(Almost) Everything You Wanted to Know About Class Actions

Author : Alexandra D. Lahav

Date : February 21, 2017

John C. Coffee, Jr., **Entrepreneurial Litigation: Its Rise, Fall, and Future** (2015).

With the advent of the new administration, aggregate litigation is under attack again. As of this writing new legislation aimed at limiting class actions has been introduced in Congress. This is the perfect time for Congresspersons and their aids to read John C. Coffee's book, *Entrepreneurial Litigation: Its Rise, Fall, and Future* – both friends and enemies of the class action will benefit from reading this fair-minded and nuanced analysis.

Before delving into the reason for this recommendation, a bit of background. In the scholarly literature on class actions there have been two big ideas. The first was that class actions can have a deterrent effect on large institutions by permitting the enforcement of laws when many people suffer a wrong too small to merit bringing a suit. It is easy to forget that this is in large part what class actions are about. The earliest statement of this idea that I know of was in 1941 in a law review article by Harry Kalven, Jr. and Maurice Rosenfeld. The second big idea was the observation that the class action separates ownership of claims from control of claims, much like the corporate form separates ownership from control of the firm, giving rise to agency costs. John C. Coffee, Jr. has long championed this formulation, first presenting it in 1986.

All subsequent work on class actions has built on, refined, and criticized these two big ideas. A prominent and important strand of scholarship on class actions, for example, demonstrates that given the diagnosis of agency costs, class actions must be thought of as posing problems of governance. Another similarly important strand looks at class actions as problems akin to those solved by the administrative state.

Coffee has now published the sum of his work on class actions in this new book, covering almost everything you wanted to know about class actions in clearly written and engaging prose, from the history of attorney's fees to the European experiment with the device. (I say almost because there is one omission in the book—an omission I will get to at the end of this review.) Coffee promises a "warts and all" look at the class action and he delivers on this promise. The book is critical of plaintiffs' attorneys, defense attorneys, and judges in class actions; it sees the strengths, weaknesses, and incentives of each of these actors with a clear eye.

This is a minor miracle. Even though they constitute only one percent of the federal docket, and probably less of the state court docket after the Class Action Fairness Act, class actions are a perennial object of attack. They are what political scientists call a "condensation symbol" – a rallying or focal point for our collective anxieties about morality, politics, and the economy. Perhaps for this reason, or perhaps reflecting the general poverty of discourse on difficult policy issues, the debate over class actions has largely generated more heat than light. Either class actions are "blackmailing" corporations into settling meritless cases or they are the only mechanism for the little guy to assert his rights. Coffee presents a balanced account of both the costs and benefits of collective litigation, rightly focusing on the main issue of lawyer incentives to bring and maintain suits. He recognizes that class-action attorneys both realize the public goals of deterrence and benefit from litigation: "No simple epithet – private attorney general or bounty hunter – adequately captures the plaintiffs' attorneys' role in high stakes litigation." He writes, "In truth, the plaintiffs' attorney does not simply supplement public enforcement but extends and drives the law's development, sometimes pushing it in directions public enforcers would not have gone."

The book begins with a history of entrepreneurial lawyering. The insight here is that fee structures drive the structure of the legal profession—had we regulated attorney's fees, for example, we might have a very different legal system in the

United States. As it was, early on the states rejected English limitations on fees and accepted contingency fees and other innovations that encouraged lawyers to find clients and allowed clients who might not be able to afford representation otherwise to hire lawyers. That was the birth of entrepreneurial litigation and it occurred not in 1966 with the promulgation of Federal Rule of Civil Procedure 23, but in the 1850s with the adoption of contingency fees. You might say it is an American tradition. As Coffee puts it, refining his original agency thesis, "the plaintiff's attorney in large class actions [is] less an agent than a risk-taking entrepreneur, with the class members serving as largely passive partners."

Especially fascinating is Coffee's history of the derivative suit. Here he tells stories that I have not seen told elsewhere, such as that of Clarence Venner, a non-lawyer who was a key player in orchestrating campaigns against public corporations as a plaintiff in the early twentieth century, and Abraham Pomerantz, a lawyer who revolutionized plaintiff's side corporate litigation after the Great Depression. This historical narrative provides a new view of the class action, not as an inflection point in the history of American law between the New Deal regime founded on administrative expertise to a mixed regime that increasingly relied on private enforcement, but instead part of a longer history of individual activism in the courts dating back to Jacksonian populism.

Coffee addresses four types of class actions: derivative suits, securities suits, merger-and-acquisition class actions, and mass-tort class actions. When I first read the book, I thought giving mass-tort class actions a chapter was a mistake, because they were defunct. But reports of the death of the mass-tort settlement class action have been greatly exaggerated, as the NFL Concussion and Deepwater Horizon cases demonstrate. His analysis of each of these areas of the law focuses on incentives – those of the defendant, plaintiff, and, importantly, judges. These include the defendant's side desire for global peace, the plaintiff's attorney's incentives created by the structure of fee awards, and judges' incentives to avoid protracted litigation or a flood of cases. Coffee describes a dynamic of one step forward and a half step back – a cycle in which attorneys succeed, overreach, and face a counter-reaction.

After reviewing the problems in class actions, Coffee sets the stage for considering reforms. Overall, the problems he focuses on can be put into three categories: (1) structural problems, such as overlapping multiple jurisdictions permitting duplicative litigation; (2) incentive problems, such as the size of the lawyer's fee in class actions, which can lead to overzealous prosecution of class actions, and the creation of limits such as the "loser pays" rule adopted by some corporations in their bylaws, which can lead to under-prosecution; and (3) accountability problems, including the fact that private attorneys general are not democratically accountable as public attorneys general are. These observations tie with common themes in discussions of litigation and politics in the U.S. more generally: the tension between the establishment and the people, between centralization and decentralized decision-making, and between regulation and deregulation. In the final chapter, Coffee proposes greater public/private partnerships in the prosecution of civil cases – not giving public agencies veto power, but perhaps adding some greater regulation of private lawyers than merely the existence of a substantive legal regime provides.

It is not surprising that Coffee describes class actions the way that he does, as an entrepreneurial enterprise with a long American tradition, given that he is a corporate law scholar in his other life. His description is convincing, novel, and important to current policy debates that present entrepreneurial litigation as an anomaly in our history. He focuses on sectors that are important not only financially but also in American political life. As Lizbeth Cohen demonstrated convincingly in *The Consumer's Republic: The Politics of Mass Consumption in Postwar America* (2003), after the Second World War the country took a turn from understanding citizenship as a political act to understanding it as an economic one: the best thing we can do for our country is buy more.

Bringing the insights of corporate law to class action litigation is Coffee's strength, but also a weakness, because it ignores how the class action, and the controversy surrounding it, extends beyond corporate litigation. Derrick A. Bell, Jr. originated the analysis of agency costs and of the lawyer having his own agenda (the core of the idea of the "entrepreneur") in his 1976 article *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*. Thurgood Marshall and the NAACP Legal Defense Fund, about whom Bell wrote, might be described as ideological entrepreneurs. And like the rest of the class action regime Coffee describes so well, civil rights

class actions are under threat. Here a public/private partnership will cure little, as the whole point of many civil rights actions is to sue the government itself on behalf of those with limited political power: those denied the right to vote, the homeless, foster children, and prisoners, to name but a few groups. (The government ought to have a role in enforcing civil rights, but an independent bar is a necessary watchdog.) It is important to remember that overreaching limitations on civil rights class actions are at least as dangerous to civil society as too harsh limits on consumer and corporate suits.

Coffee, who was for many years a colleague of the civil rights pioneer Jack Greenberg, is no doubt aware of this omission and it does not diminish the importance of this book. His insights into the costs and benefits of the class action device will continue to be crucial for anyone thinking about the class action: legislators, judges, lawyers, students, and academics.

Cite as: Alexandra D. Lahav, *(Almost) Everything You Wanted to Know About Class Actions*, JOTWELL (February 21, 2017) (reviewing John C. Coffee, Jr., **Entrepreneurial Litigation: Its Rise, Fall, and Future** (2015)), https://courtslaw.jotwell.com/almost-everything-you-wanted-to-know-about-class-actions/.