



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
ALBANY, NEW YORK 12224

February 7, 2005

Honorable Bill Frist
Majority Leader
United States Senate
461 Dirksen Senate Office Building
Washington, D.C. 20510-4205

Honorable Harry Reid
Minority Leader
United States Senate
509 Hart Senate Office Building
Washington, D.C. 20510-4103

Dear Mr. Majority Leader and Mr. Minority Leader:

On behalf of the Attorneys General of California, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oklahoma, Oregon, Vermont and West Virginia, we are writing in opposition to S.5, the so-called "Class Action Fairness Act," which will be debated today and is scheduled to be voted on this week. Despite improvements over similar legislation considered in prior years, we believe S.5 still unduly limits the right of individuals to seek redress for corporate wrongdoing in their state courts. We therefore strongly recommend that this legislation not be enacted in its present form.

As you know, under S.5, almost all class actions brought by private individuals in state court based on state law claims would be removed to federal court, and, as explained below, many of these cases may not be able to continue as class actions. We are concerned with such a limitation on the availability of the class action device because, particularly in these times of tightening state budgets, class actions provide an important "private attorney general" supplement to the efforts of state Attorneys General to prosecute violations of state consumer protection, civil rights, labor, public health and environmental laws.

We recognize that some class action lawsuits in both state and federal courts have resulted in only minimal benefits to class members, despite the award of substantial attorneys' fees. While we support targeted efforts to prevent such abuses and preserve the integrity of the class action mechanism, we believe S.5 goes too far. By fundamentally altering the basic principles of federalism, S.5, if enacted in its present form, would result in far greater harm than good. It therefore is not surprising that organizations such as AARP, AFL-CIO, Consumer Federation of America, Consumers Union, Leadership Conference on Civil Rights, NAACP and Public Citizen all oppose this legislation in its present form.

1. Class Actions Should Not Be "Federalized"

S.5 would vastly expand federal diversity jurisdiction, and thereby would result in most class actions being filed in or removed to federal court. This transfer of jurisdiction in cases raising questions of state law will inappropriately usurp the primary role of state courts in developing their own state tort and contract laws, and will impair their ability to establish consistent interpretations of those laws. There is no compelling need or empirical support for such a sweeping change in our long-established system for adjudicating state law issues. In fact, by transferring most state court class actions to an already overburdened federal court system, this bill will delay (if not deny) justice to substantial numbers of injured citizens. Moreover, S.5 is fundamentally flawed because under this legislation, most class actions brought against a defendant who is not a "citizen" of the state will be removed to federal court, no matter how substantial a presence the defendant has in the state or how much harm the defendant has caused in the state.

2. Clarification Is Needed That S.5 Does Not Apply to State Attorney General Actions

State Attorneys General frequently investigate and bring actions against defendants who have caused harm to our citizens, usually pursuant to the Attorney General's *parens patriae* authority under our respective state consumer protection and antitrust statutes. In some instances, such actions have been brought with the Attorney General acting as the class representative for the consumers of the state. We are concerned that certain provisions of S.5 might be misinterpreted to impede the ability of the Attorneys General to bring such actions, thereby interfering with one means of protecting our citizens from unlawful activity and its resulting harm. That Attorney General enforcement actions should proceed unimpeded is important to all our constituents, but most significantly to our senior citizens living on fixed incomes and the working poor. S.5 therefore should be amended to clarify that it does not apply to actions brought by any State Attorney General on behalf of his or her respective state or its citizens. We understand that Senator Pryor will be offering an amendment on this issue, and we urge that it be adopted.

3. Many Multi-State Class Actions Cannot Be Brought in Federal Court

Another significant problem with S.5 is that many federal courts have refused to certify multi-state class actions because the court would be required to apply the laws of different jurisdictions to different plaintiffs – even if the laws of those jurisdictions are very similar. Thus, cases commenced as state class actions and then removed to federal court may not be able to be continued as class actions in federal court.

In theory, injured plaintiffs in each state could bring a separate class action lawsuit in federal court, but that defeats one of the main purposes of class actions, which is to conserve judicial resources. Moreover, while the population of some states may be large enough to warrant a separate class action involving only residents of those states, it is very unlikely that similar lawsuits will be brought on behalf of the residents of many smaller states. This problem should be addressed by allowing federal courts to certify nationwide class actions to the full

extent of their constitutional power – either by applying one state’s law with sufficient ties to the underlying claims in the case, or by ensuring that a federal judge does not deny certification on the sole ground that the laws of more than one state would apply to the action. We understand that Senator Jeff Bingaman will be proposing an amendment to address this problem, and that amendment should be adopted.

4. Civil Rights and Labor Cases Should Be Exempted

Proponents of S.5 point to allegedly “collusive” consumer class action settlements in which plaintiffs’ attorneys received substantial fee awards, while the class members merely received “coupons” towards the purchase of other goods sold by defendants. Accordingly, this “reform” should apply only to consumer class actions. Class action treatment provides a particularly important mechanism for adjudicating the claims of low-wage workers and victims of discrimination, and there is no apparent need to place limitations on these types of actions. Senator Kennedy reportedly will offer an amendment on this issue, which also should be adopted.

5. The Notification Provisions Are Misguided

S.5 requires that federal and state regulators, and in many cases state Attorneys General, be notified of proposed class action settlements, and be provided with copies of the complaint, class notice, proposed settlement and other materials. Apparently this provision is intended to protect against “collusive” settlements between defendants and plaintiffs’ counsel, but those materials would be unlikely to reveal evidence of collusion, and thus would provide little or no basis for objecting to the settlement. Without clear authority in the legislation to more closely examine defendants on issues bearing on the fairness of the proposed settlement (particularly out-of-state defendants over whom subpoena authority may in some circumstances be limited), the notification provision lacks meaning. Class members could be misled into believing that their interests are being protected by their government representatives, simply because the notice was sent to the Attorney General of the United States, State Attorneys General and other federal and state regulators.

Equal access to the American system of justice is a foundation of our democracy. S.5 would effect a sweeping reordering of our nation’s system of justice that will disenfranchise individual citizens from obtaining redress for harm, and thereby impede efforts against egregious corporate wrongdoing. Although we fully support the goal of preventing abusive class action settlements, and would be willing to provide assistance in your effort to implement necessary

reforms, we are likewise committed to maintaining our federal system of justice and safeguarding the interests of the public. For these reasons, we oppose S.5 in its present form.

Sincerely,

ELIOT SPITZER
Attorney General of the
State of New York

W.A. DREW EDMONDSON
Attorney General of the
State of Oklahoma

BILL LOCKYER
Attorney General of the
State of California

LISA MADIGAN
Attorney General of the
State of Illinois

TOM MILLER
Attorney General of the
State of Iowa

GREGORY D. STUMBO
Attorney General of the
State of Kentucky

G. STEVEN ROWE
Attorney General of the
State of Maine

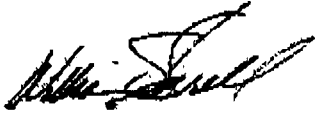
J. JOSEPH CURRAN, JR.
Attorney General of the
State of Maryland

TOM REILLY
Attorney General of the
State of Massachusetts

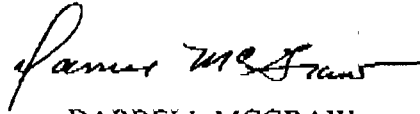
MIKE HATCH
Attorney General of the
State of Minnesota

PATRICIA A. MADRID
Attorney General of the
State of New Mexico

HARDY MYERS
Attorney General of the
State of Oregon



WILLIAM H. SORRELL
Attorney General of the
State of Vermont



DARRELL MCGRAW
Attorney General of the
State of West Virginia