

Resuscitating Erin Brockovich After the BP Oil Spill: Carving Out an Exception to the Class Action Fairness Act for Environmental Disaster Suits

Drew Cohen*

When President George W. Bush pushed the Class Action Fairness Act (“CAFA”) through Congress in 2005, environmentalists lamented the demise of one of the last robust incentives for energy companies to develop meaningful safeguards against environmental disasters.¹ At the time the bill was passed, one headline presciently read, “Erin Brockovich, drop dead,”² while another referred to it as the “Class Action-Unfairness” Act.³

In recent months, President Barack Obama and Congress have been roundly criticized for their lackluster response to the Deepwater Horizon rig explosion in the Gulf of Mexico that triggered one of the worst environmental disasters in U.S. history.⁴ Gulf residents, meanwhile, have brought well over 200 lawsuits related to the April 20 oil spill.⁵ Many of them were class action suits that were required, pursuant to CAFA, to be filed in federal district courts.⁶ Instead of

waiting years for claims to be processed in federal courts, Congress should revisit CAFA and create an exemption for environmental disaster class actions. Doing so will speed current recovery efforts in Gulf communities, further incentivize companies to develop comprehensive contingency plans for hazardous activities, and mitigate future damages in environmental catastrophes.

A CAFA Flashback

CAFA, one of the Bush administration’s prized legislative victories for large corporations, effectively stripped state courts of jurisdiction to hear multistate class action suits.⁷ It did so by providing federal district courts with original jurisdiction in class action cases where the amount in controversy exceeds \$5 million and “in which *any* member of a class of plaintiffs is a citizen of a State different from *any* defendant.”⁸

Congress’ motivation for passing CAFA was a perceived culture of plaintiff-oriented bias in state courts, whose judges routinely awarded victims maligned by corporate malfeasance millions of dollars in damages.⁹ Proponents argued that the bill could cut down on the so-called practice of “forum shopping” whereby plaintiffs’ lawyers sought out state judges sympathetic to local interests in hopes of recovering larger

*The George Washington University Law School, 2011 J.D. Candidate; The George Washington Journal of Energy and Environmental Law, Senior Editorial Board Member. An editorialized version of this article appeared in *The Baltimore Sun* (print) and in *The Chicago Tribune* (online). Drew Cohen, Calling Erin Brockovich, *BALT. SUN*, June 28, 2010, at 15 News; Drew Cohen, Calling Erin Brockovich, *CHI. TRIB.*, June 28, 2010, <http://www.chicagotribune.com/topic/bs-ed-environment-class-action-20100627,0,7181450.story?track=rss-topicgallery>.

1. See Amanda Griscom Little, *Erin Brockovich, Drop Dead*, *SALON* (Feb. 12, 2005, 3:00 PM), http://www.salon.com/news/opinion/feature/2005/02/12/class_action.

2. *Id.*

3. See 150 CONG. REC. S7567 (daily ed. July 6, 2004) (statement of Sen. Leahy) (reprinting a July 6, 2004 editorial from *The New York Times* entitled “Class-Action Unfairness”).

4. Anne E. Kornblut, *Amid Criticism Over Oil Spill, Obama Will Visit Gulf Coast Again*, *WASH. POST*, May 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/25/AR2010052504996.html>.

5. See *The Latest on the Oil Spill*, *N.Y. TIMES*, July 4, 2010, at A14.

6. For a representative sample of class action complaints filed in federal district courts related to the Deepwater Horizon oil spill, see Class Action Complaint, *Destin v. BP*, No. 3:10CV00141, 2010 WL 1759566 (N.D. Fla. May 4, 2010)

(Florida property owners); Class Action Complaint, *NOVA Affiliated, S.A. v. BP*, No. 2:10CV01313, 2010 WL 1754170 (E.D. La. Apr. 30, 2010) (Louisiana residents); Class Action Complaint, *Nguyen v. Transocean, Ltd.*, No. 1:10cv178LG-RHW, 2010 WL 1757955 (S.D. Miss. May 3, 2010) (Mississippi shrimpers); Class Action Complaint, *Cooper v. BP*, No. 2:10CV01229, 2010 WL 1727804 (E.D. La. Apr. 28, 2010) (Louisiana fisherman and shrimpers).

7. Maura Reynolds & Sara Clarke, *President Bush Pushes to Limit Class Action Suits*, *L.A. TIMES*, Feb. 10, 2005, <http://articles.latimes.com/2005/feb/10/nation/na-legal10>.

8. Class Action Fairness Act of 2005 § 4, 28 U.S.C. § 1332 (2006) (emphasis added).

9. S. REP. NO. 109-14, at 11–12 (2005).

settlements (known as “magnet venues”).¹⁰ Madison County, Illinois, where hundreds of nationwide class action lawsuits were pending at the time the legislation was passed, was routinely cited as *the* magnet venue (or, as others less endearingly called it: a “judicial hellhole”) that epitomized a judicial system run amok.¹¹ Federal judges, the argument continued, had greater resources to deal with large class action suits and were better positioned to assess equitable, unbiased remedies.¹²

Critics of the bill countered that the judicial hellhole argument was greatly exaggerated and lacked empirical evidence.¹³ Moreover, states were already taking steps to curb abuses that did exist.¹⁴ Instead of allowing states to self correct for whatever problems existed, CAFA overcorrected them. In the process it obstructed state laws, diminished states’ rights, limited corporations’ liabilities and created formidable obstacles for harmed individuals to recover. In sum, critics argued, “although the Act [had] seemingly noble purposes behind it and, at least in some instances, [was] undoubtedly driven by valid concerns about the modern state of class action litigation, the remedy contained in the legislation [was] more severe than the disease.”¹⁵

A Whale-Size Impact on Environmental Disaster Class Actions

After CAFA was signed into law in 2005, almost every claim related to an environmental disaster was filed in federal court. In most instances, cost structures inhibit individual filings in state court because defendants in environmental cases usually cause a small amount of harm to a large number of people.¹⁶ Even if a plaintiff mustered the gumption to go it alone and file an individual claim, she would still encounter a number of obstacles. Private attorneys are usually reluctant to sign onto cases with cost-benefit ratios and success rates that make such a venture Pyrrhic at best. Not only is the litigation complex due to a myriad of overlapping federal and state laws that govern liability in environmental calamities,¹⁷ but

the opposing side is usually a well funded corporation with a compelling incentive to win the first round of cases. By staunching the first wave of suits, the defendant-corporation can discourage subsequent plaintiffs from bringing similar suits. As a result, aggregating claims into a single class is the only cost effective means of ensuring that those harmed by environmental disasters, like the Gulf Coast fishermen, have their day in court.

Yet with any environmental disaster, time is of the essence. With each passing month, reports of Gulf fishermen filing for bankruptcy, marina owners shuttering their doors, and cleanup efforts stalling for lack of funds continue to surface.¹⁸ In July, which is usually the peak of tourism in many Gulf beach towns, some hotels in the region were reporting only forty percent occupancy rates.¹⁹

Federal courts, whose dockets are already largely overburdened, lack the capacity to expediently settle disputes.²⁰ As a result, cases languish for years.²¹ In state courts, where the vast majority of U.S. civil suits are filed, cases tend to settle much more quickly; usually through default judgments and pretrial settlements. Moreover, when conflicts of interest do arise in environmental cases, the larger pool of judges in state courts makes them better positioned to handle multiple recusals. For example, a “major” global warming case before the federal appeals court in New Orleans was delayed because eight out of sixteen judges had to recuse themselves for various reasons.²² Recusals by federal judges are already threaten-

10. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1595 (2006).
11. PUBLIC CITIZEN CONGRESS WATCH, CLASS ACTION “JUDICIAL HELLHOLES”: EMPIRICAL EVIDENCE IS LACKING 3 (2005).
12. See Reynolds & Clarke, *supra* note 7.
13. PUBLIC CITIZEN CONGRESS WATCH, *supra* note 11, at 3.
14. *Id.*
15. Anna Andreeva, Note, *Class Action Fairness Act of 2005: The Eight-Year Saga is Finally Over*, 59 U. MIAMI L. REV. 385, 405 (presenting four arguments in favor of CAFA and then debunking them).
16. Cf. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 832–33 (2001–2002) (noting that in the mass tort context, class actions provide a cost effective means for individual litigants to pool resources).
17. Federal laws related to the BP oil spill that are already in play include: The Oil Pollution Act of 1990, The Clean Water Act, The Limitation of Liability Act of 1851, The Refuse Act, The Alternate Fines Act, The Endangered Species Act, The Migratory Bird Treaty Act, and The Marine Mammal Protection Act. See Jonathan Stempel, *Special Report: BP Oil Spill a Gusher for Lawyers*, REUTERS (June 30, 2010, 9:48 AM), <http://www.reuters.com/article/idUSTRE65T2MZ20100630>.

18. An estimated 250,000 Gulf jobs in fishing, tourism, and energy may be lost later this year. See Jeannine Aversa, *Oil Spill’s Economic Damage May Not Go Beyond Gulf*, ABC NEWS, June 28, 2010, <http://abcnews.go.com/Business/wirestory?id=11030186&page=1>; see also Tim Webb, *Deepwater Oil Spill Victims, from Waitresses to Cabbies and Strippers, Plead for BP Payouts*, THE OBSERVER (London), June 20, 2010, at 7, <http://www.guardian.co.uk/environment/2010/jun/20/deepwater-oil-spill-victims-compensation-bp>.
19. Debbie Elliot, *Oil Spill Means Dismal Summer for Gulf Beach Town*, NPR, July 1, 2010, <http://www.npr.org/templates/story/story.php?storyId=128248167&ft=1&f=1006>.
20. Shaun M. Pettigrew & David R. Stras, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421, 423 (2010) (“The overall caseload in both the district and circuit courts is ‘trending upward’ . . . placing great strain on the ability of federal courts to give comprehensive consideration to every case.”); Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1551 (2005) (arguing that one of the “strong interests” cutting against the Class Action Fairness Act is “the desirability of not further overburdening the federal courts unless there is a very good reason for adding to their workload”).
21. Under the question, “When will the [district] court reach a decision on my case?” the Administrative Office of United States Court notes on its website that “[t]he average district court judge has more than 400 newly filed cases to contend with each year.” It further counsels litigants that, “in addition to trials, judges conduct sentencing, pretrial conferences, settlement conferences, motions hearings, write orders and opinions, and consider other court matters both in the courtroom and in their chambers.” In other words, the answer to the posed question is “not for quite some time.” *Frequently Asked Questions*, ADMIN. OFFICE OF U.S. COURTS, <http://www.uscourts.gov/Common/FAQS.aspx> (last visited Oct. 7, 2010).
22. See Carrie Johnson, *Judge Recusals May Hinder Gulf Oil Spill Lawsuits*, NPR, June 8, 2010, <http://www.npr.org/templates/story/story.php?storyId=127560878>; see also Jef Feeley & Margaret Cronin Fisk, *B.P. Suits Should Be Sent to New Orleans U.S. Says*, BUS. WK. (June 17, 2010, 1:39 PM), [Winter 2011](http://www.busi-</p></div><div data-bbox=)

ing to thwart litigation efforts related to the BP oil spill; at least seven federal judges in New Orleans have recused themselves, citing conflicts of interest, such as holding BP stock.²³ This has left only a few federal judges eligible to adjudicate ongoing cases.²⁴

By funneling multistate environmental class action suits into federal court, CAFA has made it far more expensive, burdensome, and time consuming for Gulf state residents to recover damages from the oil spill. The cost of spending years in federal court may deter many from filing claims against BP at all.

Why Only Environmental Class Actions?

One might inquire as to why environmental class actions should be afforded special status under CAFA in the first place. Are not all injured class plaintiffs, such as those involved in antitrust, securities fraud, employment discrimination, product liability, or any other common type of class action, entitled to as speedy a judgment as possible?

What makes environmental class actions unique from other types of class litigation is the breadth and depth of the injured class. When an environmental disaster occurs, it tends to indiscriminately impact large, geographically concentrated groups of people, paralyzing entire towns, counties, and states for years or even decades.

The injuries suffered in communities impacted by environmental calamities take on a variety of different forms. The paralysis could be primarily economic, as in the recent Deepwater Horizon oil spill in the Gulf that eviscerated businesses across every major industry in the region. The debilitating effect may also manifest itself through deaths and physical destruction to a community. In the infamous Buffalo Creek disaster in West Virginia, 125 people from sixteen small communities were killed after a coal company's negligently designed impoundment dam gave way during heavy storms.²⁵ Another 4,000 were left homeless and many survivors were ultimately forced to relocate.²⁶

Finally, the disaster may result in long lasting psychological damage. After the Exxon Valdez ran aground in the Prince William Sound, one study found that the oil spill had a profound negative impact on "social relations, traditional subsistence activities, the prevalence of psychiatric disorders, community perceptions of alcohol and drug abuse and

domestic violence, and physical health of Alaskan Native and non-Native residents of the affected communities."²⁷

While other types of class action lawsuits impact individuals with similar socioeconomic or pathologic backgrounds, they mostly affect geographically disparate groups of individuals. When Toyota recently discovered that many of its vehicles accelerated uncontrollably, leading to millions of recalls and a number of class action lawsuits, the costs (anxiety, money, and death) were spread out across the entire country.²⁸ Indeed many individuals were severely harmed in some capacity by the faulty accelerators, but no single community suffered a debilitating number of injuries so as to threaten a system-wide shutdown of the local economy. Unfortunately, this is usually not the case with environmental disasters.

As a result, environmental class actions take on a different meaning from many other types of class suits. Not only do they have the potential to provide individual monetary relief and stem long lasting psychological damage, but they also have the potential to reignite devastated local economies. In order to do so effectively, environmental class actions cannot be relegated to overburdened federal courts, which take years, and in many instances decades, to render judgments. Twenty years after the Exxon Valdez ran aground, coastal residents in affected communities are still fighting for full recovery.²⁹ The country can ill afford to have a similar situation play out in the Gulf where damages are already projected to greatly exceed those of the Exxon Valdez spill.³⁰ Congress can easily play a meaningful role in speeding recovery efforts in local communities maligned by the Deepwater Horizon oil spill by creating an exception to CAFA for environmental class actions. By allowing such cases to be filed in state courts, government officials can take the first of many steps to revive Ms. Brockovich's legacy.

nessweek.com/news/2010-06-17/bp-suits-should-be-sent-to-new-orleans-u-says-update2-.html.

23. *See id.*

24. *Id.*

25. For an insightful analysis of the lasting physical, psychological, and economic effects of the Buffalo Creek disaster on the local community see GERALD M. STERN, *THE BUFFALO CREEK DISASTER* 3 (1976).

26. *Id.*

27. Lawrence A. Palinkas et al., *Social, Cultural, and Psychological Impacts of the Exxon Valdez Oil Spill*, 52 *HUM. ORG.* 1, 8 (1993).

28. Peter Valdes-Dapena, *Toyota Recall: 2.3 Million Cars*, CNN (Jan. 22, 2010, 9:23 AM), http://money.cnn.com/2010/01/21/autos/toyota_recall/.

29. Financial recovery was determined nearly twenty years after the disaster occurred in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). However, full economic recovery in the community remains incomplete. *See, e.g.*, William Yardley, *Recovery Still Incomplete After Valdez Spill*, N.Y. TIMES, May 6, 2010, at A22.

30. Greg Bluestein, *BP Spill Worse Than Exxon Valdez, According to Government Estimates*, CHRISTIAN SCI. MONITOR, May 27, 2010, <http://www.csmonitor.com/From-the-news-wires/2010/0527/BP-oil-spill-worse-than-Exxon-Valdez-according-to-government-estimates>.