Judge Rosenthal was appointed to the Federal bench by President George W. Bush. She previously practiced with Houston based Baker & Botts. She has been very active in seeking Federal Rules reforms in the class action context, including overlapping and duplicative class actions. Judge Rosenthal recently declined to freeze assets that Enron officers had earned by selling their stock.

The task force is charged with reviewing the Class Action Fairness Act (H.R.2341, S.1712), passed by the House of Representatives on March 13, 2002 by a 233-190 vote. On March 14, 2002, it was introduced in the Senate by Senator Charles Grassley (R-Iowa) and referred to the Senate Judiciary Committee the same day. It is currently pending in the Senate Judiciary Committee with no scheduled hearing.

The stated purpose of the Class Action Fairness Act is to remove from state courts class action litigation that is national in character, with a view toward cutting back on forum-shopping that adversely affects national commercial activity. As articulated by supporters, the impetus for the legislation is a proliferation of class action claims of questionable merit in a handful of states that have produced huge damage awards including record-setting punitive damages. The effect of this trend is that a single local judge or jury can have significant impact on the flow of interstate commerce and national commercial policy. The bill gives federal district courts original jurisdiction of any civil action exceeding \$2 million and where *any* plaintiff member is:

1. a citizen of a state different from *any* defendant,

2. a foreign state or a citizen of a foreign state and the defendant is a citizen of a state, or
3. a citizen of a state and the defendant is a foreign state or a citizen of a foreign state.

The first provision would be the most substantial change to current law. This provision makes it easier to remove large, multi-state class actions to federal court by reducing the complete diversity requirement. Plaintiffs would no longer be able to strategically name class representatives and name “straw-man” defendants to evade party diversity.

The House initiative also establishes a consumer class action bill of rights, including:

1. judicial review and approval of non-cash settlements;
2. protection against loss by class members because of payments to class counsel;
3. prohibition against court approval of proposed settlements providing greater payments to class members located geographically closer to the court;
4. prohibition against court approval of proposed settlements paying a greater share of a reward to the class representative;
5. standardized settlement notification information;
6. specific requirements regarding proposed settlement notifications to federal and state officials.

The ABA task force first met on December 17, 2001. Since then the task force held one hearing on the Class Action Fairness Act in April 2002 and a meeting with Republican and Democratic staffers on the status of the bill in early June 2002. The task force asked those testifying at the April 8 hearing to focus on the following issues:

- Article III authority for minimal diversity jurisdiction
- encroachment of bill on state courts and federalism principles
- adequacy of the exceptions in the bill:
  - \$2 million required removal amount
  - definitions of the phrases “substantial majority,” “primary defendant” and “governed primarily by state law”
- identifying class members who are entitled to remove
- use of Multi-district Litigation Panels
- amending the Federal Rules rather than adopting legislation

The testimony and exchanges at the hearing were, in a number of instances, rather contentious. Task force member Robert Clayton scolded the presenters for focusing on advocacy rather than on developing solutions. Chairman Sherman commented on the

difference of opinion between the defendant's and plaintiff's bars. Alfred Cortese of Lawyers for Civil Justice, one attorney who appeared to testify, criticized the task force for starting with a "minimal reform bill." He urged the task force to broaden the scope of its investigation.

Richard Middleton, President of the Association of Trial Lawyers of America (ATLA) called the Class Action Fairness Act a "jurisdictional restraint bill" that would create "reverse forum shopping" where defendants chose the court. Middleton suggested that the issue be handled by the Judicial Conference Rules Committee rather than through Congressional legislation.

Thomas Henderson of the Lawyer's Commission for Civil Rights also opposed the bill, concerned that increased removal would overload the federal courts. Edward O'Connell spoke against the bill representing the National Center for State Courts. He testified that the chief justices of the state supreme courts have sent a letter to Senator Leahy, chairman of the Senate Judiciary Committee, expressing their opposition. They claim that there is no hard evidence that the states cannot handle large, nationwide class actions in an equitable and efficient manner. Brian Wolfman of Public Citizen expressed federalism concerns with respect to the legislation, but suggested that duplicative state-federal class actions and a lack of judicial scrutiny of settlements might be areas of plaintiff and defense bar agreement.

Conversely, George Pickle of Shell Oil Company and the Defense Research Institute criticized the current class action situation as "reverse federalism." He maintained that some state courts, namely Illinois, Alabama and Mississippi, set federal policy by certifying class actions that involve national commercial disputes. Pickle asserted that the Class Action Fairness Act would eliminate the forum shopping of questionable claims that often are filed with knowledge that the mere threat of easy certification in a plaintiff-friendly state court will force settlement without regard to the merits.

James Wootton of the US Chamber Institute for Legal Reform also attacked the current status of class action litigation. Wootton claimed that the movement of class actions to state courts creates four undesirable effects. First, it allows plaintiffs to forum shop among a few jurisdictions with lax enforcement of certification rules. Secondly, it

allows for the manipulation of the rules to defeat federal jurisdiction. This includes naming only particular class members and “straw-man” defendants. Thirdly, in these nationwide class actions, a state court is often faced with having to apply the laws of other states with which they have little or no experience. Finally, Wootton claimed that some state courts are either ill-equipped to deal with multi-state class actions or have shown to be biased in favor of plaintiff classes.

Especially troublesome, according to Wootton, is the prospect that a state class action creates tremendous pressure on defendants to settle. Many times these result in collusive settlements that provide huge payments for the attorneys and little recompense for the plaintiffs.

The class actions task force originally sought to develop proposals and make recommendations to the House of Delegates by the August 2002 Annual Meeting. Because of a desire for more information and the divisiveness between the plaintiff and defense bars, presentation of a proposal has been postponed until the February 2003 Mid-Year Meeting.