

Thinking Fast And Slow About Class Action Reform

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Law360, New York (April 26, 2017, 5:22 PM EDT) -- A book all lawyers, judges and legislators should read is Professor Daniel Kahneman's eminently accessible and elegantly humbling "Thinking Fast and Slow." Among other things, the Nobel Prize winner details the countless biases, deceits, illusions and fundamental faults of what we call "human reasoning."

Practically all of these systemic defects of the human mind have a direct or indirect application to the practice of law, legal decision-making and legislating public policy. As the title suggests, thinking fast is more likely than not the very worst way to practice law, render a judicial decision or enact legislative policy.



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A perfect example of the worst kind of "thinking fast" is reflected in H.R. 985, a bill passed by the House of Representatives on March 9, 2017, without any hearings, studies, surveys or even a single poll. The bill is an agglomeration of several corporate wish-lists and lobbyist party favors.

Under the false guise of protecting consumers and American competitiveness, the bill seeks to restrict class actions by preventing federal courts from certifying "any personal injury or economic loss" class action unless the lead plaintiff can show that each and every class member has "suffered the same type and scope of injury" as the named plaintiff. In other words, a case cannot proceed as a class action in federal court without satisfying this new, more restrictive definition of a "same injury" class.

Remarkably, the proponents of H.R. 985 are the same corporate interests and their legal counsel who lobbied for and successfully enacted the Class Action Fairness Act in 2005 (CAFA). That law significantly expanded federal jurisdiction over class actions by altering diversity jurisdiction to include any class action where a class member is a citizen of a state different from the defendant and the aggregate claim for relief is likely to exceed \$5 million.

The problem the corporate lobbyists sought to correct was that of state courts that were too readily certifying national class actions. By expanding removal jurisdiction, the corporate interests could at least eliminate nationwide class actions in state courts and significantly reduce the threat posed by the deceptively framed "judicial hellholes."

In the federal courts, according to the corporate lobbyists, multi-nationals would have a better chance of surviving or fending off a class action. In the years since CAFA, practically all significant class actions have migrated to the federal courts.

Despite this, the threat perceived by corporate interests and their counsel has not materially changed. Large class cases such as the BP Oil Spill Litigation, the Chinese Drywall Litigation, the GM Ignition Switch Litigation and the Wells Fargo False Account Litigation are still being filed — only this time primarily litigated and resolved in federal courts. Hence, H.R. 985.

This is where "thinking fast" comes in. H.R. 985 does not elaborate on the new "same type and scope of injury" standard for a federal class action, the vagueness of which appears to be

intentional. Advocates for the bill claim the standard emanates from the Supreme Court's Wal-Mart v. Dukes decision, which reversed certification of a class of female workers who claimed they were systematically underpaid or under-promoted because of their sex.

But this explanation conflates the substantive merits element of the Title VII discrimination claim with the procedural commonality requirement of Rule 23. While the high court in Dukes acknowledged an overlap for Title VII claims, it categorically did not engraft the Title VII intent requirement on to the Rule 23 commonality test.

Title VII and class requirements, to be sure, were both discussed in Dukes, but the two were not equated or combined. A grunting steer and a leather couch both have hides but they are far different when it comes to comfortable seating.

All persons familiar with class actions understand it is impossible to define any class in which all members have suffered the "same type and scope of injury." People purchase different amounts of an artificially inflated stock at different times and prices; they pay different amounts at different times and places for the same model of defective car; they take different amounts for different reasons of a defective or overpriced drug; and they buy different amounts of a commodity whose price has been inflated through a price-fixing conspiracy.

In all of these instances, however, the central issue of whether the defendant engaged in a common course of conduct to inflate its stock price, sell its defective car, market its defective or overpriced drug, or charge supra-competitive prices in a true market can be and has been answered in one proceeding for all of the persons who transacted with the defendant in a defined time frame.

The point, as even a cursory reading of Dukes reflects, is the commonality of the defendant's conduct, not the sameness of the victims' injuries.

Here again, "thinking fast" comes into play. If the new substantive "same injury" standard of H.R. 985 were to become law, the "thinking slow" question is: What impact would that have on CAFA jurisdiction?

What if a lead plaintiff conceded in his or her state class action complaint that not all members of the proposed class have the same type and scope of injury as set forth under the new federal class action standard? While current law might treat such a "class" as sufficiently diverse to support federal jurisdiction, could it be true that a class not meeting the "same injury" standard would lack the standing or federal definitional requirements for CAFA jurisdiction?

Is it possible — again, "thinking slow" — that H.R. 985 could work a repeal and replacement of CAFA jurisdiction, thus returning the bulk of personal injury and economic loss class actions to the state courts, particularly those common law state courts that do not have the same "case or controversy" standard as the federal courts?

If H.R. 985 is, in truth, a repeal and replacement of CAFA jurisdiction, do the proponents of the bill understand, realize or appreciate that most class actions will then return to the state courts, including the same national class actions they once sought to remove to the federal courts? Is that what they really want? Think about it, but think slow.

Michael D. Donovan is a founding member of Donovan Litigation Group LLC, and has been involved in litigating numerous securities and consumer justice class actions. He is the chair of the Consumer Law Subcommittee of the ABA Litigation Section's Class Actions and Derivative Suits Committee.

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