Legal Opinion Letter

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ILLINOIS SUPREME COURT REJECTS CLASS ACTION ABUSE

by
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On August 18, the Illinois Supreme Court handed down its long awaited decision in *Avery v. State Farm*. The Court agreed with State Farm — and disagreed with the rulings of the trial and appellate courts — that there was no basis for certifying a class action. As Chief Justice McMorrow stated in her opinion for the Court, "The circuit court's decision to force this case into the mold of a class action by fabricating a single contract and a single interpretation is an error of law of constitutional dimension that requires reversal by this Court."

That was clearly the right outcome. The Court's opinion describes in detail the obvious differences in legal and actual status among the members of the putative class — different insurance contracts because of divergent applicable state laws, different facts as to whether non-original equipment manufacturer parts ("non-OEM parts") were actually inferior and whether their use diminished the value of the insured vehicle — and chastised the lower courts for ignoring or glossing over these differences.

Certainly, the class action mechanism can be abused. *See* Lawrence H. Mirel, *Lawyers Have No Business Regulating Insurance*, LEGAL BACKGROUNDER (Wash. Lgl. Fndt.), Apr. 6, 2001. Intended to provide an efficient way of adjudicating a large number of small claims by persons who have suffered similar losses because of tortious behavior by the same defendant, the class action mechanism has been used by some plaintiffs' attorneys to "shake down" very large corporations by positing ostensible harm to huge numbers of the corporations' current or former customers, most or even all of whom were unaware they had been injured. The ostensible goal of such litigation is not to win any important legal rights, but simply to try to force the corporate defendants to pay a large amount of money to settle the matter. The lion's share of these settlement agreements goes to the lawyers who came up with the putative injury theories in the first place, with little or nothing to those who were supposedly harmed.

The lawyers who bring these kinds of abusive class actions are not looking for (and may actually fear) a trial on the merits. Corporations are ready (all too ready, in my view) to settle meritless or dubious class action claims by paying millions of dollars to the plaintiffs lawyers who put the suits together. The corporate defendants settle for "business" reasons, and not because they believe the claims are valid. It is far cheaper to settle quickly up front than to pour millions of dollars into defense costs, even if victory is likely. And an adverse result — always a possibility when the plaintiffs' attorneys can choose to file their cases where courts and juries are notorious for their hostility to large corporations — could result in bankruptcy.

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The *Avery* case illustrates very well how the system works. State Farm, and other insurers, look for replacement parts for fenders and other exterior automobile parts damaged in a crash that are manufactured and sold by suppliers other than the original manufacturer of the vehicle. They do so because they believe the parts are just as good and are far less expensive; unlike the original manufacturer, the non-OEM parts manufacturers do not have a monopoly. Whether the non-OEM parts are just as good is, of course, a question of fact. But that question was never decided in *Avery* because the trial court simply assumed, without allowing the presentation of any evidence to the contrary, that non-OEM parts are always inferior.

Faced with a hostile court (in Williamson County, Illinois), State Farm could understandably have decided to pay off the lawyers and gone about its business of selling insurance. Instead, it decided to fight. The gamble was huge. The verdict against State Farm in the trial court was for more than $1.18 *billion*. That was reduced somewhat by the Court of Appeals, to just over a billion dollars. But even to an insurance company as large and healthy as State Farm, a billion dollars is not chump change. Moreover, that would be on top of the millions of dollars in defense costs incurred by State Farm and the higher prices that would have to be paid in the future for crash parts manufactured by the original car makers. The result would surely have been a sharp rise in the cost of purchasing a State Farm insurance policy. Thus a lawsuit filed in the name of the millions of State Farm policyholders, the vast majority of whom were totally unaware of the suit—or even that they had a beef with the company—would have ended up increasing the cost of premiums to those policyholders. The lawyers who brought the case, of course, would have shared the booty — 30% or more of the billion dollar judgment. It is very difficult to see how such a result would be "just" in any sense of that word.

The impact of the *Avery* decision will be widely felt. Not only is the lengthy decision methodically reasoned, showing beyond doubt that the conclusion of the trial court — that questions of law and fact were common to the class — was erroneous, but the Court's ruling was a clear warning that the rules for certifying a class, at least in Illinois, will be followed. Other state and federal courts will view this decision as a meticulous articulation of how class certification rules should be applied. Even more important, however, will be the impact of the decision on the trial bar and on the insurance industry. As long as creative plaintiffs' attorneys can anticipate that large corporations, faced with claims — however strained — that are enormous because they affect a very large class, will willingly settle rather than risk having to fight a class action suit, such suits will be filed, and they will become larger and more fanciful as time goes on. But there are costs to the plaintiffs' attorneys also, especially when a claim may actually have to be tried. The *Avery* ruling should encourage insurance companies to stand their ground, and be unwilling to settle claims they know are without merit, even when faced with huge financial exposure. That, in turn, will force plaintiffs' attorneys to think twice before launching an expensive and perhaps losing class action offensive.

The issue is not whether class action litigation is a bad idea per se. There can be meritorious class actions, where a large number of individuals have suffered relatively minor losses due to wrongful behavior by a corporate defendant, and where individual litigation to correct the wrongful behavior would be uneconomical. But the class action mechanism can also be abused, as when it is used to pursue claims made out of whole cloth in order to try to extract a settlement from a corporate defendant that has done no wrong. It should not be the size of the class, the size of the claim, or the size and wealth of the defendant that determines whether a class action will be filed. It should be the merit of the claim and the reality of harm to the class members.

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