IBD Editorials

Class-Action Suits Benefit Few Other Than Attorneys

By THEODORE H. FRANK
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On Feb. 27, the Supreme Court will hear arguments in American Express v. Italian Colors Restaurant. AmEx is hoping the court will enforce a contract requiring its retail customers to arbitrate disputes.

And, as has been the recent practice when the Supreme Court hears an arbitration case, an array of Chicken Littles are suggesting that a Supreme Court decision enforcing the contract will result in the end of the class action.

Such dire warnings confuse class actions as an end in and of themselves rather than as a means for consumers to vindicate their rights. In reality, consumers would be better off if they had the right to promise that they would avoid bringing the class action in the first place.

The reason we're seeing so much hue and cry over the arbitration vs. class action dispute — including legislative and regulatory proposals to eliminate the ability of employers and vendors to offer arbitration clauses — is because class actions, as now practiced, are tremendously profitable to attorneys.

If AmEx loses, it will face an expensive antitrust class action of dubious merit. But when the size of the class is large enough, and the defendant has deep enough pockets, merit matters very little to whether a class action gets brought.

As sensible judges have recognized for the half century since federal procedure was changed to make class actions easier to bring, the huge gambles of mass liability to every customer in a class action has an in terrorem effect that forces settlement.

If the case is big enough, attorneys can make small fortunes even when a case settles for pennies on the dollar, so defendants are often sued because they are big targets rather than because they have done something wrong.

This is bad enough, but the problem is exacerbated because many of the same consumer advocates demanding that consumers be forced into class actions disappear when it turns out that even the "successful" class actions don't do anything for the consumers they're supposedly advocating for.

My non-profit Center for Class Action Fairness regularly finds itself representing class members objecting to settlements where lawyers receive the lion's share of the benefits.

A federal judge in Philadelphia approved a settlement of an antitrust class action where the attorneys received $14 million, and their clients less than $3 million. (Our appeal is pending.)

I'm objecting to a settlement against Bayer in federal court in Brooklyn where the attorneys are asking for $5.1 million for themselves, but their clients won't even receive a 10th of that.

The problem is immeasurably worse than this: Many times judges rubber-stamp settlements without even trying to determine whether or how many class members will receive any benefit.

In other cases, class attorneys try to benefit at the expense of their clients with bills that would get an attorney fired or sued if they were presented anywhere other than a class action.

In a pending case I'm litigating involving Citigroup, the plaintiffs' attorneys have inflated their fee request by tens of millions of dollars by asserting that they should be compensated as much as $1,000 an hour or more for temporary document-review attorneys.

As Dan Fisher has documented at Forbes.com, those same attorneys were paid only $32 an hour for work that could have been done by nonlawyers, and will not receive any of the proposed several-thousand-percent markup.

Such windfalls are good for attorneys, but not so much for consumers, who face higher prices to pay the anticipated expense of attorneys. Moreover, as I document in a recent white paper I wrote for the Manhattan Institute, consumers and employees achieve superior results in arbitration compared to conventional litigation. The consumer benefits accrue even further in a competitive market where vendors have the incentive to pass savings from attorneys' fees not paid on to consumers.

AmEx might lose on a technicality: The plaintiffs are arguing that a confidentiality clause made it infeasible to bring an antitrust suit in arbitration, and that no meritorious suit could be brought without the class action procedure.

AmEx didn't take full advantage of the opportunity in the lower court to demonstrate that this wasn't true, and the Supreme Court may rest its decision on that narrow fiction.

But if instead the Supreme Court enforces the arbitration agreement because it recognizes that class actions are not necessary when opt-in aggregate litigation in arbitration can vindicate meritorious cases, don't buy the hype from those claiming the decision is a consumer disaster that requires legislative correction.

Such proponents may call themselves consumer advocates, but they're really arguing for a wealth transfer from middle-class consumers to millionaire lawyers in the 1%.

And if consumers are allowed to sign on to enforceable arbitration clauses, it might provide the competitive nudge for the legal community to do more to ensure that the primary beneficiaries of class actions are consumers, rather than attorneys.

• Frank is an adjunct fellow with the Manhattan Institute Center for Legal Policy and the founder of the Center for Class Action Fairness.