

Sec. 5. Extension of fast track procedures.—Fast track procedures apply to any agreement entered into before June 1, 2003, with the possibility of a two year extension. The extension will be denied if either House passes a disapproval resolution.

Sec. 6. Conforming amendments.

Sec. 7. Advisory committee reports.—Private sector advisory committee reports have to be submitted not more than 45 days after the President notifies Congress of his intent to enter into an agreement.●

By Mr. KOHL:

S. 254. A bill to amend part V of title 28, United States Code, to require that the Department of Justice and State attorneys general are provided notice of a class action certification or settlement, and for other purposes; to the Committee on the Judiciary.

THE CLASS ACTION FAIRNESS ACT OF 1997

● Mr. KOHL. Mr. President, I introduce the Class Action Fairness Act of 1997. This legislation is necessary to address a troubling and growing problem in class action litigation—unfair and abusive settlements that ignore the best interests of injured plaintiffs while unscrupulous defendants and attorneys reap the rewards.

Let me give you an example of this situation. It involves a class action settlement that affected a constituent of mine, Martha Preston of Baraboo, WI. Ms. Preston was a member of a class action lawsuit filed in Alabama State Court against BancBoston Mortgage Corp. The suit alleged that the bank was holding an excess balance of Ms. Preston's money in her mortgage escrow account. As with many class members in this case—and in most class action lawsuits—Ms. Preston did not actually initiate the suit or even have knowledge that her mortgage company was being sued on her behalf. But a group of lawyers who claimed to represent her and all other people in a similar situation filed the suit on behalf of the class and negotiated a settlement of the suit, as they are allowed to under the law.

The settlement they negotiated provided that the bank would refund the excess money that it was holding and provide a small amount of compensation to the plaintiffs for lost interest. Pursuant to the settlement, Ms. Preston received a check for \$4.38 to compensate her for the interest she would have earned had the excess money been invested. A few months later, a miscellaneous disbursement of \$80.94 showed up on her escrow account. That \$80 went to pay the class action attorneys their fee for getting her \$4.38. So Ms. Preston ended up losing \$75 as the result of a lawsuit filed without her knowledge and that purported to be to her advantage.

Unfortunately, Ms. Preston's losses did not end there. She was understandably upset at what happened to her. So she found an attorney who was willing to represent her pro bono. She sued the

attorneys who had negotiated the agreement that cost her \$75. No sooner had she sued them for what they had done, than these attorneys turned around and sued her and her pro bono attorneys in Alabama—a State she has never visited—for abuse of process and malicious prosecution and asked for \$25 million in damages against her. Both of these lawsuits are ongoing; indeed the suit that Ms. Preston filed is now the subject of a petition for a writ of certiorari to the Supreme Court. Not only did Ms. Preston lose \$75, but now as a result of trying to defend herself from being fleeced she is defending a \$25 million lawsuit against her.

The Preston case is especially egregious. Unfortunately it is not uncommon. The system of class action lawsuits has created a climate where this kind of abuse is possible.

A class action is a lawsuit in which an attorney not only represents an individual plaintiff but, in addition, seeks relief for all those individuals who have suffered an injury similar to the plaintiff. For example, a suit brought against a pharmaceutical company by a person suffering from the side effects of a drug can, if the court approves it as a class action, be expanded to cover all individuals who used the drug.

Often, these suits are settled. The settlement agreements provide money and/or other forms of compensation. The attorneys who brought the class action suit also get paid for their work. All class members are usually notified of the terms of the settlement and frequently—but not always—given the chance to withdraw from the agreement if they do not want to be part of it. A court must ultimately approve a settlement agreement.

Many of these suits are brought and settled fairly and in good faith. Unfortunately, we also know that there are a few unscrupulous lawyers who file class actions in search of big attorney fees rather than to get compensation for victims. And the class action system does not adequately protect class members from such predatory acts. The primary problem is that the client in a class action is a diffuse group of thousands of individuals scattered across the country. The group is so diffuse that it is incapable of exercising meaningful control over the litigation. As a result, while in theory the class action lawyers must be responsive to their clients, in practice, the lawyers control all aspects of the litigation.

Moreover, when a class action is settled, the amount of the attorneys fee is negotiated between the plaintiffs' lawyers and the defendants. But in most cases the fee is paid by the class members—the only party that does not have a seat at the bargaining table.

In addition, class actions are now being used by defendants as a tool to limit their future liabilities. Class actions are being settled that cover all individuals exposed to a particular substance but whose injuries have not yet

manifest themselves. As Prof. John Coffee of Columbia Law School has written, "the class action is providing a means by which unsuspecting future claimants suffer the extinguishment of their claims even before they learn of their injury."

In light of the incentives that are driving the parties, it is easy to see how the class members can be left out in the cold. Plaintiffs attorneys and corporate defendants can reach agreements that satisfy their respective interests—and even the interests of the name class plaintiffs—but that short sell the interests any class members who are not vigilantly monitoring the litigation.

Although members of class actions get notices of settlements, the settlements are often written in incomprehensible legalese. Let me give you an example of a recent notice:

"The Rebate payable to the eligible member [sic] of the Open Class and the Closed Class shall be an amount equal to (i) the Average Surplus, as determined by the above subparagraph, multiplied by (ii) 50% multiplied by (iii) 3% multiplied by (a) 1 if the loan was serviced for at least 1 year but less than"

Even well trained attorneys are hard pressed to understand these notices. But these long, finely printed and intricate letters are being sent to class members. And on the basis of these notices, people's legal rights are being eliminated and in cases like Ms. Preston's they are being injured.

We all know that class action suits can result in significant and important benefits for class members and for our society. Class actions have been used to desegregate racially divided schools, to obtain redress for victims of employment discrimination, and to compensate individuals exposed to toxic chemicals or defective products. Class actions increase access to our civil justice system because they enable people to pursue claims that collectively that would otherwise be too expensive to litigate.

The difficulty in any effort to improve a basically good system is in weeding out the abuses without causing undue damage. The legislation I propose attempts to do this. It does not limit anyone's ability to file a class action or to settle a class action. It seeks to address the problem in two ways. First, it requires that State attorneys general be notified about potential class action settlements that would affect residents of their states. With this systematic notification in place, the attorneys general can intervene in cases where they think the settlements are unfair. Second, the legislation requires that class members be notified of a potential settlement in clear, easily understood English—not legal jargon.

Let me emphasize the limited scope of this measure: we do not require that State attorney generals do anything with the notice that they receive. No obligations are imposed upon them at

all, although we are hopeful that they will act when appropriate. Moreover, we do not give the attorneys general any new or special rights to intervene in the settlements. They must work within current law.

The simple goal of this legislation is to provide better information and better consumer protection through greater knowledge. We do not want to close the courthouse door to meritorious cases, but merely assure that people are provided with meaningful information so that they can defend themselves.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 254

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This section may be cited as the "Class Action Fairness Act of 1997".

SEC. 2. NOTIFICATION REQUIREMENT OF CLASS ACTION CERTIFICATION OR SETTLEMENT.

(a) IN GENERAL.—Part V of title 28, United States Code, is amended by inserting after chapter 113 the following new chapter:

"CHAPTER 114—CLASS ACTIONS

"Sec.

"1711. Notification of class action certifications and settlements.

§ 1711. Notification of class action certifications and settlements

"(a) For purposes of this section, the term—

"(1) 'class' means a group of similarly situated individuals, defined by a class certification order, that comprise a party in a class action lawsuit;

"(2) 'class action' means a lawsuit filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State rules of procedure authorizing a lawsuit to be brought by 1 or more representative individuals on behalf of a class;

"(3) 'class certification order' means an order issued by a court approving the treatment of a lawsuit as a class action;

"(4) 'class member' means a person that falls within the definition of the class;

"(5) 'class counsel' means the attorneys representing the class in a class action;

"(6) 'electronic legal databases' means computer services available to subscribers containing text of judicial opinions and other legal materials, such as LEXIS or WESTLAW;

"(7) 'official court reporter' means a publicly available compilation of published judicial opinions;

"(8) 'plaintiff class action' means a class action in which the plaintiff is a class; and

"(9) 'proposed settlement' means a settlement agreement between the parties in a class action that is subject to court approval before it becomes binding on the parties.

"(b) This section shall apply to)

"(1) all plaintiff class actions filed in Federal court; and

"(2) all plaintiff class actions filed in State court in which—

"(A) any class member resides outside the State in which the action is filed; and

"(B) the transaction or occurrence that gave rise to the lawsuit occurred in more than one State.

"(c) No later than 10 days after a proposed settlement in a class action is filed in court, class counsel shall serve the State attorney general of each State in which a class member resides and the Department of Justice as if they were parties in the class action with—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints;

"(2) notice of any future scheduled judicial hearing in the class action;

"(3) any proposed or final notification to class members of—

"(A) their rights to request exclusion from the class action; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

"(6) any final judgment or notice of dismissal;

"(7)(A) if feasible the names of class members who reside in each State attorney general's respective State and their estimated proportionate claim to the entire settlement; or

(B) if not feasible, a reasonable estimate of the number of class members residing in each attorney general's State and their estimated proportionate claim to the entire settlement; and

"(8) any written judicial relating to the materials described under paragraphs (3) through (6).

"(d) A hearing to consider final approval of a proposed settlement may not be held earlier than 120 days after the date on which the State attorneys general and the Department of Justice are served notice under subsection (c).

"(f) Any court with jurisdiction over a plaintiff class action shall require that—

"(1) any written notice provided to the class through the mail or publication in printed media contain a short summary written in plain, easily understood language, describing—

"(A) the subject matter of the class action;

"(B) the legal consequences of joining the class action.

"(C) if the notice is informing class members of a proposed settlement agreement—

"(i) the benefits that will accrue to the class due to the settlement;

"(ii) the rights that class members will lose or waive through the settlement;

"(iii) obligations that will be imposed on the defendants by the settlement;

"(iv) a good faith estimate of the dollar amount of any attorney's fee if possible; and

"(v) an explanation of how any attorney's fee will be calculated and funded; and

"(D) any other material matter; and

"(2) any notice provided through television or radio to inform the class of its rights to be excluded from a class action or a proposed settlement shall, in plain, easily understood language—

"(A) describe the individuals that may potentially become class members in the class action; and

"(B) explain that the failure of individuals falling within the definition of the class to exercise their right to be excluded from a class action will result in the individual's inclusion in the class action.

"(g) Compliance with this section shall not immunize any party from any legal action under Federal or State law, including actions for malpractice or fraud.

"(h)(1) A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action lawsuit if the class member re-

sides in a State where the State attorney general has not been provided notice and materials under subsection (c). The rights created by this subsection shall apply only to class members or any person acting on their behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(2) Nothing in this chapter shall be construed to impose any obligations, duties, or responsibilities upon State attorneys general" or the attorney general of the United States.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V of title 28, United States Code, is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions

1711".

SEC. 3.

APPLICABILITY.

This section and the amendments made by this section shall apply to all class action lawsuits filed after or pending one year after the date of enactment of this Act.●

ADDITIONAL COSPONSORS

S. 4

At the request of Mr. ASHCROFT, the name of the Senator from Mississippi [Mr. COCHRAN] was added as a cosponsor of S. 4, a bill to amend the Fair Labor Standards Act of 1938 to provide to private sector employees the same opportunities for time-and-a-half compensatory time off, biweekly work programs, and flexible credit hour programs as Federal employees currently enjoy to help balance the demands and needs of work and family, to clarify the provisions relating to exemptions of certain professionals from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and for other purposes.

S. 11

At the request of Mr. INOUE, his name was added as a cosponsor of S. 11, a bill to reform the Federal election campaign laws applicable to Congress.

S. 19

At the request of Mr. DODD, the name of the Senator from Nebraska [Mr. KERREY] was added as a cosponsor of S. 19, a bill to provide funds for child care for low-income working families, and for other purposes.

S. 29

At the request of Mr. LUGAR, the name of the Senator from Mississippi [Mr. COCHRAN] was added as a cosponsor of S. 29, a bill to repeal the Federal estate and gift taxes and the tax on generation-skipping transfers.

S. 30

At the request of Mr. LUGAR, the name of the Senator from Mississippi [Mr. COCHRAN] was added as a cosponsor of S. 30, a bill to increase the unified estate and gift tax credit to exempt small businesses and farmers from inheritance taxes.

S. 31

At the request of Mr. LUGAR, the name of the Senator from Mississippi [Mr. COCHRAN] was added as a cosponsor of S. 31, a bill to phase-out and repeal the Federal estate and gift taxes