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Senate

Statement of Senator Dianne Feinstein

"The Class Action Fairness Act"

MRS FEINSTEIN: Mr. President, what I would like to do is say a few words on behalf of this amendment which is submitted on behalf of both Senator Bingaman, who will be on the floor shortly to speak on it, and myself.

As the legislation has been debated, Senator Bingaman has raised, I think, a reasonable, valid, and a real concern about whether certain national class action cases may be caught in a catch-22 when they were prohibited from having their cases heard either in State or Federal court, leaving the case to reside in oblivion.

This problem was best described by the Bruce Bromley Harvard Law Professor Arthur Miller in a letter he sent to Senator Bingaman. It is a lengthy letter, but I will read one part:

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 a home state of a 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 the cases would be 'unmanageable.'"

That's the catch-22. You send a consumer class action to Federal court, the judge says it is unmanageable, will not certify it, the case cannot go back to State court and it sits in oblivion. Senator Bingaman and I have worked to address this problem. I believe we have.

The original solution proposed by Senator Bingaman was a bit too broad because it could impact consumers in States with strong consumer protection laws such as my State of California. What we tried to do, and did, was develop a compromise amendment that provides Federal judges with guidance on how to proceed in these cases, while leaving the judges with the discretion they need to manage their court dockets.

This ensures that national class actions will be heard. They will be certified and claimants in those cases will be more likely to receive the benefit of his or her own State's law. Let me quickly go over the amendment. The amendment basically provides that:

Notwithstanding any other so-called choice of law rule [which is what is involved here] in any class action over which the district courts have jurisdiction, asserting claims arising under State law concerning products or services marketed, sold, or provided in more than 1 State on behalf of a proposed class, which includes citizens of more than 1 such State, as to each such claim and any defense to such claim –

Here is the amendment:

(1) the district court shall not deny class certification, in whole or in part, on the ground that the law of more than one State will be applied. That solves the problem of the kind of unanswered question in this bill: can a class action remain uncertified? The answer is, clearly, no.

(2) the district court shall require each party to submit their recommendations for sub-classifications among the plaintiff class based on substantially similar State law; and

(3) the district court shall --

(A) issue sub-classifications, as determined necessary, to permit the action to proceed; or

(B) if the district court determines such sub-classifications are an impracticable method of managing the action, the district court shall attempt to ensure that plaintiffs' State laws are applied to the extent practical.

This provides guidance to the judge. Secondly, it requires these cases receive certification in the district court. We believe this is a good solution. It is a significant solution. I hope this Senate will accept that.

Let me say something about this bill as a supporter of a class action bill. This bill is not perfect. It represents the best that can be done to solve what is a real problem in our legal system. I have tried to spend a good deal of time on this issue through Judiciary Committee hearings, personal hearings with both sides, and research and analysis.

As I said in the Judiciary Committee when we marked up the bill, I had a kind of epiphany in one of the hearings a few years ago when a woman named Hilda Bankston testified before our committee. She was the owner of 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 that there are actually more plaintiffs than residents. So she, in effect, became a person to sue in that county to enable the forum shopping process to take place.

I will read a letter from her because it is indicative. Let me say this: This bill is not anti-class action as some would have Members believe. This bill tries to fix a broken part of class action which is the ability to venue or forum shop and to make that much more difficult. The Bankston case is a reason for doing that. So many people such as Hilda Bankston, innocent people who have done nothing wrong, get caught up in how these class actions are put together. Let me quickly read what she told us in committee:

“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.”

This 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. The result is a broken system that has strayed far from the Framers’ intent.

I believe this bill is a well-thought-out, reasoned and an easily read bill. I have actually read it three times -- as solution to this problem 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.

All these things are important guarantees for the plaintiff, for the individual, for the aggrieved party. I believe it makes the class action procedure much sounder for the consumer.

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

Now, the original bill that came to the Judiciary Committee said 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. We changed this. I actually offered an amendment in committee that changed this definition to split the jurisdiction into thirds. Now there is less ambiguity about where a case will end up, and more cases will actually remain in State court.

I think that is important to stress: more cases will actually remain in State court. This is an important compromise.

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 only if one of the parties asks for removal. Otherwise, these cases, too, remain in State court.

In the middle third of the cases, where between one-third and two-thirds of the 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 which are defined in the bill.

I would hope Members would take the time to read the bill. I think it is an important bill. I think to a great extent it has been maligned in that people have chosen to interpret it as anti-class action. I think if those of us -- and it is interesting that some of us on this bill are not attorneys; Senator Grassley, Senator Kohl, certainly myself from the Judiciary Committee - I think if you are not an attorney, you can look at the forest and not really get caught up in some of the process trees of that forest, and you can make an assessment whether the forest well serves class action cases.

I think these changes, and particularly the diversity requirement changes, make this a much sounder way to make a decision as to whether a class action should remain in State court or is truly national in scope and, therefore, should be heard by the Federal court.

I commend to this body the consumer bill of rights. It is very clear in reading the bill that protections are given for coupons. There is review for settlements. The consumer is taken very seriously. I think the system is improved.

Now, let me speak just for a moment to this business: Well, you have to take the bill as is or forget it, there is not going to be a bill. There is an arrangement with the House to take the bill if it is exactly as is.

Well, in many complicated issues, there are dilemmas or problems or issues or corrections that need to be made which appear as the legislative process takes place. And that is what has happened with this bill. In certain areas of concern, where the law may be silent, and case law may be conflicting, I think it is important to clarify the law. That is what the Feinstein-Bingaman amendment does.

There is a hole there. The issue is governed by old case law. What we do is, in essence, codify that so we make clear the discretion that the judge has.

Most importantly, we make clear that a bona fide class action going to Federal court is not going to fall into oblivion because a judge is going to say, Oh, my goodness, there are so many State laws at issue here I can't possibly manage the case, and, therefore, that judge does nothing and the case goes nowhere.

So I think we have worked out a good solution. I know Senator Bingaman was here on the Senate floor. I would say to the Senator from Pennsylvania, I know he is desirous of saying a few words. So perhaps if his staff is listening, they will urge him to come to the floor. Otherwise, Mr. President, I thank the Chair, and I thank the chairman. I yield the floor.