

NATIONWIDE CLASS ACTIONS BELONG IN FEDERAL COURTS

by

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Dispute One: An auto accident occurs in a parking lot causing crushed fenders and doors on two automobiles as well as two sore necks, with damages claimed in excess of \$80,000. A dispute arises between the plaintiff, an out-of-state resident, and the defendant as to who should pay for the claimed damages.

Dispute Two: Five major plaintiff law firms sue multiple insurance companies in multiple actions filed in different state courts, each alleging that a class comprised of millions of people, living throughout the United States and Canada have been injured to the collective amount of over \$10 billion by the same insurance company claims or underwriting practice.

Public Policy Questions. Which dispute is more likely to receive attention from the federal judiciary and be finally resolved in one legal proceeding?

Which dispute will proceed in multiple state courts with potentially conflicting results, no possibility of consolidation of the issues in a single forum and no final resolution until an adverse result for the defendant occurs? And which case involves more people, major issues of interstate commerce, international law and the greatest potential for arbitrary and unbalanced “hometown justice,” yet is likely to be excluded from the jurisdiction of the federal courts?

The fact that the answers to these questions are obvious (and obviously wrong from a public policy standpoint) signals the need for class action reform to expand federal jurisdiction. Many have recognized this need and are supporting two bills now pending before Congress — H.R. 1115 and S. 274. Both bills would expand federal diversity jurisdiction over interstate class actions in which the aggregate amount in controversy exceeds \$5 million and there is requisite diversity among the members of the class and the defendants.

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These changes in the law contained in the proposed legislation are gaining wide and bipartisan support. The House of Representatives passed the “Class Action Fairness Act of 2003,” (H.R. 1115) by a vote of 253 to 170 on June 12, 2003. It is also likely that the Senate Judiciary Committee will have a mark-up session on H.R. 1115 before the summer begins. The Senate Judiciary Committee reported S. 274 to the full Senate on April 10, 2003.

The Non-OEM Crash Parts Litigation. State Farm Mutual Automobile Insurance Company has extensive experience with multiple and overlapping class actions in state courts that illustrate with concrete examples the problems that need to be solved. One important example of the problem is State Farm’s litigation relating to Non-OEM crash parts. In recent years, twenty separate class actions have been filed against State Farm concerning whether or not it is consistent with the Company’s auto insurance contract to prepare auto physical damage claims estimates using the prices of replacement crash parts which are not manufactured by the original equipment manufacturer (“Non-OEM Parts”). These class actions all concern essentially the same Non-OEM claim practice. The use of non-OEM crash parts (outer sheet metal) and other non-OEM parts (such as batteries and mufflers) has been widespread in the auto repair industry for many years. Use of crash parts in insurance estimates and repairs has its proponents and detractors among both industry and consumer groups. Some states expressly permit insurers to specify non-OEM parts, either by statute or regulation. The practice helped introduce price competition into the after-market parts arena that most consider beneficial to car owners.

The non-OEM Crash Parts class actions began for State Farm in 1985 with a statewide class action filed in Chicago, Illinois. The Company resolved this action by agreeing to a settlement that entitled any Illinois policyholder who felt aggrieved by the practice to have either an OEM part placed on his or her car or a cash payment. Following the Illinois statewide settlement, a similar statewide class action evolved in state court in California. State Farm initially removed this case to federal court, but it was later remanded. The reason for remand was a decision that precluded aggregation of claims for purposes of meeting the jurisdictional minimum dollar amount.

In 1993, State Farm settled this California action. The Company agreed to pay any class plaintiff who was dissatisfied with non-OEM crash parts a stated sum of money, without question, or to replace that non-OEM crash part at the policyholder’s option. State Farm also agreed to revise its policy language and to make a substantial cash contribution to the Certified Automotive Parts Association (“CAPA”), in recognition of the fact that continued independent existence of CAPA to test the quality of non-OEM parts was in the best interests of car owners. The settlement specifically contained an acknowledgment that non-OEM parts would continue to be used by State Farm in California. The California court that considered the settlement found this to be in the best interest of California citizens. Changes were also made to the guarantee of repairs and policy form language issued by State Farm. The California Department of Insurance reviewed this revised language and agreed to it. Moreover, in this settlement the class plaintiffs specifically acknowledged that State Farm would continue to use non-OEM crash parts in repair estimates and recognized the vital role that the Certified Automotive Parts Association has in ensuring the quality of these parts. In the end, therefore, the practice of using non-OEM crash parts was approved as appropriate both by California insurance regulators and the California courts.

Yet this did not end the repetitive class actions on this same issue, even in California and Illinois. Additional non-OEM crash parts class action litigation against State Farm immediately followed in Tennessee and then in Alabama. The same plaintiffs’ law firms were involved in both of these actions. Neither of these actions produced any positive results for the plaintiffs. In an Order of the U.S. District Court in Tennessee that is illustrative of the several court rulings finding that the case was not appropriate for class certification under Rule 23, Judge Jon P. McCalla wrote:

In this case, it is clear that there are potential conflicts among the class representatives and the unnamed class members and that these conflicts may not be resolvable. Thus, as outlined by defendants, it does not appear that the class representatives have common interests with each other, let alone the unnamed members of the class. Accordingly, plaintiffs have not met the adequate representation requirement of Rule 23(a)(4). *See Senter* 532 F.2d at 525

In this case as discussed previously, common questions of law or fact do not exist. Even if they did, however, it is clear that given the variety of vehicle makes, models, and years, the different types of crash parts, and the number of part manufacturers, it cannot be said that common issues predominate over the individual issues. In this respect, this case is similar to *In re American Medical Systems, Inc.*, 75 F3d 1069 (6th Cir. 1996).

The fact that these actions were resolved in a manner that was favorable to State Farm and to the continued use of non-OEM parts by the insurance industry ultimately meant little, however. Essentially the same group of plaintiffs' law firms filed yet another action, this one in a Williamson County in Southern Illinois. Plaintiffs' counsel was careful to plead the case so as not to be removable to federal court under current law.

Almost immediately after it was filed, the Illinois court certified a *nationwide* class — even though the issue had already been resolved through litigation in several other states and in Illinois. This class even included California, where the California court had already considered what best served California residents. The case proceeded to a jury trial in which, among other things, State Farm was prevented from introducing critical evidence showing why it created its non-OEM crash parts policy in the first place. Ultimately, the jury rendered a billion dollar plus verdict against State Farm, which is now on appeal.

These cases illustrate one of the reasons why expansion of federal diversity jurisdiction is warranted. While State Farm strongly disagrees with the result in the Williamson County, Illinois case, of greater concern here is the process that led to it. In effect, a group of plaintiffs' firms, at times augmented by more law firms, litigated what amounted to the same case time and time again. State Farm resolved many of these lawsuits, some by settlement and some by favorable litigation results. None of the plaintiffs in the settled cases sought to stop the practice of using non-OEM crash parts in repair estimates. Quite the reverse, the California settlement expressly approved the continuation of the use of non-OEM parts as a beneficial practice in moderating repair costs. Policyholders were better informed and at all times able to choose OEM parts if they insisted upon them, based upon State Farm's written guarantee. In effect, however, even such settlements, which involved significant changes in claim practices and large payments as well as the oversight of regulators, resolved virtually nothing. Class action cases continued to be filed.

No matter how many class action lawsuits State Farm won or settled there was nothing to prevent the same or other plaintiffs' lawyers from filing more and more litigation raising the same claims. Eventually, by repeatedly filing nationwide class actions in state court after state court, plaintiffs were ultimately able to bring the case before a state court judge willing to certify a nationwide class. Under current law, no matter how many times a defendant defeats certification or settles, plaintiffs are free to change courts and try again. But, once the Southern Illinois court made adverse findings against the Company, issues of collateral estoppel and *res judicata* immediately were raised.

Significant national public policy issues are raised by this litigation as well. In a letter from Bob Enoex, Chief Counsel for the Illinois Department of Insurance, to George Reider, Commissioner of Insurance for the State of Connecticut and National Association of Insurance Commissioners (NAIC) Vice President, Mr. Enoex formally asked that the NAIC Executive Committee approve the submission of an Amicus Brief on behalf of State Farm. The letter from Mr. Enoex demonstrates some of the problems with the state court class action procedures from the point of view of an insurance regulator. He wrote:

Moreover, a judgment for Plaintiffs in the current Class Action will impose upon a single insurer domiciled in this state a standard of performance, not only in Illinois but wherever it does business no matter what standards such local authorities may see fit to implement, and no matter what standards are applied to any other company doing business within this state or elsewhere. This will create a substantial variation in insurance benefits and costs for policyholders. It is one thing for an Illinois court to enter a ruling which casts doubt upon statutory policy in Illinois; but the present action effectively allows two Illinois residents to initiate an Illinois state court action in which they seek to nullify or effectively pre-empt the laws and regulations of every other state in which the company operates.

In fact, Mr. Enoex' predictions have come true to the extent that, after the Southern Illinois court verdict and judgment, State Farm changed claim practices so that nationwide the Company no longer issues repair estimates using non-OEM crash parts.

The problems described above are not unique to State Farm, nor are they unique to the insurance industry. Many other companies and firms that do business throughout the United States have faced similar problems. There is, in a very real sense, no practical way to bring an end to continuing litigation in state courts over the same issue. Sophisticated plaintiffs' lawyers can file what amounts to the same suit over and over again. If they lose, they can simply move on to another jurisdiction. And if, after say five or six or even more tries, they achieve a victory, they quickly claim *res judicata* and collateral estoppel.

The issue here is not *how* any particular case is decided, but the creation of a single forum for that limited number of truly nationwide disputes that should be resolved once, in a single proceeding. The issue is avoidance of repetitive litigation over the same issue, time and time again. The issue is effective relief, if relief is due, and an end to otherwise unending litigation if a court decides that no relief is due. While not every dispute is appropriate for federal jurisdiction, there are a number of highly significant cases that are nationwide in scope and significance, and plainly deserve the attention of our nation's federal courts. This fundamental fact is recognized by H.R. 1115 and S. 275.

Summary and Conclusion. Class action lawsuits were conceived and intended as a procedural device to promote judicial economy and efficiency. In actual practice, however, multiple state court class actions in many cases result in the exact opposite. A balance is essential to address this phenomenon.