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The End of the Class-Action Carnival

By: Paul M. Barrett - October 10, 2013

F. Paul Bland Jr. brings class-action lawsuits for a living. Over the years he's represented groups of plaintiffs in suits against payday lender Check 'n Go and financial institution Wachovia. He's worried about business drying up. As a result of hostile Supreme Court rulings over the last several years, scores of mass consumer and employment suits that would have been viable a decade ago have been dismissed, says Bland, a senior attorney with Public Justice, a nonprofit in Washington. "People bring me cases against cable companies or big employers, and I say, 'Forget it. It's impossible. Not even worth trying.'"

The mass lawsuit—in which hundreds or even thousands of plaintiffs join together to go after a corporate defendant—is in deep trouble. Growing judicial skepticism toward such suits and toward the lucrative settlements they generate has caused plaintiffs' attorneys to shy away from accepting lengthy, complicated cases. That's tilting the legal playing field decisively in favor of Big Business—and as the Supreme Court reconvened on Oct. 7 for its 2013-14 term, trial lawyers are bracing for more setbacks.

Not everyone is shedding tears. Walter Olson, a legal expert at the libertarian Cato Institute in Washington, attributes the decline of mass lawsuits to a predictable—and welcome—backlash against "a wild carnival" of frivolous damage claims and outrageous conduct by plaintiffs' lawyers. To consumer advocates, however, the increasingly high barriers to mounting mass lawsuits could give companies the wrong incentives. "We're in danger of losing an important deterrent to corporate misconduct," says Brian Fitzpatrick, a professor at Vanderbilt Law School. As is usually the case in legal arguments, there are elements of truth in what both sides say.

Reliable data on class actions are in regrettably short supply because courts don't track them. The only helpful gauge over time measures just a slice of the relevant cases: federal securities fraud claims. The economic consulting firm Cornerstone Research says in the first six months of 2013, 74 securities class actions were filed in U.S. district courts. That's down 22 percent from the 16-year average from 1997 to 2012 and off 42 percent from the peak in the second half of 1998. "Securities filings have definitely fallen off," Fitzpatrick says, "and anecdotally we're starting to see other kinds of cases decline as well."

Mass litigation took off in the U.S. in the 1960s. Plaintiffs' attorneys seized on loosened court rules and expanding liability theories to hold corporations legally responsible for injuries that previously had been written off as the inevitable hazards of life. In the 1970s and '80s, huge cases were launched on behalf of laborers exposed to asbestos and patients who suffered harmful side effects from drugs and medical devices. In the name of rough justice, judges suspended traditional requirements, such as quantifying the precise harm to each plaintiff.

Class-action lawyers assume upfront costs to investigate cases and gather as large a pool of clients as possible: the more purported victims, the more menacing to a corporate foe. Companies fight fiercely to get the cases dismissed and, if they fail, tend to settle rather than risk a jury's wrath. In a better world more closely resembling junior high civics textbooks, many of the social ills that generate class actions would get addressed by legislation or regulation. In response to political sclerosis, the trial lawyers saw their opportunity and took it. The mass tobacco litigation of the '90s extended the pattern as well-heeled plaintiffs' firms, allied with state governments, forged multibillion-dollar settlements and reaped hundreds of millions of dollars in fees.

Business interests complain that class actions discourage innovation, drive up insurance premiums, and unjustly enrich a trial lawyer elite. Rigorous research on the economic effects of large lawsuits, though, has yielded muddled conclusions. The corporate-backed Rand Institute for Civil Justice published a paper in February on big-dollar cases against drug manufacturers since 1990. "There is little direct empirical evidence concerning the economic effects of product liability," Rand found.

What's really turned the legal tide against class actions in recent years has been the excesses of plaintiffs' attorneys. "Coupon cases" typify one pervasive problem: lawyers making out like bandits while putative victims get little or nothing. Exhibit A: In 2007 a group of lawyers in California took home \$25 million in fees for what they advertised as a \$500 million settlement on behalf of owners of allegedly defective Ford (F) Explorer SUVs. The fine print revealed, however, that each consumer became eligible for nothing more than a \$500 coupon toward the purchase of—wait for it—a new Ford. Relatively few people sought the dubious benefit.