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## Antitrust Modernization Commission Goes to Work

For the first time since World War II, Congress has authorized a comprehensive review of the nation's antitrust laws. [\[FN1\]](#) Essentially, antitrust laws protect business competition, which, in turn, benefits consumers by ensuring a competitive marketplace. The Antitrust Modernization Commission Act of 2002 ("AMC"), authorizes a twelve-member bipartisan panel to conduct a three-year examination of U.S. antitrust law and related issues. [\[FN2\]](#) The Commission held its first public meeting on July 15, 2004. [\[FN3\]](#)

The Commission's members, who were chosen by President Bush and Congressional leaders, are evenly split between Republicans and Democrats. [\[FN4\]](#) Despite the Commission's bipartisan make-up, however, the panel has drawn criticism for its lack of diversity. [\[FN5\]](#) The panel consists of only one member who can be said to \*122 represent states attorneys general; and no member of the panel can be said to represent private plaintiffs' lawyers or consumer advocates. [\[FN6\]](#) Given this lack of diversity, the Commission's ability to persuade Congress on issues related to state and private antitrust enforcement has been called into question. [\[FN7\]](#) On the other hand, six members of the Commission have ties to the recent Microsoft antitrust litigation. [\[FN8\]](#) Consequently, the panel appears to be well equipped to consider difficult high-tech intellectual property issues that simply did not exist the last time Congress reviewed this area of law.

While it is anticipated that the panel will examine a variety of antitrust issues over the next three years, the AMC does not specify the issues to be studied, and instead leaves it to the Commission to define its scope and priorities. [\[FN9\]](#) At the Commission's first public meeting, House Judiciary Committee Chairman, F. James Sensenbrenner, Jr., a Republican from Wisconsin, urged the twelve-member panel to examine, among other things, the relationship between antitrust law and intellectual property rights, the impact of state and federal enforcement of antitrust laws, and the application of foreign antitrust laws to U.S. industries. [\[FN10\]](#) Each of these areas seems likely to get a share of the Commission's attention over the next three years.

Historically, intellectual property rights and antitrust law have been viewed as being at odds with one another because while the owner of intellectual property is entitled to a "monopoly," antitrust \*123 laws outlaw monopolies as defined under the Sherman Act. [\[FN11\]](#) More recently, however, courts have come to view the two bodies of law as "actually complementary, as both are aimed at encouraging innovation, industry and competition." [\[FN12\]](#) Still, developing and clarifying the fine line between these two bodies of law without harming either competition or innovation is likely to be a difficult challenge facing the Commission over the next three years.

Meanwhile, state authority to review mergers has been under attack as wasteful and redundant even before federal appellate court Judge Richard Posner called the states "barnacles" on the ship of federal antitrust enforcement. [\[FN13\]](#) Companies are

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frustrated by state involvement that no doubt complicates and extends the investigation into proposed mergers. For example, the Federal Trade Commission approved Wal-Mart Stores Inc.'s purchase of a supermarket chain in Puerto Rico in 2002, but Puerto Rico sued, forcing Wal-Mart to take the case to a federal appeals court. [\[FN14\]](#) State officials, however, say their involvement is critical because they ensure that federal enforcers do not skirt their responsibilities. [\[FN15\]](#) For example, they point to Ronald Reagan's eight years as president as a time when antitrust enforcement would have stopped altogether without the involvement of the states. [\[FN16\]](#)

Likewise, the application of foreign antitrust laws in a way that hurts U.S. business interests is an area that would seem to warrant closer examination. At the Commission's first public meeting, Sensenbrenner remarked that "I am increasingly convinced that foreign antitrust authorities have applied their antitrust laws in a \*124 discriminatory manner that unfairly advances foreign commercial interests at the expense of American business and American jobs. . ." [\[FN17\]](#) Although the Commission's mission as stated in the AMC includes the examination of the nation's antitrust law and "related issues," [\[FN18\]](#) a extensive study of the fairness of the application of foreign laws to U.S. companies would seem to detract from the Commission's focus on its primary mission, namely, examining the need for modernizing U.S. antitrust law.

Congress' last commissioned study of antitrust laws, the Temporary National Economic Committee ("TNEC") began hearings in 1938 and issued its final report in 1941. [\[FN19\]](#) The TNEC hearings were a massive undertaking, producing eleven bound volumes of material, representing the most detailed analysis of American industry ever conducted. [\[FN20\]](#) Ultimately, however, the TNEC failed to agree on any major changes to the nation's competition law, and by the time the final report was issued, circumstances had changed as wartime patriotism swept the nation. [\[FN21\]](#)

While the AMC was passed with little fanfare, the Commission's impact could be substantial and may be affected as much by the scope of its investigation, as by changes in the economic condition in the next three years before the Commission's report is due. [\[FN22\]](#) If the economy slips into depression, if international deposes between antitrust regimes worsen, if intellectual property rights expand and become perceived as anticompetitive, or if state and federal antitrust enforcers continue to clash, then the Commission's report and recommendations may come at a time when U.S. antitrust law is ripe for change. Indeed, even if the Commission's report fails to have an immediate impact, it should provide a valuable reference point as new antitrust legislation is contemplated in the more distant future. [\[FN23\]](#)

#### \*125 Class Action Fairness Bill Stalls in Senate

On July 8, 2004, the Senate voted 44-43 against ending the debate over the Class Action Fairness Act ("CAFA"). [\[FN24\]](#) Without the 60 votes needed for cloture, Democrats, who generally opposed the bill, defeated the bills passage--at least for now. Democratic Senator Tom Carper of Delaware remarked, "Before the bill was brought up, Democrats supporting the legislation consistently said that in order to get the bill done, Republicans should not cut off debate too quickly and should let Democrats offer amendments. That didn't happen." [\[FN25\]](#) Republicans, however, insist the bill had already undergone significant bipartisan compromise and that Democrats, instead of challenging the bill on its merits, attempted to load it down with "poison pill" amendments unrelated to class action lawsuits and aimed only at defeating the bill. [\[FN26\]](#)

At there best, class action lawsuits protect the rights of large groups of individuals, often consumers, who, for all practical purposes, are unable to seek relief individually. However, despite the class action lawsuit's noble purpose and undeniable success in many instances, arguably, no component of our legal system is more susceptible to abuse. [\[FN27\]](#) The "fairness" of class action lawsuits, for both plaintiffs and defendants, is dependant on the careful observance of fundamental rules that allow the class action device to function as originally intended. For instance, class action rules require that the legal and factual questions of a particular case be shared by each member of a class. [\[FN28\]](#) This rule protects the interests of the

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unnamed members of the plaintiff class by insuring that their interests are being represented by the attorneys representing the named plaintiffs. This rule of "commonality," as it is sometimes called, also protects defendants from the danger of oversized judgments resulting from an oversized class. [\[FN29\]](#)

**\*126** The fairness of class action lawsuits also depends on vigilant judicial review of class action settlements. Unnamed plaintiffs are often swept into the litigation with little knowledge of the issues involved, and with no direct involvement in litigation decisions. [\[FN30\]](#) Consequently, class action plaintiffs are vulnerable to unethical attorneys who settle the class' cause of action by negotiating "sham settlements" that provide large payouts to the plaintiffs' attorneys, while leaving the plaintiff class with only a nominal recovery. [\[FN31\]](#) Tales of consumer class action plaintiffs receiving meaningless coupons from defendant corporations while plaintiffs' attorneys collect multi-million dollar fees are becoming commonplace, as is distrust of the class action device. [\[FN32\]](#)

If courts cannot be relied upon to insist that class action settlements compensate the very plaintiffs on whose behalf the suit was purportedly filed, then the value of the class action device must be questioned. One study found that when class actions are brought on behalf of consumers in state courts, the class' attorneys frequently collected more money than all the class members combined. [\[FN33\]](#) Meanwhile, in federal court, class recoveries usually exceed attorney fees by wide margins. [\[FN34\]](#)

To some, the growing number of class action suits brought in particular states, and in particular counties, appears to correspond with the lax enforcement of fundamental class action rules in these courts and signals the need for reform. [\[FN35\]](#) Republican Senator Orin Hatch, a proponent of the proposed Act, opines:

[U]nlike our Federal courts which have judges who are insulated from political influence through lifetime appointments, many State court judges are elected officials who answer through the political process itself. . . . There are jurisdictions in this country, State jurisdictions and local jurisdictions, that border on corruption, that literally don't care what the facts are, don't care what the law is. **\*127** They are just going to give the plaintiffs' attorneys whatever they want. [\[FN36\]](#)

Meanwhile, states which are less attractive to plaintiffs' attorneys are, in effect, surrendering their authority over their citizens' claims and handing over the interpretation of their own laws to other states. [\[FN37\]](#)

The Framers of our Constitution anticipated these types of problems and consequently provided the federal courts with "diversity jurisdiction," i.e., jurisdiction over cases arising between citizens of different states. [\[FN38\]](#) Federal statutes defining the scope of diversity jurisdiction, however, were drafted long before the advent of the modern class action and have been interpreted to exclude most class actions from federal court. [\[FN39\]](#) Presently, class action suits may only be filed in, or removed to, federal court when no plaintiff is a resident of the same state as any defendant, and when the claim of each plaintiff exceeds \$75,000. [\[FN40\]](#) The result is that most class actions are denied access to federal court and cases which are truly national in scope, involving thousands of class members living in all parts of the country, are heard in state courts. [\[FN41\]](#)

The CAFA, as proposed, would make federal courts more accessible to class action plaintiffs by redefining diversity jurisdiction requirements for large interstate class action suits, while at the same time limiting smaller intrastate class actions to state courts. [\[FN42\]](#) This legislation would grant diversity jurisdiction to federal courts whenever any of the named plaintiffs in a class action lawsuit reside in a different state than any of the defendants, so long as the amount in controversy for the claim as a whole exceeds five million dollars. [\[FN43\]](#)

Furthermore, the proposed legislation would require that the fees for attorneys representing a consumer class be calculated based upon the value of the coupons that are actually redeemed by the **\*128** consumer class. [\[FN44\]](#) As a result, attorneys

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would no longer profit sham settlements that provide only meaningless coupons to injured consumers. The legislation would also require that notice of pending settlements be given to state and federal officials to allow them an opportunity to object to class action settlements that do not appear to be in the best interests of the citizens they represent. [\[FN45\]](#)

Opponents of the bill, such as Democratic Senator Patrick Leahy of Vermont, argue that it will deny citizens the right to bring state law claims in their own courts. [\[FN46\]](#) Senator Leahy explains:

In other words, you might have somebody from state A, but they have invested a huge amount in the second state. They are involved in things in that second state. They do something in that second state. They may deprive citizens of their rights in that second state, and they can't sue in that state. [\[FN47\]](#)

Senator Leahy argues that special interest groups are trying to lock plaintiffs out of state court. He claims these groups are relying on a small number of anecdotes, and large sums of money spent on radio and television advertising, in an attempt to free themselves from a state-based tort system that has developed over the last 200 years. [\[FN48\]](#) "I think we should take steps to correct actual problems in class action litigation where they occur. But simply shoving most suits into Federal court will not correct the real problems faced by plaintiffs and defendants." [\[FN49\]](#)

Joining Senator Leahy in opposition to the bill were the attorneys general from several states including, California, New York, and Illinois. [\[FN50\]](#) In a letter addressed to majority leader Bill Frist, and minority leader Tom Daschle, the attorneys general expressed their concern that the CAFA "unduly limits the right of individuals to seek redress for corporate wrongdoing in their state courts. We \*129 therefore strongly recommend that this legislation not be enacted in its present form." [\[FN51\]](#)

While acknowledging that some class action suits have resulted in extraordinary fees for attorneys and minimal recovery for class members, the attorneys general categorized the CAFA as "fundamentally" and unnecessarily "altering the principles of federalism" and "inappropriately usurp[ing] the primary role of state courts. . ." [\[FN52\]](#) Instead, the states' attorneys general urged the Senate to consider "targeted efforts to prevent such abuses. . ." This approach, the states' attorneys general suggest is consistent with the views expressed by many of the organizations that have come out against CAFA, including: American Association of Retired Persons; American Federation of Labor--Congress of Industrial Organizations; Consumer Federation of America; Consumers Union; Leadership Conference on Civil Rights; National Association for the Advancement of Colored People; and Public Citizen. [\[FN53\]](#)

While those on both sides of the CAFA can claim to be pro-consumer, it is telling that pro-business groups, such as The National Association of Manufacturers ("Association"), have thrown their support behind the Act. [\[FN54\]](#) The Association reports that the U.S. tort system cost U.S. businesses \$205 billion in 2001, or just over two percent of the gross domestic product. [\[FN55\]](#) Furthermore, the Association warns that tort costs could reach 2.33% of gross domestic product by 2005. [\[FN56\]](#)

Although the CAFA undeniably contains pro-consumer elements, its ultimate effect will almost certainly be to reduce the amount of money awarded as a result of class action lawsuits. The well-documented abuses in the current class action system can be cured by federal legislation targeting specific areas where abuses have occurred, most notably settlements that favor attorneys over class members, without making wholesale structural changes to our national tort system. While in this light the Senate's failure to pass CAFA is a victory for consumers, some measure of class action reform is needed, and the same issues will be before the Senate again \*130 in the not too distant future.

DRAM Price Fixing Conspiracy: Computer Chipmaker to Pay

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Prices for dynamic random access memory ("DRAM") chips, used in personal computers, mobile phones, digital cameras, and a host of other consumer electronic products [\[FN57\]](#) jumped from around \$1.00 for a 128-megabit chip in March of 2001, to around \$4.40 by the end of 2001. [\[FN58\]](#) To some, the spike appeared to signal a turnaround for an industry that had recently fallen on hard times.

A Dow Jones news release on January 7, 2002, however, quoted an unnamed executive of a Taiwanese chipmaker who suggested a more dubious reason for the surge in prices: "There's an understanding among chipmakers to keep prices at reasonable levels." [\[FN59\]](#) Six months later, DRAM manufacturers Micron Technology Inc., Samsung Electronics Co., Infineon Technologies AG, and Nayna Technology, Inc., had all been hit with subpoenas from the Department of Justice.

Then, in September of this year, Infineon, the world's fourth largest DRAM manufacturer, pleaded guilty to conspiring to fix DRAM prices and agreed to pay a \$160 million penalty, the third largest criminal antitrust penalty ever assessed. [\[FN60\]](#) Additionally, Infineon has also set aside \$224 million pending settlement discussions with its customers, computer manufacturers such as Hewlett-Packard Co., Dell Inc., International Business Machines Corp., and Apple Computer, Inc. [\[FN61\]](#)

Of course, Infineon did not conspire alone, and as part of its settlement with the Department of Justice, the company has agreed to cooperate with the Department's on-going investigation of DRAM \*131 manufacturers. [\[FN62\]](#) Although it has not been officially announced, it is widely believed that Micron has already negotiated immunity in exchange for its cooperation with the government. [\[FN63\]](#) The status of the investigations of the two largest DRAM manufacturers, Samsung and Hynix, remain open questions.

Judgments against Samsung and Hynix could lead to a massive high-stakes legal battle between chipmakers and computer manufacturers. Most individual consumers, however, are unlikely to recover anything for the higher prices paid for personal computers. Under *Illinois Brick Co. v. Illinois*, only overcharged direct purchasers, with some exceptions, are entitled to damages under the federal antitrust law. [\[FN64\]](#) While some states have antitrust laws that provide a private right of action for indirect purchasers, [\[FN65\]](#) the prospect of recovery for most individual consumers appears bleak. Still, to the extent that government and private actions under federal antitrust law deter companies from conspiring to fix prices in the future, individual consumers can claim victory.

#### Health Care Costs Continue Steady, Steep Climb

Health insurance premiums increased more than eleven percent this year, the fourth consecutive year in which consumers have seen their premiums increase by double digits. [\[FN66\]](#) The average cost to insure a family of four is now nearly \$10,000 a year, up sixty percent from 2001. [\[FN67\]](#)

Industry analysts suggest that advances in medical technology and prescription drugs are driving the increase, and that by addressing unhealthy lifestyles costs can be controlled. [\[FN68\]](#) Others \*132 blame the high costs, at least in part, on the fact that consumers are directly responsible for paying only one dollar out of every six dollars spent on health care. [\[FN69\]](#) They argue that consumers have less incentive to seek out low-cost high value health care when insurers are footing the bill for even routine care. [\[FN70\]](#)

Not surprisingly, employers faced with soaring healthcare expenses and an uncertain economy have scaled back or eliminated their participation in employee coverage plans. The number of uninsured Americans rose to 45 million last year, up 1.4 million in the last year. [\[FN71\]](#) Consumers who were accustomed to simply signing up for their employer-sponsored health care plan are being forced to make important and complex health care buying decisions on their own. Increasingly,

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consumers are falling victim to unethical sales tactics and outright fraud.

In the last two years, the state of Florida has shut down 200 "fake" insurance operators. [\[FN72\]](#) This year alone, Montana has issued fifteen cease and desist orders against companies selling discount plans for as little as \$89.95 a month without even inquiring into the consumer's medical condition or history. [\[FN73\]](#)

Nationwide, it is estimated that five of the most aggressive of the fraudulent insurers have left more than 85,000 consumers with at least \$85 million in unpaid medical bills. [\[FN74\]](#) Health care fraud cost \*133 consumers \$54 billion in 2003, and this figure, like the cost of legitimate health care insurance, appears likely to increase in the years ahead. [\[FN75\]](#)

In July, however, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") released the results of an extensive study which offers a ray of hope. [\[FN76\]](#) The report suggests that much of what ails the healthcare marketplace can be cured with a healthy dose of competition. [\[FN77\]](#)

Historically, healthcare has been viewed as a special marketplace in which normal economic forces should not be allowed to operate. [\[FN78\]](#) In the vast majority of markets rivals compete for consumers, and consumers actively make decisions based on the price and quality of the available products. [\[FN79\]](#) Competition generally provides lower prices and broader access to products and services, while at the same time promoting quality and innovation. [\[FN80\]](#) Competition, however, can be "quite unpleasant" for competitors. [\[FN81\]](#) The idea of health care providers ruthlessly fighting off competitors seems at odds with the trust and compassion that consumers expect from their health care providers. [\[FN82\]](#) Yet, in this study, the DOJ and FTC suggest that it is not increased regulation, but increased competition that has the potential to stem rising costs, and improve the quality of the health care available to consumers. [\[FN83\]](#)

The report's recommendations for increasing competition in \*134 the health care marketplace include:

High deductible payment structures and increased access to information. [\[FN84\]](#) The idea here is that high deductibles will increase consumers' incentive to research available medical options. If consumer incentive is combined with access to reliable and understandable information on the price and quality of medical services, consumers will naturally become increasingly smart shoppers for health care services. Incentive and information should, in turn, lead to an increasingly consumer friendly marketplace.

States should reduce barriers to entry for out-of-state providers. [\[FN85\]](#) When potential suppliers to a market are locked out of the market by state-particular regulation, the result is patently anti-competitive. Uniform licensing standards with reciprocity agreements between states, would allow health care supply to flow across state lines according to consumer demand, resulting in a more pro-competitive health care market place.

Governments should not enact legislation that excludes physicians from otherwise applicable antitrust laws. [\[FN86\]](#) Collective bargaining agreements between physicians are akin to price fixing cartels. These agreements limit competition and have not been shown to improve the quality of physician services.

Whatever the merits of these recommendations may be, however, neither political party appears committed to aggressive health care reform. [\[FN87\]](#) Although President Bush suggests that private sector competition will help control Medicare costs, he has yet to support the pro-competitive measure of opening U.S. borders to \*135 prescription drug imports. [\[FN88\]](#) While an infusion of competition may provide some hope for the future, a solution to the rising costs of health care seems unlikely anytime soon. For at least the short term, health care consumers should be prepared to keep reaching a little deeper into their pockets.

[\[FN89\]](#). J.D. candidate, May 2005, Loyola University Chicago School of Law; B.A. English, Michigan State University.

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[FN1]. See Jaret Seiberg, Rules of the Road, Stacked Deck? Daily Deal, Mar. 15, 2004 (discussing the U.S. competition review panel appointees drawing criticism for lack of diversity and confusion regarding vertical merger guidelines).

[FN2]. Antitrust Modernization Commission Act of 2002, [Pub. L. No. 107- 273, 116 Stat 1856](#) (to be codified in 15 U.S.C.).

[FN3]. Press Release, Antitrust Modernization Commission, Antitrust Modernization Commission Holds First Public Meeting, Seeks Public Comment on Topics for Study, and Unveils Website, available at [www.amc.gov](http://www.amc.gov) (Jul. 16, 2004).

[FN4]. Seiberg, supra note 1. Although Republicans and Democrats may differ with regard to some areas of antitrust law, in recent years, there has been a considerable convergence of opinion as to fundamental antitrust principles. Robert Pitofsky, Address at the Loyola University Chicago School of Law (Sept. 27, 2004).

[FN5]. Seiberg, supra note 1.

[FN6]. Id. The Chairman of the Commission is Deborah Garza, a partner at Fried, Frank, Harris, Shriver & Jacobson LLP in Washington D.C. The other members are Makan Delrahim, New York State Deputy Assistant Attorney General; Deborah Majoras, FTC Chairman; Debra Valentine, Assistant General Counsel at United Technologies Corp.; Dennis Carlton, University of Chicago economist; Sanford Litvak, former general counsel at Walt Disney Co.; Steve Cannon, general counsel for Circuit City Stores, Inc., John Shenefield of Morgan, Lewis & Bockius LLP; Johathan Yarkowsky of Patton Boggs LLP; Jack Warden of Sullivan & Cromwell LLP; and Don Kempf of Morgan Stanley. Jaret Seiberg, New Panel could Reshape Merger Law, Daily Deal, July 14, 2004.

[FN7]. Seiberg, supra note 1.

[FN8]. Id.

[FN9]. Antitrust Modernization Commission Act of 2002, [Pub. L. 107-273, 116 Stat 1856](#) (to be codified in 15 U.S.C.).

[FN10]. See Press Release, U.S. House of Representatives, Committee on the Judiciary, Sensenbrenner Introduces Antitrust Study Commission Legislation, available at [www.house.gov/judiciary/news\\_062701.htm](http://www.house.gov/judiciary/news_062701.htm) (June, 27 2001) (discussing issues and problems relating to the modernization of antitrust laws).

[FN11]. M. Howard Morse, Intellectual Property Licensing: The Intersection Between Intellectual Property Rights and the Antitrust Laws, at [http:// www.drinkerbiddle.com/file/Morse\\_IP\\_Antitrust.pdf](http://www.drinkerbiddle.com/file/Morse_IP_Antitrust.pdf) (Dec. 1, 2003).

[FN12]. See e.g. [Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 \(Fed. Cir. 1990\)](#) (reasoning that when a patented product is so successful that it creates its own economic market or consumes a large section of an existing market, the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds).

[FN13]. Jaret Seiberg, Checks and Imbalances, Daily Deal, July, 26 2004.

[FN14]. Id.

[FN15]. Id.

[FN16]. Id. U.S. Assistant Attorney General R. Hewitt Pate suggests an approach similar to that recently adopted by the European Commission. Under this approach, the European Commission has the right to review pan-European mergers, but if

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it declines, review of the merger is delegated to the member county most affected by the proposed merger. Id.

[FN17]. Jaret Seiberg, Lawmaker: Speed Merger Reviews, Daily Deal, July 16, 2004.

[FN18]. Antitrust Modernization Commission Act of 2002, [Pub. L. 107-273, 116 Stat 1856](#) (to be codified at 15 U.S.C.).

[FN19]. Albert A. Foer, [Putting the Antitrust Modernization Commission into Perspective, 51 Buff. L. Rev. 1029, 1032 \(2003\)](#).

[FN20]. [Id. at 1034](#).

[FN21]. [Id. at 1035](#).

[FN22]. [Id. at 1047](#).

[FN23]. [Id. at 1051](#).

[FN24]. Chris Grier, Class-Action Bill Fails Crucial Vote, Senate Leader Declares It Dead, Best's Insurance News, Jul. 9, 2004.

[FN25]. [Id.](#)

[FN26]. [Id.](#)

[FN27]. Walter Dellinger, The Class Action Fairness Act: Curbing Unfairness and Restoring Faith in our Judicial System, Progressive Policy Institute, at 1- 2, available at [www.ppionline.org](http://www.ppionline.org) (Mar. 2003).

[FN28]. [Id. at 2](#).

[FN29]. Dellinger, *supra* note 27, at 2.

[FN30]. [Id.](#)

[FN31]. 150 Cong. Rec. S7,563 (2004).

[FN32]. [Id.](#)

[FN33]. Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain (1999).

[FN34]. Federal Judicial Center, Empirical Study of Class Actions in Four Federal District Courts (1996).

[FN35]. 150 Cong. Rec. S7,564 (2004).

[FN36]. [Id.](#)

[FN37]. Dellinger, *supra* note 27, at 1.

[FN38]. [Id. at 4](#).

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[FN39]. Id. at 5.

[FN40]. [28 U.S.C. § 1332 \(2000\)](#).

[FN41]. Dellinger, *supra* note 27, at 5.

[FN42]. S. 2,062, 108th Cong. § 4 (2004).

[FN43]. Id.

[FN44]. S. 2,062, 108th Cong. § 3.

[FN45]. Id.

[FN46]. 150 Cong. Rec. S7,566 (2004).

[FN47]. Id.

[FN48]. Id. at S7,565.

[FN49]. Id.

[FN50]. Id. at S7,566. Attorneys General of Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, New Mexico, Oklahoma, Vermont, and West Virginia also joined Senator Leahy in opposing the CAFA in its present form. Id.

[FN51]. Id.

[FN52]. Id.

[FN53]. Id.

[FN54]. Donald E. Hegland, *Betrayed Again, Redux*, Assembly, Aug. 1 2004.

[FN55]. Id.

[FN56]. Id.

[FN57]. Don Clark & John R. Wilke, *Infineon Agrees To Guilty Plea For Price Fixing*, Wall St. J., Sept. 16, 2004, at B4.

[FN58]. Dan Nystedt, *Taiwan Nanya Says Received Subpoena From U.S. Justice Dept.*, Dow Jones Int'l News, June 20, 2002.

[FN59]. Dermot Doherty, *Asia DRAM Report: Spot Prices Surge On Supply Controls*, Dow Jones Int'l News, Jan. 7, 2002.

[FN60]. Clark & Wilke, *supra* note 57.

[FN61]. Yun-Hee Kim, *Antitrust Probe Weighs on Samsung and Hynix*, Asian Wall St. J., Sept. 22, 2004, at M4.

[FN62]. Id.

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[FN63]. Clark, *supra* note 57.

[FN64]. [Illinois Brick Co. v. Illinois, 431 U.S. 720 \(1977\)](#).

[FN65]. William Meade Fletcher, [Fletcher Encyclopedia of the Law of Private Corporations § 5062.35 \(2004\)](#).

[FN66]. Rob Kaiser, Health Premiums Soar, *Chi. Trib.*, Sept. 10, 2004, at A1.

[FN67]. *Id.* (quoting Drew Altman, president of the Kaiser Family Foundation, "I see no scenario other than health-care costs continuing to outdistance wage increases and inflation by a very wide margin").

[FN68]. *Id.*

[FN69]. Glenn Hubbard, A Prescription for Health-Care Reform, *Businessweek*, Sept. 20, 2004, at 28. See also Improving Health Care: A Dose of Competition, Dept. of Justice and the Federal Trade Commission, available at [www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf](http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf) (Jul. 2004). In 2002, health care spending in the United States was equal to approximately fourteen percent of the gross domestic product, or 1.6 trillion dollars. *Id.* Federal, state and local governments pay approximately forty-five percent of this amount; private insurers pay forty percent; and consumers pay the remaining fifteen percent directly to health care providers. *Id.*

[FN70]. Hubbard, *supra* note 69 (proposing tax deductions for consumers who elect insurance plans with high deductibles).

[FN71]. Kaiser, *supra* note 66.

[FN72]. Brian Grow, It's Enough To Make You Sick, *Businessweek*, Sept. 13, 2004, at 58.

[FN73]. *Id.* In California, a law suit is pending against an insurer and the company's marketing agent for selling a policy to a cancer survivor which, in fine print, capped coverage for chemotherapy at \$1,000 per day. When the cancer returned chemotherapy costs ran as high as \$18,000 a day, leaving almost \$500,000 in unpaid medical bills at the time of the policyholder's death. *Id.*

[FN74]. *Id.*

[FN75]. Grow, *supra* note 72, at 58.

[FN76]. Dept. of Justice and the Federal Trade Commission, Improving Health Care: A Dose of Competition, available at [www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf](http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf) (Jul. 2004). This two-year study included 27 days of hearings in which approximately 250 experts in healthcare, economics, and antitrust law testified, generating nearly 6,000 pages of transcripts. *Id.*

[FN77]. *Id.*

[FN78]. *Id.*

[FN79]. *Id.*

[FN80]. *Id.*

[FN81]. Department of Justice and the Federal Trade Commission, Improving Health Care: A Dose of Competition, available at [www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf](http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf) (Jul. 2004) [hereinafter Improving Health Care].

[FN82]. Id. at 2.

[FN83]. Id.

[FN84]. Improving Health Care, *supra* note 81, at 21.

[FN85]. Id. at 23.

[FN86]. Id.

[FN87]. See Sarah Lueck, Deft Political Hand Reshapes Health-Insurance Behemoth, *Wall ST. J.*, Sept. 28, 2004, at A4 (observing that the presidential candidates "show no appetite" for radical health care reform, and suggesting that President Bush believes he has already "fixed Medicare...").

[FN88]. Jill Dougherty, Bush Mulls Importing Prescription Drugs, *CNN*, at [www.cnn.com/2004/ALLPOLITICS/08/18/bush.drugs/index.html](http://www.cnn.com/2004/ALLPOLITICS/08/18/bush.drugs/index.html) (Aug. 18, 2004).

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