

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—The bill limits nonresident participation in class action lawsuits filed in Florida state courts in certain circumstances.

B. EFFECT OF PROPOSED CHANGES:

Background

Class action lawsuits entail a balancing of policy considerations. On the one hand, no one can be bound by a judgment affecting his interests without his or her day in court.¹ On the other hand, class action lawsuits can “save a multiplicity of suits, reduce the expense of litigation, make legal process more effective and expeditious and make available a remedy that would not otherwise exist.”²

Regulation of Class Action Lawsuits

The Florida Legislature has enacted legislation regulating class actions lawsuits in a variety of contexts. For instance, the Legislature has:

- expressly authorized class actions for certain subject matter (e.g., in chapters 718, F.S., and 719, F.S., re: condominiums);
- provided that certain provisions of law “shall not be construed to authorize a class action,” (e.g., ss. 634.3284, F.S., and 642.0475, F.S., in the Insurance Code);
- prohibited class action lawsuits for certain subject matters (e.g., s. 282.5004, F.S., relating to Y2K-related suits);
- prohibited the use of funds to maintain a class action relating to civil legal assistance for the poor (e.g., s. 68.098, F.S.); and
- made limits on punitive damages inapplicable in certain actions (e.g., s. 768.735, F.S.).

Class action lawsuits generally are not looked upon favorably or considered inappropriate for certain matters such as contract actions and causes of action based upon fraud and deceit.³

The Florida Supreme Court has adopted procedural requirements for class action litigation, including prerequisites for class certification, pleading and notice requirements, and dismissal or compromise.⁴ The Florida Rules of Civil Procedure establish four prerequisites for a class action:

- Numerous members: The class is so numerous as to make joinder of the parties impracticable.
- Common questions of law or fact: The representative’s claim or defense raises questions of law or fact common to the questions of law or fact raised by each class member.

¹ Fla. Jur. 2d., PARTIES, s. 34.

² Fla. Jur. 2d., PARTIES, s. 37-38.

³ Fla. Jur. 2d., s. 37-38, at 48-49.

⁴ Fla. R. Civ. Pro. 1.220

- Typical claim or defense: The class representative's claim or defense is typical of that of each class member.
- Fair and adequate: The representative can fairly and adequately protect and represent the interests of each class member.⁵

If these four prerequisites are satisfied, the court must conclude that the class fits into one of three categories: 1) that the prosecution of separate claims would create a risk of inconsistent or varying adjudications resulting in incompatible standards of conduct for the party opposing the class, or, as a practical matter, adjudications dispositive of the interests of other class members; 2) the party opposing the class has acted or refused to act on grounds generally applicable to all class members, making relief appropriate for the class as a whole; or 3) the claim is not maintainable under 1) or 2), but the common questions of law or fact predominate over any question affecting only individual members of the class.⁶

The court then either grants or denies class certification.⁷ Once the class is certified, due process requires all potential class members to be notified. These class members may be included in the class or take steps to "opt out."⁸ Final judgments of a state court over which it has personal and subject matter jurisdiction are entitled to full faith and credit in any other state court.⁹

Proposed Changes

The bill would make a number of changes affecting class actions in Florida.

Capacity to sue

The bill would limit membership in any class action filed in Florida state courts to Florida residents, but permit expansion to include nonresident claimants under certain circumstances. A court could expand a class to include nonresidents:

- Whose claim is recognized within their state of residence;
- Whose claim is not time barred; and,
- Who cannot assert their rights because their state of residence lacks personal jurisdiction over the defendant.

[Currently, Florida does not limit class membership to Florida residents in class actions filed in Florida state courts. The federal Class Action Fairness Act of 2005, signed into law on February 18, 2005, grants diversity jurisdiction to federal courts over class actions meeting certain criteria.

⁵ Fla. R. Civ. Pro. 1.220(a)

⁶ Fla. R. Civ. Pro. 1.220(b)

⁷ "The class certification process... does not examine the merits of the underlying claim. Rather, the certification process determines whether a class action is the best manner by which to proceed with litigation. Connell, Michele, "Full Faith and Credit Clause: A Defense to Nationwide Class Action Certification?" 53 Case W.L.Res. L. Rev. 1041, 1050 (Summer 2003).

⁸ A state generally must have both subject matter jurisdiction over the case and personal jurisdiction ("minimum contacts" in the case of nonresident defendants, and procedural due process in the case of nonresident plaintiff class members). Personal jurisdiction over plaintiffs becomes an issue in class action lawsuits because typically only the class representative has placed himself under the jurisdiction of the court. Personal jurisdiction over potential members, especially those from another state, can therefore be uncertain. In the case of a nationwide class action, class members can be located in multiple states. Since a judgment in a class action binds all class members, courts have repeatedly held that due process requires that potential nonresident class members be notified of the class action and be given the opportunity to "opt out" of the action. See, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

⁹ Art. I, s. 4, U.S. Const.

With respect to these changes, Congress found that “(a) abuses in class actions undermine the national judicial system, ... in that State and local courts are... (A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.”¹⁰

As a result, Congress vested federal courts with diversity jurisdiction over these actions when the amount in controversy exceeds \$5 million in the aggregate, there are at least 100 class members (if a non-federal question class action), and any class member is a citizen of a state different from any defendant. The exercise of jurisdiction by the court is tied to the number of class members from the forum state, as follows:

<u>Proposed class members:</u> <u>residents of forum state</u>	<u>Defendants</u>	<u>Federal jurisdiction</u>
<1/3rd		Must accept
>1/3rd < 2/3rds	Primary defendants are citizens of forum state	May accept or decline
<2/3rd	One defendant from whom “significant relief” is sought; conduct formed “significant basis” for the claims; and citizen of forum state ¹¹	Must decline

Certain actions involving securities and corporate governance claims are excluded from the federal act. The federal act also authorizes a defendant to remove a class action from state court to federal court, without regard to whether any defendant is a citizen of the State in which the action is brought.

In 1977, in *Shutts I*,¹² the Kansas Supreme Court, in considering the propriety of permitting nonresident class members to be included as class members in a state other than their state of residence, permitted the state court to hear the nationwide class action citing recent United States Supreme Court cases that had restricted access to the federal courts in class action lawsuits. This, the court said, made it necessary for state courts to hear nationwide class actions:

Recently the United States Supreme Court has required plaintiffs to assume the cost of notice in common-question class actions. The United States Supreme Court has also refused to aggregate class action claims to meet the \$10,000 federal jurisdictional requirements. While the results are supported by the fear of overloading the federal judicial system and the desire not to judicially expand the constitutionally established jurisdictional limits, these recent United States Supreme Court cases have clearly

¹⁰ S. 5, Class Action Fairness Act of 2005 (Enrolled as Agreed to or Passed by Both House and Senate), Sec. 2(a)(4).

¹¹ In addition, at least one defendant must be a defendant “from whom significant relief is sought by members of the plaintiff class.”

¹² *Shutts v. Phillips Petroleum Co.*, 567 P.2d 1292 (Kan. 1977), *cert. denied* 434 U.S. 1068 (1978). In this case, Phillips had argued that the action should be brought in several different state courts. The Kansas Supreme Court disagreed, noting that if the in personam claims of nonresident plaintiff class members were dismissed from the action, those persons would be barred from recovering on their claims elsewhere.

restricted access to federal courts. (In this instance,) (i)f the state courts will not hear the matter, who will grant relief?¹³

Today, with passage of the federal Class Action Fairness Act of 2005, the pendulum has swung the other way: federal courts will now entertain many of these actions.]

Damages

The bill would require class action claimants to allege and prove actual damages to obtain any monetary relief. It also would require claimants to request a specific dollar amount and describe the nature of the injury or damage. In addition, the bill would authorize judgment amounts not exceeding the amount of money owed to class members in the aggregate, with the amount for each individual member specified in the judgment.

[Florida currently only requires proof of nominal damages, not actual damages, for the recovery of monetary relief in class actions. “Nominal damages” have been defined as “damages of an inconsequential amount¹⁴...where there is no substantial loss or injury to be compensated...or where, although there has been a real injury, the plaintiff’s evidence entirely fails to show its amount.”¹⁵ In contrast, “actual damages” are damages awarded for “actual and real loss or injury.”¹⁶ They are compensatory in nature, designed to replace the loss.]

Demand to cure

The bill would require the complainant to present the person alleged to have committed the misconduct with a demand to cure notice 60 days prior to filing a class action. It also would require complainants to specify the amount of the loss suffered, if damages are being sought, and the remedy the party is seeking, if non-monetary relief is being sought. In addition, for the class action to proceed, the bill would require the complainant submitting the demand to cure notice to indicate that the complainant is acting on behalf of a class.

[Florida currently does not require a plaintiff in a class action to notify the defendant and give the defendant an opportunity to cure any injury to the class prior to filing the class action. However, the Legislature has enacted presuit notice requirements for a variety of actions such as an action to obtain benefits under a personal injury protection policy of motor vehicle insurance,¹⁷ for negligence involving a nursing home,¹⁸ and for medical negligence.¹⁹]

Elements of claim

The bill would require plaintiffs to plead and prove that the party gave the defendant a reasonable opportunity to cure and that the defendant failed to cure.

Defense

As part of the claim, the bill would make it an absolute defense when a complainant fails to submit a demand to cure notice to the defendant, the complainant denies the defendant a reasonable opportunity to inspect, or the defendant tenders the damages sought or remedy proposed.

¹³Shutts v. Phillips Petroleum Co., 679 P.2d 1159 (Kan. 1984)

¹⁴ Fla. Jur. 2d., DAMAGES, s. 5.

¹⁵ Black’s Law Dictionary, 6th Ed., at 392.

¹⁶ *Id.* at 390.

¹⁷ S. 627.736(11), Fla. Stat. (2004)

¹⁸ S. 400.0233, Fla. Stat. (2004)

¹⁹ S. 766.106(2), Fla. Stat. (2004)

C. SECTION DIRECTORY:

Section 1. Creates s. 774.01, F.S., relating to class actions; capacity to sue.; requiring proof of actual damages.

Section 2. Creates s. 774.02, F.S., relating to demand to cure notice; pleading and proof requirements; and defense.

Section 3. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate, but potentially negligible recurring negative fiscal impact for the court system, if the bill leads to a greater number of suits brought as individual actions rather than consolidated into class actions.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate, but potentially negligible recurring negative fiscal impact for the clerks of the court, if the bill leads to a greater number of suits brought as individual actions rather than consolidated into class actions.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

Privileges and immunities

Limiting Florida state courts to resident plaintiffs in a class action could implicate the Privileges and Immunities Clause of the United States Constitution. There are two Privileges and Immunities Clauses in the United States Constitution. The Privileges and Immunities Clause of Article IV is

relevant to this bill. It provides that "(T)he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."²⁰ This clause prohibits discrimination by states against nonresidents.²¹ But, like other constitutional provisions, it is not an absolute. The Clause does not "preclude disparity of treatment in the many situations where there are perfectly valid, independent reasons for it."²² And, it does not infuse citizens with "new and independent rights."²³

If confronted with a challenge under the Privileges and Immunities Clause to the distinctions between residents and nonresidents in this bill, the state may defend its position by demonstrating that there is a substantial reason for the difference in treatment, and that the discrimination practiced against nonresidents bears a substantial relationship to the state's objective.²⁴ The courts will give "due regard for the principle that states should have considerable leeway in analyzing local evils and in prescribing appropriate cures."²⁵

In enacting the Class Action Fairness Act of 2005, Congress cited a number of policy reasons for assuming federal jurisdiction over nationwide class actions, many of which might constitute a "substantial reason" for limiting class members to residents of the state in which the action is brought. These include: cases of national importance are being kept out of federal court (presumably where they belong), and state and local courts acting in ways that could bias out-of-state defendants and making judgments that impose their view on other states and bind the rights of the residents of those States.²⁶ This bill does not recite the specific reasons for the difference in treatment between residents and nonresidents.

Access to courts

Placing limits on the use of Florida courts by nonresidents in a class action could implicate the right to access the courts. There are two sources of the right to access the courts—that implied from the United States Constitution²⁷ and that expressly provided in the Florida Constitution.

According to Article I, Section 21, of the Florida Constitution:²⁸

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The Legislature must not unduly or unreasonably burden or restrict access. The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."²⁹ In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida and, if so, that it has provided a

²⁰ Art. IV, s. 2, U.S. Const.

²¹ The only cases staff could find discussing the application of the Privileges and Immunities Clause to state exclusion of nonresidents from a class action solely based on nonresidency are the Shutts cases out of Kansas. Although the Kansas Supreme Court did not hold that excluding nonresidents would violate the clause, it did reference a commentary from Newberg on Class Actions, s. 1206(d), in which Newberg writes: "...exclusion of non-residents from the class solely on the ground of their non-residency may be an unconstitutional discrimination against non-residents with respect to access to this state's courts, in violation of the Privileges & Immunities Clause of the United States Constitution. Each state court system, while possessing its own jurisdiction, is nevertheless part of a larger network of courts of the several states." Shutts v. Phillips Petroleum Co., 679 P.2d 1159, 1170 (Kan. 1984) and Shutts v. Phillips Petroleum Co., 567 P.2d 1292 (Kan. 1977), cert. denied 434 U.S. 1068 (1978). However, in Missouri v. Mayfield, 340 U.S. 1, 3-4 (1950), the United States Supreme Court, while recognizing that the Privileges and Immunities Clause prohibits a state from discriminating against citizens of another state, found it to be a "choice within its own control" for a state to "prefer residents in access to often overcrowded Courts and to deny such access to all nonresidents, whether its own citizens or those of other states...."

²² Am. Jur. 2d., CONSTITUTIONAL LAW, s. 749.

²³ *Id.*

²⁴ Fla. Jur. 2d., CONSTITUTIONAL LAW, s.388; Lunding v. New York Tax Appeals Tribunal, 118 S. Ct. 766 (U.S. 1998).

²⁵ Lunding, *supra*, note 24.

²⁶ See discussion in body of analysis cited in note 12, *supra*.

²⁷ The right is not express. The United States Supreme Court, nevertheless, has held that there is such a right arising from several constitutional provisions including the First Amendment, the Due Process Clause, and the Equal Protection Clause. Fla. Jur. 2d., s. 360.

²⁸ Art. I, s. 22, Fla. Const.

²⁹ Fla. Jur. 2d., s. 360

reasonable alternative for redress, unless there is an “overpowering public necessity” for eliminating the right and no alternative method exists.³⁰

In this bill, nonresidents are not barred from asserting their rights. The bill neither limits their ability to file an individual action in Florida or in their state of residence, nor file a separate class action in their state of residence. Further, unlike when the Shutts case was decided, the federal courts are now available to as a forum for many of the nationwide class action lawsuits.

Separation of Powers: procedural and substantive changes

This bill could implicate separation of powers. The resolution of this question will turn on whether the provisions affecting class membership are substantive or procedural. If considered to be substantive, the bill would survive a separation of powers challenge. If procedural, it would not.

Article II, Section 3, of the Florida Constitution, provides,

No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Article III, Section 1, of the Florida Constitution, vests “legislative power” in the Legislature. Article V, Section 2(a), of the Florida Constitution, directs the Supreme Court to adopt rules of “practice and procedure” for all courts.³¹ The Legislature does have the power to repeal court rules. In *In re Rules of Criminal Procedure*, Justice Adkins defined “practice and procedure” to encompass the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress....³² Rules of practice and procedure include all rules governing the parties, their counsel and courts throughout the progress of the case from the time of its initiation until final judgment and its execution.³³ In contrast, Justice Adkins defined substantive law as consisting of the “rules and principles which fix and declare the primary rights of individuals as respects their persons and property.”³⁴ “Capacity to sue” is an absence of legal disability which would deprive a party of the right to come into court. It is considered a substantive right within the purview of the Legislature.³⁵

B. RULE-MAKING AUTHORITY:

None authorized or necessitated by the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

³⁰ Kluger v. White, 281 So.2d 1, 4 (Fla. 1973)

³¹ Art. V, s. 2(a), Fla. Const.

³² Allen v. Butterworth, 756 So.2d 52, 60 (Fla. 2000), Citing In Re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972).

³³ *Id.*

³⁴ *Id.*

³⁵ The Florida Bar, In Re Rule 1.220(b), Florida Rules of Civil Procedure, 358 So.2d 95, 97 (Fla. 1977)