CLASS ACTION FAIRNESS ACT OF 2003

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CLASS ACTION FAIRNESS ACT OF 2003

THURSDAY, MAY 15, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:02 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr., (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order.

Today, the Committee will conduct a legislative hearing on H.R. 1115, the "Class Action Fairness Act of 2003," introduced by Members Goodlatte and Boucher.

The increasing use and abuse of class action lawsuits filed in State courts continues to be a matter of grave concern. Long ago this matter became more serious than the occasional frivolous class action lawsuit that produced an outrageous verdict or settlement. The problems are now systemic. They are a threat to the integrity of our civil justice system and a drain on the national economy.

Since this economy last conducted a hearing on class action reform in the 107th Congress, the problem has gotten worse, not better. In the last 10 years, State court class action filings nationwide have increased over 1,000 percent. In certain "magnet courts" known for certifying even the most speculative class action suits, the increase in filings over the last 5 years is now approaching 4000 percent.

Last November, *The Washington Post* editorial board, in a critique of the present system, wrote:

"Class actions permit almost infinite venue shopping; national class actions can be filed almost anywhere and are disproportionately brought in a handful of State courts whose judges get elected with lawyers' money. These judges effectively become regulators of products and services produced elsewhere and sold nationally. And when cases are settled, clients get token payments, while the lawyers get enormous fees. This is not justice; it is an extortion racket only Congress can fix."

So today, the Committee is once again acting to examine the scope of the problem and to fix it. Clearly, some lawyers are winners under the current rules. The present rules encourage a race to any available State courthouse in the hopes of a rubber-stamped nationwide settlement that produces millions in attorneys' fees. But the ultimate losers in this system run amok are the consumers, who have their individual rights to relief preempted, receive only coupons as their reward, and bear the cost of increased prices for goods and insurance.

Article III of the Constitution empowers Congress to establish Federal jurisdiction over cases between citizens of different States. But the current rules require all plaintiffs and defendants to be residents of different States, and that every plaintiff's claim is valued at $75,000 or more. These jurisdictional statutes, enacted before the advent of modern class actions, lead to results the Framers would find perverse.

For example, under current law, a citizen of one State may bring in Federal court a simple $75,001 slip and fall claim against a party from another State. But if a class of 25 million product owners living in all 50 States bring claims collectively worth $15 billion against the manufacturer, the lawsuit usually must be heard in State court.

H.R. 1115 would apply new diversity standards to class actions by changing the diversity requirement for class actions where any plaintiff and any defendant reside in different States and where the aggregate of all plaintiffs' claims is at least $2 million. These modest changes will keep large actions of a national character in Federal court where they belong.

H.R. 1115 also addresses another major area in need of reform, the incentives for settlements in class action cases and scrutiny of those settlements. Under current rules, the first case settled wins. Those left out must either find a way to join the settlement or forego their claim. This leads to bad settlements favoring lawyers over consumers in jurisdictions with lax class actions requirements.

In the last year, more such one-sided benefits benefiting only lawyers have occurred. For example, one, a settlement with Blockbuster over late fees, produced $9.25 million in lawyer fees, and nothing but dollar coupons for the consumers represented, only 20 percent of which will likely be redeemed.

Second, a State settlement with Crayola over asbestos included in crayons produced $600,000 in attorneys' fees and nothing but a 75-cent discount on more crayons for affected consumers.

In order to help prevent abuses like these, H.R. 1115 aims to protect plaintiffs by prohibiting the payment of bounties to class representatives, barring the approval of net loss settlements, establishing a "plain English" requirement which clarifies class members' rights, and by requiring greater scrutiny of coupon settlements and settlements involving out-of-State class Members.

I will now recognize the gentleman from Virginia, Mr. Boucher, for an opening statement.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

During the course of the last Congress, class action reform legislation, which I was pleased to join with my colleague, the gentleman from Virginia, Mr. Goodlatte, in introducing, was approved in this Committee, and also approved with a bipartisan majority on the floor of the House.

Unfortunately, during the last Congress, the Senate did not take up this measure. In the intervening 2 years, the problems we have been seeking to address have grown and more voices have now been raised in support of our modest remedy.

Cases that are truly national in scope are being filed as State class actions before certain favored judges who employ an almost "anything goes" approach that renders almost any controversy sub-

ject to certification as a class action. In that environment, defendants, and even the plaintiff class members, are routinely denied their range of normal rights as there is a rush to certify classes and then a rush to settle the cases.

Plaintiffs suffer a range of harms. In order to prevent removal of the case to Federal court, the amount sued for is sometimes kept artificially below the $75,000 Federal jurisdictional threshold amount.

In another effort to avoid removal to Federal court, the class action complaint sometimes will not assert Federal causes of action that could legitimately be raised, thereby denying the plaintiffs an opportunity to have these particular aspects of their claims heard.

Sometimes in the settlement of the cases, the plaintiffs get mere coupons while their lawyers make millions. And in at least one case, the plaintiff class members at the end of the settlement had a deficit of $91 posted to their mortgage escrow accounts, while their lawyers received $8.5 million in compensation for their services. The plaintiffs actually had a net loss as a result of this action. They were worse off than if the class action had never been filed.

Our legislation addresses these problems by preventing cases that are truly national in scope to be removed to the Federal courts, even if the strict diversity of citizenship requirements of current law are not met.

Instead, we look to the center of gravity of the case. The target of these cases is typically a large out-of-State corporation. The plaintiffs are usually consumers who reside in many States across the Nation. These cases are national in character, and our bill would permit their removal to Federal court, even if a local defendant has been sued for the purpose of destroying complete diversity of citizenship.

In one noted example of the abuse and injustice that has occurred, a pharmacist in Mississippi, who testified before this Committee in the last Congress, has been sued hundreds of times, not because anyone expected to recover anything from her, but because her presence in the case kept that case out of Federal court and kept it in State court in the State of Mississippi.

The reform that Mr. Goodlatte and I are advancing is truly modest, and it would be effective in resolving the problems plaguing current class action State practice.

I appreciate the Chairman scheduling this hearing today, and I look forward to further action on the bill in this Committee and on the floor of the House.

Thank you, Mr. Chairman. I yield back.

Mr. GOODLATTE. [presiding.] I thank the gentleman for his comments, and for joining me as the lead cosponsor in this important legislation which we have passed through the House of Representatives twice, and I am very optimistic that we will do so again in the very near future.

However, the great interest we have right now is in the progress that is being made in the Senate. That is very encouraging.

This legislation is badly needed. It is very bipartisan, and it targets a very significant and serious problem in our country. That is the imbalance that exists in the ability to bring forward class action lawsuits, which we certainly recognize is an important right,

but the inability to get fair treatment in the judicial process because of the fact the case has become locked into the judge that is selected by the plaintiff, in many cases.

There are over 4,000 jurisdictions in this country, so a nationwide class action lawsuit with plaintiffs located all across the country gives the attorney the opportunity, and any good attorney is going to exercise that opportunity, to choose the jurisdiction they feel is most favorable to their case. That is well recognized. As a trial lawyer, I certainly looked for what I thought was the best jurisdiction.

But in the cases that I handled, you would have two, three, maybe four or five different courts that I could bring the action in, and that was it. Being able to choose from 4,000 and knowing which are the couple of dozen jurisdictions that are most friendly to certification of these nationwide class action lawsuits, is an unfair advantage. It becomes an even more unfair advantage when it is impossible to move the case to Federal court because of Federal rules which are indeed arcane in the light of the use and the abuse of the class action process in recent decades.

Our Founding Fathers created diversity jurisdiction for the very type of cases that we are considering here: cases involving parties from a multitude of different States being brought into Federal court for fair treatment.

The fact of the matter is that because of the diversity requirements of having to allege $75,000 per plaintiff, a class action lawsuit of 1 million plaintiffs involving an average claim of $50,000, or a $50 billion lawsuit, cannot be brought in Federal court under our diversity rules; while a simple slip and fall involving a Virginia plaintiff and a Maryland defendant and alleging $75,000 in damages can be. That is wrong, and that is what this legislation is designed to fix.

It has a number of other important features dealing with making sure that bounties aren't paid to the named plaintiff in the suit while every other plaintiff in the case receives a coupon, or in some instances actually have to wind up paying attorneys' fees in cases that they were not seeking to become a part of that class action.

I myself have seen this abuse in class actions that I have been named a plaintiff to because of a company that I have done business with, and where the attorneys were proposing to receive millions of dollars in attorneys' fees, I think $13 million in that case. I was going to receive a promise from the company that they would not engage in this activity, which all 50 States have authorized this activity to take place, but this one judge certifying this class action lawsuit didn't think was appropriate. That kind of action, overturning the laws of the 49 other States by bringing a class action lawsuit in a State court, is a further abuse of the process.

Some have criticized this legislation saying that it violates the rights of the States. I would strongly argue the opposite, that this corrects an abuse of the States by allowing the Federal courts to determine issues that affect a multitude of different jurisdictions, and not allowing one State court judge in one jurisdiction to decided on the law of the other 49 States.

This legislation is badly needed. We have shown that time and again here in the House. We look forward to working with the Sen-

ate to produce a bill to send to President Bush, who has indicated his intention to sign legislation ending this abuse.

At this time the Chair would be happy to recognize the witnesses. We are very pleased to have Assistant Attorney General Viet Dinh. Viet Dinh has served as the Assistant Attorney General for the Office of Legal Policy since May 31, 2001. Prior to his entry into Government service, Mr. Dinh was Professor of Law at the Georgetown University Law Center. He was a law clerk to Judge Lawrence H. Silverman of the U.S. Court of Appeals for the D.C. Circuit and to U.S. Supreme Court Justice Sandra day O'Connor. Dinh graduated magna cum laude from Harvard and Harvard Law School.

Commissioner Lawrence H. Mirel has served as Commissioner of the District of Columbia Department of Insurance and Securities Regulation since he was appointed by Mayor Anthony A. Williams in 1999. Commissioner Mirel directs the 100-person Government agency responsible for enforcing all laws of the District of Columbia relating to the conduct of the businesses of insurance and securities in the jurisdiction.

Mr. Mirel also plays an active role in the National Association of Insurance Commissioners and chairs their new working group on class action litigation. Before becoming Commissioner, Mr. Mirel worked in the insurance industry, practiced and taught law, and served as a congressional aide.

Mr. John Beisner heads the 120-attorney class action practice group at O'Melveny and Myers. Mr. Beisner specializes in the defense of purported class actions, mass tort matters, and other complex litigation in both Federal and State courts. Over the past 20 years, he has been involved in the defense of over 440 class actions in Federal and State courts of 37 States at both the trial and appellate court level.

Mr. Beisner is also a frequent writer and lecturer on class action and complex litigation issues, and has been an active participant in litigation reform initiatives before Congress, State legislatures, and judicial committees. He has testified before this Committee previously on class action reform, and he is a graduate of the University of Michigan Law School.

Mr. Brian Wolfman has served since 1990 with Public Citizen Litigation Group as a staff attorney. Mr. Wolfman practices in the areas of consumer health and safety, class actions, court access, open Government litigation, general appellate litigation, and poverty law.

In addition to litigating cases for Public Citizen, Mr. Wolfman has taught law as an adjunct professor during this time, and has been published on numerous topics, including class action. Prior to joining Public Citizen he worked for Legal Services Corporation, and clerked for the U.S. Court of Appeals for the 11th Circuit.

He is an honors graduate at Harvard Law School and the University of Pennsylvania.

At this time we are pleased to recognize Assistant Attorney General Dinh. We would remind all panelists that their full statements will be part of the record. We ask you to limit your comments to 5 minutes.

Attorney General Dinh, thank you for being with us.

STATEMENT OF THE HONORABLE VIET DINH, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. DINH. Thank you, Mr. Chairman, for the opportunity to present the views of the Department of Justice. I want to commend you for your leadership in class action reform, as well as the efforts of other cosponsors of the legislation.

I want to especially thank Chairman Sensenbrenner for having this hearing. He is a good friend of the Department, and an advocate of good government, as represented by his cosponsorship of this excellent legislation, the "Class Action Fairness Act of 2003."

Just as we did in the 107th Congress, the Department and the Administration strongly support your efforts to reform our Nation's class action system, and we strongly support this bill.

Let me emphasize at the outset, as you have, that the problem here is not the class action device itself. If that were the case, we would simply repeal Rule 23 and we can all go home. Everyone recognizes that class actions serve a very noble goal: the protection of large numbers of victims with similar claims who, without the ability to aggregate their claims in a class, may not have an effective remedy in the courts.

Abuses of this mechanism, however, have taken a toll on our legal system. As explained by multiple committees of the Judicial Conference, the process burdens both plaintiffs and defendants with expenses of multiple litigation. Worst of all, under the current system, the incentives in class action litigation often inhibit the resolution of lawsuits on terms that are fair to victims and consumers.

The goal of class action reform, then, is to end the abuses so that the class action device will work effectively to serve its noble purpose of compensating victims, deterring wrongdoers, and protecting consumers. The Department supports each of the three essential components of the "Class Action Fairness Act of 2003."

First, the bill would establish a consumer class action bill of rights. The bill would establish long needed protections for class action plaintiffs whose rights are often advocated by lawyers not of their own choosing in fora with which they have little connection and where settlements are often approved without their knowledge. This section guards against settlements that are unreasonable or even harmful to individual class members by requiring thorough review by the courts.

To ensure that class members receive adequate information and notice, this section also requires settlement notices to be in plain English and in a standardized, easy-to-read-and-understand format. These and other commonsense consumer protections will help restore class actions to their noble purpose.

Second, the legislation would expand Federal court jurisdiction for national class actions. In addition to the problem of duplicative class actions filed in numerous States, certain State and local courthouses have become notorious for the ease with which they certify nationwide class action actions and impinge upon the substantive laws of other States.

Threats of large awards arising out of class actions filed in these jurisdictions coerce defendants to agree to disproportionately high

settlement amounts. Such interstate litigation is exactly why the Framers created diversity jurisdiction, to provide a Federal forum preventing bias against out-of-State defendants and out-of-State plaintiffs.

The legislation would close the gap in diversity jurisdiction and prevent attorneys from avoiding removal through artful pleading. Specifically, sections 4 and 5 relax the so-called complete diversity rule and instead would permit but not require removal by any class member and any defendant so long as there is "minimal diversity", as long as the aggregate amount in controversy exceeds $2 million and the lawsuit is not primarily intrastate in nature.

The Department fully supports these changes to the Federal diversity jurisdiction and removal procedures, which recognize the strong Federal interest in class action litigation that is national in reach and in scope.

Third, the bill would allow immediate appeal of class action certification decisions. Federal Rule of Civil Procedure 23(f) currently permits appeals of class certification decisions as a matter of judicial discretion. The bill would permit immediate appeal of certification decisions as a matter of right.

The Department litigates numerous class actions on behalf of the Federal Government and other agencies, and our interest in this provision is born of experience. We have seen many cases where a class is certified, and 15 or 20 years later the actual merits of the case are actually appealed.

By that time the incentives for review are quite significant, and courts are very, very hesitant to overturn the initial class certification decision, even if, as in a number of cases, they have reason to suspect that the original certification decision was ill-informed. This immediate certification appeal would recognize that the decision has significant litigation impact on the interests and incentives for both sides of the case, and allow for an immediate appeal of such a decision.

In sum, H.R. 1115 is an important step in returning common sense to the Nation's class action system. It will, in our judgment, alleviate some of the burdens on class action litigants and provide greater protections for the class action system's intended beneficiaries, victims and consumers. The Attorney General and the President share your goal in reforming the class action system. We greatly appreciate your efforts, and would answer any questions that you may have.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Dinh follows:]

PREPARED STATEMENT OF VIET D. DINH

Mr. Chairman, it is a pleasure for me to be here this morning to present the views of the Department of Justice on H.R. 1115, the "Class Action Fairness Act of 2003." The Department of Justice supports this bill, which is nearly identical to H.R. 2341 passed by the House of Representatives in the 107th Congress, also with our strong support. Mr. Chairman, we appreciate your leadership on this important legislation, and the leadership of the bill's bi-partisan group of sponsors.

Let me emphasize at the outset that the problem is not the class action device itself. If that were the case, then we could simply repeal Rule 23 and all go home. Everyone recognizes that class actions can serve a very important goal. As one former Solicitor General has stated, "their true purpose is noble—to vindicate the

rights of large groups of individuals who sought justice for civil rights violations and other wrongs, but who could not achieve such justice individually."

Class action abuses, however, have taken a toll on our legal system. All too often, class actions represent a lawyer's rush to the courthouse in order to select the most favorable State forum before duplicative actions purporting to represent the same victims with the same claims are filed in other States. In essence, it becomes a race to the courthouse for the attorneys to see who among them can file and then settle his or her case the fastest and thereby collect attorney's fees. The losers in this race are the victims who often gain little or nothing through the settlement, yet are bound by it in perpetuity.

As explained by committees of the Judicial Conference, overlapping and duplicative class actions in federal and state courts threaten the resolution and settlement of such actions on terms that are fair to victims, burden both plaintiffs and defendants with the expenses of multiple litigation of the same issues, and place conscientious class counsel at a potential disadvantage. Certainly we can all agree that consumers such as Bank of Boston account holders do not benefit when plaintiffs are each awarded $8.76, but then each must pay $90 to the attorneys who purportedly brought the action on their behalf. The goal of class action reform, then, must be to stop the abuses which have frustrated the class action device's noble purpose.

The Class Action Fairness Act of 2003 contains three distinct, but necessary components: (1) a "Consumer Class Action Bill of Rights" which addresses the administration of class actions in Federal courts; (2) expanded federal diversity jurisdiction to ensure that class actions with national implications can be heard in federal courts; and (3) expedited appellate review of decisions whether to certify a class. I would like to briefly address each in turn.

CONSUMER CLASS ACTION BILL OF RIGHTS

Section 3 of H.R. 1115, entitled the "Class Action Bill of Rights and Improved Procedures for Interstate Class Actions," would establish long needed protections for victims whose rights are often adjudicated by lawyers not of their choosing in fora with which they have no connection, and where settlements are, in practical effect, imposed on them. Too often victims receive notices of class action settlement proposals that are too confusing to provide any meaningful information about the proposed settlement. This section appropriately would guard against settlements that were unreasonable or even harmful to individual class members by providing for thorough review by the courts. To ensure that class members receive adequate information, this section would require settlement notices be in plain English and in a standardized, easy-to-read format.

FEDERAL COURT JURISDICTION FOR NATIONAL CLASS ACTIONS

In addition to the problem of duplicative class actions being filed in numerous states, certain local courthouses have become known for the ease with which they certify class actions. The threat of large awards arising out of class actions filed in these jurisdictions coerces defendants to agree to disproportionately high settlement amounts. Often, these tiny jurisdictions are the first to adjudicate a class action claim and impose their laws on class members from other States and on those States themselves, where similar actions may be pending. Such interstate litigation is exactly why the Founders created diversity jurisdiction: to provide a Federal forum preventing bias against out-of-State defendants and out-of-State plaintiffs.

H.R. 1115 would close the gap in diversity jurisdiction that has resulted from the interpretation and application of diversity and jurisdictional amount requirements in the unique class action world. The bill would prevent attorneys from avoiding removal through artful pleading that eliminates full diversity or minimizes the claimed damages of the individual class members—actions that fail to serve the victims and prejudice the defendants. Specifically, sections 4 and 5 of H.R.1115 provide much needed amendments to Federal diversity jurisdiction by relaxing the "complete diversity" rule. The Act would permit, but not require, removal by any class member and any defendant, so long as there is "minimal diversity," the aggregate amount in controversy exceeds $2 million, and the lawsuit is not primarily intrastate in nature.

Importantly, H.R. 1115 also contains an anti-circumvention measure. Section 4 provides that—regardless of the label placed on a lawsuit by the State court—an action will be "deemed" a class action if: (1) the named plaintiff (exclusive of a State attorney general) purports to act for the interests of its members who are not named parties to the action; or (2) the monetary relief claims of 100 or more other persons are proposed to be tried jointly in the action on the grounds the claims involve common questions of law or fact. This definition would appropriately encompass "pri-

vate attorney general suits" in which an individual seeks to recover on behalf of the general public, as well as "mass actions" brought on behalf of plaintiffs who claim that their suits present common questions of law or fact that should be resolved in a single proceeding.

The Department fully supports these changes to Federal diversity jurisdiction and removal procedures, which recognize the Federal interest in significant class action litigation that truly involves multiple interstate plaintiffs and defendants. In addition, providing for consistent and uniform Federal adjudication of these claims will protect each State and its citizens from other State courts' legal rulings from which there is no recourse.

Prior witnesses before this committee have described the multi-billion dollar judgment awarded in Madison County, Illinois against State Farm Insurance for repairing automobiles with "aftermarket parts" as distinguished from original manufacturers' parts. That decision applied Illinois law to plaintiffs in all 50 states, even though such a ruling was contrary to state insurance regulations in New York, Massachusetts, and Hawaii among other places. The State Farm case is not an isolated example. Right now, for instance, we are following with interest a case in Oklahoma where a nationwide class has been certified against DaimlerChrylser Corporation. The Oklahoma courts plan to apply Michigan law to adjudicate, on behalf of residents of all 50 states, claims that Chrysler should not have installed certain airbags that comply with federal safety standards.

Expansion of Federal diversity jurisdiction, of course, will shift some state class actions to the Federal courts. However, Federal courts have significant interests in cases that involve interstate commerce and parties from many States, and federal adjudication avoids costly and inefficient duplication in State courts. The Constitution's provision for diversity jurisdiction was intended to prevent just the sort of local biases that have resulted from State court class actions that often award higher settlements to in-State victims and award excessive damages against out-of-State defendants. The unique circumstances of class actions, a modern phenomenon, have outstripped the original conception of 28 U.S.C. § 1332, when that provision was initially enacted.

INTERLOCUTORY APPEAL OF CLASS CERTIFICATION DECISION

Because a district court's decision whether to certify a class often is decisive—a decision to certify may place insurmountable pressure on the defendant to settle, while a refusal to certify may force the plaintiffs to abandon their claims—the bill permits immediate appeal of certification decisions as a matter of right. Immediate appeals of certification decisions can be crucial to efficient management of class actions, preventing the nightmare situation where parties engage in years of expensive litigation under a ruling on the class certification, only to have the appeals court reverse the class certification determination. Contrary to concerns voiced about previous legislative proposals, H.R. 1115 would not encourage or permit the destruction of documents or other evidence during the appeal of the certification decision. On the contrary, discovery would be stayed under this section unless the court finds that specific discovery is necessary to preserve evidence or to prevent undue prejudice.

CONCLUSION

In sum, H.R. 1115 is an important step in returning common sense to the nation's class action system and providing greater protections for the victims the system originally was designed to benefit. The bill would update diversity jurisdiction appropriately to account for class action litigation, while permitting State court actions to proceed in cases where no party sought removal and in specified circumstances such as where the class is relatively small or where the primary plaintiffs and defendants are within the State. Thus, State courts would be able to offer redress and provide a convenient forum for their citizens, while Federal courts would provide a forum for truly interstate class actions.

Thank you for this opportunity to present our views. We greatly appreciate your efforts in support of meaningful class action reform. I would be pleased to answer any questions that the Committee may have on this subject.

Mr. GOODLATTE. Thank you, Attorney General Dinh.

Mr. Mirel, welcome. We will be glad to have your testimony, as well.

STATEMENT OF LAWRENCE H. MIREL, COMMISSIONER, DISTRICT OF COLUMBIA DEPARTMENT OF INSURANCE AND SECURITIES REGULATION

Mr. MIREL. Thank you. I am very glad to be here.

I am the Insurance Commissioner for the District of Columbia. In that role, I have the privilege of enforcing the laws passed by this Congress from the time the office was created in 1901 until the time the District government was set up in 1974, and since then the bills passed by the District council with the approval of this Congress.

I have the same role for the District of Columbia as State insurance commissioners in the States, and in essence, I am your State insurance regulator.

I agree with the statements made by the Chairman and by the other Members who have spoken already, and I agree with Mr. Dinh's comments. The problem is not class action per se; the problem is the abuse of class actions. What I want to do today is describe one of those abuses in some detail.

We have a very elaborate system of State regulation of insurance in this country today. I am not speaking for the State regulators per se today, I am speaking on my own behalf, but I am an active member of the NAIC, and I know this is a matter of interest to the association.

What we do is enforce laws that have been enacted by legislators, by this Congress in my case, and by the State legislators in the case of my colleagues. Very often, our ability to enforce those laws is compromised by State class actions that are filed in other States.

There are two different systems in conflict here, in my view. One is the statutory law system, the system where legislators representing the people enact laws that are designed to provide the greatest good for the greatest number.

The other is the common law system, where parties go into court to try to resolve a dispute between them. They serve very different purposes, and in the courtroom the judge is enjoined to do justice between the parties. It is not his responsibility to look at the larger issues and to deal with the larger good. That falls to the legislators and to those of us who administer the laws passed by the legislators.

Let me give you a couple of examples of where these conflicts exist. I think, by the way, that this bill is a very excellent start in trying to fix some of these problems, because I think they can be more easily handled in the Federal courts than they can in the State courts.

I agree with what Mr. Goodlatte said earlier, that it is not a diminution of State law, but rather an enhancement of State law.

Let me mention one case filed in a municipal court in Los Angeles claiming that the Nation's largest auto insurer, a mutual company, was retaining too much of its earnings in reserves. The suit asked that the company be forced to disgorge these reserves to the mutual policyholders.

My responsibility as an insurance commissioner is to make sure this company and other companies like it have enough reserves to be able to pay future claims. I take that seriously. We need to protect our citizens. That is our job. The best way to do it is to make

sure the companies can pay their claims when those claims are due.

Now, what happens when a jury of laymen in municipal court in Los Angeles decides that this company must reduce its reserves? I never get a chance to comment on that. Yet, I am charged by statute with making sure that this company is viable.

That case was dismissed by the trial judge. It was appealed, and the intermediate appellate court in California restored the suit in a two-to-one decision, and it is now before the California Supreme Court.

Let me give you one other example. I know my time is running out. There are more in my testimony.

A series of cases have been filed in New Mexico in State court against all the major life insurance companies in the United States on the issue of modal payments. A modal payment is the ability to pay a premium due installments. That is, you know what the annual premium is, but you are allowed to pay it every 6 months, every quarter, or every month. Companies typically charge a small fee for that, for the administration of these checks.

The suit does not claim these modal payments are illegal, it does not claim that they are excessive, it does not claim, even, that they are unknown to the people who choose modal payments. The single claim is that these payments are not expressed in terms of annual percentage rates, APRs. That, they claim, is a violation of fair practices under the New Mexico unfair trade practices law.

Now, we have approved these arrangements, and yet we are going to be told they are not valid. Well, these cases are not going to trial, they have all been settled, the first for $7.5 million, all went to the plaintiff's attorneys, none went to the plaintiffs; the second for $10 million, all went to the attorneys, and the plaintiffs got $30 off on their next purchase of insurance from that life insurance company.

That is the kind of abuse that is going on. That is why I would like to support this bill.

[The prepared statement of Mr. Mirel follows:]

PREPARED STATEMENT OF LAWRENCE H. MIREL

Mr. Chairman and members of the Committee, my name is Lawrence Mirel. I am the Commissioner of Insurance and Securities for the District of Columbia. The position I hold was originally created by Congress in 1901[1] as the Office of the Superintendent of Insurance for the District of Columbia and became part of the District's "Home Rule" Government upon the passage of the Home Rule Act of 1973.[2]

As you know, the business of insurance is regulated primarily by the states.[3] Although the District of Columbia is not a state, I have the authority of a state insurance commissioner, and I am a full member of the National Association of Insurance Commissioners (NAIC). My job is to enforce the insurance laws and the securities laws of the District of Columbia as enacted over the years by the Congress of the United States, as the District's primary legislature,[4] and by the Council of the District of Columbia, with the approval of Congress, since that body was created in 1974.

Although I chair an NAIC working group looking into the issue of the impact of class action lawsuits on the regulatory authority of state insurance commissioners, I am speaking today solely in my capacity as insurance commissioner for the Dis-

[1] 31 Stat. 1289, CH 854 § 645

[2] The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 777, D.C. Official Code, § 1–201.01 *et seq.*

[3] McCarran-Ferguson Act, 15 U.S.C.A. § 1011 *et seq.*

[4] U.S. Constitution, Art. I, Section 8, clause 17.

trict of Columbia, and not on behalf of the NAIC. The NAIC working group was established only recently and has just begun its work.

I want to thank the Committee for its consideration of H.R. 1115. This is very significant legislation and an important first step in curbing the abuses—"havoc" is not too strong a term—that certain kinds of class action lawsuits can visit on an orderly and well-regulated insurance system. I do not think this legislation alone is sufficient to protect the public against the cost and dislocation of questionable class action litigation against insurers, but it will go a long way toward eliminating one of the most egregious aspects of the current system—the ability of plaintiffs' lawyers to "forum shop." Currently plaintiffs' lawyers can file their nationwide suits in the most favorable state or county court they can find. H.R. 1115 provides for the removal of most class action suits to federal District Courts, where appointed, tenured judges are likely to have a broader outlook on the issues at stake.

What H.R. 1115 does not address directly, however, is the larger issue of the impact of certain kinds of class action lawsuits on the statutory authority of elected or appointed state insurance regulators. I would like to urge this Committee to consider, as part of this bill or as future legislation, an "exhaustion of administrative remedies" provision that would make clear that *where there is a statutory regulator and an administrative remedy available* for the abuse complained about, plaintiffs must show that they tried and failed to obtain relief from the regulator before they are allowed to file their complaint in court.

As a state insurance commissioner, my primary function is to protect the public. My colleagues and I see ourselves as consumer advocates, and the laws we administer give us that responsibility and authority. Our expert staffs are knowledgeable about the stringent laws that govern the operation of the business of insurance, and about the complex financial rules that insurance companies must follow. We receive and act upon consumer complaints against insurance companies. We make sure that insurance contracts are fair, understandable, and in accordance with the law. We go after companies that do not treat their customers properly, or that are engaged in fraud. We have substantial enforcement tools at our disposal, including the authority to fine or even to close down insurance companies that misbehave, and to refer bad actors for criminal prosecution.

Insurance is a highly regulated business, and it needs to be. There is no other business in which a customer pays up front for protection against some future event without knowing when, or sometimes even if, that event will occur. As insurance commissioners, we must make sure that when a covered claim is made the company that took the consumer's premium money is able and willing to pay that claim. That means we must assure that the insurers we regulate are solvent and are prudent in how they manage and invest their capital and reserves. We are also responsible for maintaining a fair and competitive insurance market that allows insurance companies to offer their customers good products at fair prices in accordance with clear and uniformly applied laws and regulations. In other words, we have the statutory responsibility to balance all aspects of the insurance market to make sure that the public is well served.

Judges have very different responsibilities. They are required to render justice as between the parties before them, without regard to the larger public or to issues of economic impact on persons or institutions that are not represented in the courtroom. Where the matter at issue involves one or a small number of injured persons, a litigated solution can provide the fairest solution. Where a claim is filed, however, on behalf of millions of persons, most of whom are unaware that they have been "injured," and where the result of such litigation is to severely distort the insurance market, by increasing costs to policyholders and future policyholders in order to provide token benefits to those persons putatively injured, the system does not provide justice and does not serve the public interest.

Large-scale nationwide litigation against major insurance companies frequently circumvents or simply ignores state insurance laws and the role of state regulators. Class action lawsuits against insurers can, and often do, directly impair our statutory authority to regulate the business of insurance in our jurisdictions. Moreover these suits, whether successful or not, can have a major effect on the cost and even the availability of good insurance products to the public. That is because they produce small, sometimes negligible, benefits to a large class of present or past policyholders—and, incidentally, huge legal fees to the lawyers who bring them—without regard to the impact on the insurance market as a whole and the cost to the insurance-buying public.

Consider the following examples:

- In Texas, two of the state's largest automobile insurance companies eventually decided to settle a $100 million class action lawsuit brought against them

in 1996 over a long-standing, industry-wide practice of "rounding up" to the nearest dollar for auto insurance premiums. Although the insurers' premiums were calculated according to specific instructions from the Texas Department of Insurance, mounting legal expenses and negative publicity compelled the companies to settle for nearly $36 million. Policyholders received refunds of about $5.50 each, while the lawyers took home almost $11 million.

- More than 20 nationwide class action lawsuits are currently pending in New Mexico's trial courts claiming that the nation's largest life insurance companies are misleading policyholders by not disclosing the "annual percentage rate" of fees charged for processing installment payments of premiums. In the District of Columbia, and in most if not all states, companies are allowed to charge small processing fees to customers who make "modal payments" on their annual premiums, so long as those charges are disclosed and are reasonable. I would not permit companies selling in the District of Columbia to show these fees at an "annual percentage rate" because APRs imply that a loan was made, and there is no loan. Modal payments are simply a convenience to customers who would rather not make lump-sum annual payments. There has never been a complaint about such charges in the District of Columbia or any other jurisdiction, as far as I know. Yet not only was the issue not raised with the New Mexico Insurance Commissioner before suit was filed, but when he tried to intervene in the case his petition was denied.

Facing billions of dollars in potential liability, as well as the threat of massive costs to defend themselves against these suits, insurance companies are under tremendous pressure to settle. Once the first modal premium case was settled, with $7.5 million paid to the plaintiffs attorneys and *nothing* to class members, that pressure increased. A second insurer agreed to a proposed settlement of $10 million, all of which was to go to the plaintiffs attorneys, but this proposal was withdrawn when Trial Lawyers for Public Justice—a plaintiffs' lawyers trade association—denounced it as "outrageous" and "an abuse of both the class-action device and class members." The settlement was reinstated when the company agreed to give all class members $30 off their next purchase of an insurance policy from that company. None of these modal payment cases has yet to be tried on the merits, but the damage already done to the insurance market is enormous.

- A county court in southern Illinois rendered a billion-dollar judgment against the nation's largest auto insurer that would provide miniscule payments to the six million members of the plaintiff class and huge fees for the lawyers who brought the suit. The case has already caused the insurer to discontinue nationally its practice of replacing damaged auto parts with parts made by companies other than the original manufacturer of the automobile. Now on appeal before the Illinois Supreme Court, the trial court decision has been strongly denounced by consumer advocates. Clarence Ditlow, director of the Center for Auto Safety, a non-profit group founded by Ralph Nader and Consumers Union, has expressed fear that the decision will end the use of aftermarket parts, which are allowed in the District of Columbia and most states, and required by some. Mr. Ditlow believes such a move could cost consumers an extra $2 billion to $3 billion a year for auto repairs, which of course means higher auto insurance premiums.
- A suit was brought in a Los Angeles municipal court alleging that a large national mutual insurance company based in Illinois is keeping too much money in reserves, thereby depriving its policyholders of the benefits of that money in the form of refunds or reduced premiums. The suit ignores the fact that insurance commissioners, such as myself, *require* insurance companies to maintain adequate reserves, so that we can assure the public that their covered claims will be paid. Who should decide what level of insurer reserves are "adequate" to protect the policyholders in the District of Columbia, the statutory Commissioner of Insurance for the District of Columbia or a lay jury in California? The trial judge dismissed the suit, but it was ordered reinstated by an intermediate appellate court (in a 2 to 1 decision) and is now before the California Supreme Court.
- A case was brought in Georgia against a major auto insurer claiming that the company is defrauding its insureds by paying only the cost of fixing a damaged car, and not the loss of value of the car because it has been damaged in an accident—even though the insurance contract, which has been approved by insurance commissioners of the various states where the company operates, specifically requires the company to fix the car, not to pay for any diminished value of the vehicle.

There are many more examples like these where multimillion dollar nationwide class action lawsuits are dreamed up by creative plaintiffs' attorneys and filed against insurance companies that have large amounts of money in "reserve"—money that we insurance commissioners require companies to maintain in order to fulfill our statutory obligation to protect the public by making sure that insurers are able to pay legitimate claims. The lawyers reap millions of dollars in fees from these cases, most of which are settled because of the high cost of defending against them and the fear that a loss in court could be crippling. The large policy-owning public in whose names these suits are filed generally receive little if any benefit, but end up paying for them through higher insurance premiums as companies factor the risk and cost of this kind of litigation into their rate bases.

Let me be clear about my position. I am not opposed to class action lawsuits *per se*, but rather to the abuse of such powerful and expensive litigation weapons. Class action suits, when used properly, have an important role to play in our legal system. But they should not be allowed to substitute for, or interfere with, administrative systems enacted into law by the various state legislatures and the U.S. Congress for protecting the public. When suits are filed on behalf of persons residing in more than one state, those suits should be heard in Federal, not state, court so that we do not have a court in one state, applying the law of that state, setting policy for all the other states and the District of Columbia.

The costs of large class action lawsuits are substantial, whether the cases are litigated or settled, and these costs will be paid by insurance consumers in the form of higher premiums. When valid insurance company practices, reviewed and approved by state insurance regulators, are challenged in class action litigation, we must recognize that the result could be the discontinuation of products that are desired by the public and are beneficial to the public.

I commend the House Judiciary Committee for holding hearings on this important topic, and for considering H.R. 1115, the "Class Action Fairness Act of 2003." It would be very helpful to those of us who regulate insurance at the state level to know that class actions brought in the name of our citizens in another state are going to be heard in Federal court, under Federal procedural rules, rather than the courts of that state.

I want to conclude by expressing my hope that class action reform not be looked at as a partisan issue. I was appointed to my present position by the Democratic Mayor of the District of Columbia, Anthony A. Williams. In an earlier part of my career I worked here in the House of Representatives for former Representative Robert Kastenmeier of Wisconsin, a Democrat, and in the Senate for Democratic Senator George McGovern. Before that I had been a special assistant to another Democrat, Abraham Ribicoff, when he was Secretary of Health, Education and Welfare. I do not think that concerns about possible abuses in the use of class action lawsuits should be limited to one party or one level of government. We are all in agreement about the goal-protecting the public in the most effective and efficient way we can.

Thank you for inviting me to testify. I am happy to answer any questions you may have.

Mr. SMITH. [Presiding.] Thank you, Mr. Mirel.

Without objection, the entire statements of all witnesses will be made part of the record.

Mr. Beisner.

STATEMENT OF JOHN H. BEISNER, ESQ., PARTNER, O'MELVENY & MYERS LLP

Mr. BEISNER. Thank you, Mr. Chairman.

Let me begin with a few questions for everyone in this room. Have you ever bought a product? Do you have automobile insurance? Do you have a cell phone in your pocket or a long distance service at your home? If you answered yes to any of these questions, then you are probably a plaintiff right now in a State court class action. In fact, each of us in this room today is probably a plaintiff in at least four or five such cases.

Did anybody ask you to file, or did you ask anybody to file those lawsuits? No. Did anybody ask you if you wanted to be a plaintiff in any of those lawsuits? No. Do you even know the lawyers who

supposedly represent you in those lawsuits? Probably not. Do you agree with the claims asserted in those lawsuits? Who knows, because you don't even know what those lawsuits are about.

Welcome to the world of class actions, where attorneys you never heard of can file a lawsuit on your behalf without your permission asserting claims with which you may not agree.

Unlike other lawsuits where the plaintiff controls his or her own claims, class actions are controlled by lawyers. For that reason, they are a lawyer's dream. But for that same reason, they also can be a societal nightmare, because without adequate supervision class actions present a very substantial risk of abuse.

Unfortunately, such abuse is becoming commonplace in at least some State courts. Those courts are readily certifying class actions with little regard for procedural rules or basic due process considerations. They are taking it upon themselves to tell other States what their laws should be with little regard for what their laws really are, and they are rubber-stamping class action settlements with little regard to whether they benefit the plaintiffs on whose behalf the cases were supposedly brought.

As *The Washington Post* editorialized last year, class actions have turned into an extortion racket. Plaintiffs' lawyers bring suits in small county courts with elected judges and frighten defendants into massive settlements that do little for consumers but enrich the lawyers.

For example, the current issue of Smart Money Magazine suggests that shareholders should consider selling their stock in companies that have class actions pending against them in certain county courts, regardless of the merits of those actions.

H.R. 1115 would correct that problem by amending the Federal diversity jurisdiction statute to allow more interstate class actions to be heard in Federal court, as authorized by article III of the Constitution. It would also establish a consumer bill of rights protecting class action litigants.

Opponents of H.R. 1115 argue that the bill would improperly federalize class actions, and that all cases involving State law should remain in State court. But in making these arguments, what they are essentially advocating is a repeal of a substantial portion of article III of the Constitution.

The framers included the concept of diversity jurisdiction in article III for just this situation. They wanted to provide a Federal forum for major disputes involving only State law issues—that is, disputes involving no Federal law issues at all—in order to protect out-of-State defendants from the potential of biases of local courts.

Without question, if Congress were drafting the statutes implementing article III for the first time today, class actions would top the list of cases to be heard in Federal court. They typically involve the most people, the most money, and the most interstate commerce implications of any lawsuits in our judicial system.

Only a drafting glitch that occurred when the jurisdictional statute was written over 200 years ago, before the modern day class action existed, is keeping those cases out of Federal court. Those opposing the bill are trying to preserve that glitch that prevents the full realization of what diversity jurisdiction is supposed to be. That is a glitch that allows single plaintiff $75,000 slip-and-fall

cases to be heard in Federal court while excluding billion-dollar cases involving millions of persons.

In closing, I want to mention a yet-to-be-seen alternative class action bill that reportedly will be introduced by Senator Leahy. By offering that bill, Senator Leahy is implicitly acknowledging that there is a serious State court class action problem, ending any real debate on that issue.

But beware of the Leahy bill. It is all holes and no doughnut. Supposedly, it would more rigorously regulate class actions to be heard in Federal courts, but the trick is that the bill really would not move any cases to Federal court where they would be subject to that regulation. It is like passing the Sarbanes-Oxley Act, but sticking in a provision that says it doesn't apply to corporations.

For example, as I understand it, the bill would effectively declare significant corporations to be citizens of all 50 States so that they could never remove cases to Federal court. Under the bill, lawyers could file, as I understand it, a class action in the State court of Madison County, Illinois, on behalf of all residents of New York, California, and Texas, almost 30 percent of the U.S. Population.

So the bill would encourage State courts to continue presiding over huge class actions that had absolutely nothing to do with the community in which they are filed, and that require the court of one State to dictate the laws of other jurisdictions.

The Leahy bill is a ruse to preserve the status quo. Only H.R. 1115 will provide the change that is so badly needed.

[The prepared statement of Mr. Beisner follows:]

PREPARED STATEMENT OF JOHN H. BEISNER

Since 1997, the House and Senate Judiciary Committees have held eight hearings to address concerns about a troubling scandal that is hurting consumers and businesses and undermining confidence in our legal system.[1] With each hearing, it has become clearer that the problem is getting worse. Yet, millions of Americans continue to be ripped off, our courts continue to be misused for personal gain, and the public is still waiting for their elected representatives to pass corrective legislation.

The scandal that I am referencing, of course, is class action abuse. Every year, thousands of class actions are filed in the United States—the vast majority in our state court system. The attorneys who file such lawsuits explicitly represent to the court that they are filing their actions on behalf of allegedly injured individuals and that they are assuming a fiduciary responsibility to fully vindicate those individuals' rights. But the record is now clear that all too frequently, the interests of the supposedly injured parties in those cases are not really represented at all. Indeed, in many instances, if those class actions produce any recovery, the money ends up in the pockets of the attorneys who bring the lawsuit—not in the hands of the supposedly injured parties they purport to represent.

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[1] *Class Action Lawsuits—Examining Victim Compensation and Attorneys' Fees: Hearing before the Subcomm. on Administrative Oversight and the Courts, Senate Comm. on the Judiciary,* SERIAL NO. J–105–62 (S. HRG. 105–504), 105th Cong., 1st Sess. (Oct. 30, 1997); *Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* SERIAL NO. 141, 105th Cong., 2d Sass. (Mar. 5, 1998); *Class Action Jurisdiction Act of 1998: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* SERIAL NO. 121, 105th Cong., 2d Sess. (June 18, 1998); *Interstate Class Action Jurisdiction Act of 1999: Hearing before the House Comm. on the Judiciary,* 106th Cong, 1st Sess. (July 21, 1999); *The Class Action Fairness Act of 1999: Hearing before the Subcomm. on Administrative Oversight and the Courts,* SERIAL NO. J–106–22 (S. HRG. 106–465) 106th Cong., 1st Sess. (May 4, 1999); *The Class Action Fairness Act of 2000,* S. REP. NO. 106–420, 106th Cong., 2d Sess. (Sept. 26, 2000); *The Class Action Reform Act of 2001: Hearing before the House Comm. on the Judiciary,* SERIAL NO. 59, 107th Cong., 2d Sess. (Feb. 6, 2002); *Class Action Fairness Act of 2002,* H. REP. 107–370, 107th Cong., 2d Sess. (Mar. 12, 2002); *Class Action Fairness Act of 2002: Hearing before the Sen. Comm. on the Judiciary* (July 31, 2002).

Class action abuse is unjustifiably draining millions of dollars from our nation's economy by transferring large amounts of capital from companies to plaintiffs' lawyers with no commensurate benefit to society at large. It is also undermining public confidence in the law by suggesting to American citizens that our judicial system condones a perverse form of justice in which plaintiffs go without any real compensation, while their supposed lawyers walk away with millions in cash.

The good news is that unlike many other problems we confront as a nation, this one is relatively easy to fix. One major reason for the increase in class action abuse is the failure of some state courts to properly supervise these cases.[2] These courts readily satisfy the whims of the class counsel (while ignoring the due process rights of unnamed class members and defendants), and they serve as assembly lines for the mass production of settlements that benefit only the lawyers. As a result, they have become magnets for dubious class action filings in which plaintiffs' counsel extort settlements from frightened corporations familiar with the reputation of these courts.

The irony is that most class actions should not be in state court in the first place. When the Framers drafted the Constitution, they gave federal courts jurisdiction over disputes among persons residing in different states because they wanted to ensure that local bias and "uneven" justice would not interfere with the conduct of interstate commerce. Unfortunately, over the years, the contours of such federal diversity jurisdiction have been interpreted in a way that has prevented most interstate class actions from being heard in federal court.

H.R. 1115 is a modest bill that would both correct this jurisdictional anomaly and implement a "Class Action Consumer Bill of Rights," steps that would curb class action abuse and restore the integrity of our judicial process.

I. THE SCOPE OF THE PROBLEM: ABUSIVE CLASS ACTIONS AND COERCIVE SETTLEMENTS

The original purpose of the class action device was a noble one—to vindicate the rights of large groups of individuals who sought justice for civil rights violations and other wrongs but could not achieve such justice individually. Without question, that honorable intent has been fulfilled in many cases over the years. But today, the life cycle of a class action too frequently involves a very different scenario: A lawyer scans the newspaper or television, looking for articles and news programs about corporate practices that have attracted regulatory or press scrutiny—whether it is home video late fees, chicken processing techniques, or weight reduction program representations. Then, the lawyer hunts down someone who was the object of the allegedly suspect business practice to serve as a named plaintiff in a class action challenging the practice. Sometimes, the plaintiff is a paralegal in the lawyer's office or the friend of a friend; other times, the lawyer simply places an advertisement in a local newspaper that is located in a county where the judges are reputed to be friendly to class actions and recruits a stranger. Once the lawyer has selected a plaintiff and a court, he or she files a state court class action on behalf of all persons across the United States supposedly affected by the challenged business practice. Then, the lawyer sits back and waits for the company, which is likely to be concerned about negative publicity and the risk of an astronomical jury verdict to a huge class (even though the legal challenge may be frivolous), to yield to counsel's demand to "settle cheap"—*i.e.,* to agree to a resolution that pays counsel handsomely, but provides little or nothing for the class members.

What's wrong with this form of so-called "private law enforcement"? It's analogous to permitting self-appointed "cops" to go out on the streets, set up speed traps, pull drivers over (whether they were speeding or not), and give them the option of either: (a) spending a few nights in jail, or (b) resolving the problem by paying the "cop" (for personal benefit) whatever he demands. No doubt, the "cops" would argue that this is a marvelous system—on the theory that it discourages speeding. But justifiably, the public would have no trust in—or respect for—such a system of law enforcement, since prosecutorial decisions would be driven (or at least have the appearance of being driven) by the overwhelming financial self-interest of the "cops" themselves.

Unfortunately, that is what is occurring in the class action arena. A small number of lawyers have anointed themselves as "cops," and are making decisions about when and where to "enforce" the law based in many instances not on what best serves the public interest or what will most effectively redress consumer injuries—

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[2] It should be stressed that this is a problem only with a select number of state courts. Others handle class actions admirably. Unfortunately, as some of the studies cited later in this testimony demonstrate, class action counsel tend to file their cases in state courts that are more prone to tolerate or foster abuses.

but rather based on what will provide them with the largest direct revenue flow. Thus, class actions have become a big game in which lawyers seek to divert to themselves corporate revenues that would otherwise be paid to shareholders, often including the very consumers they claim to represent. And these lawyers are using the state court system as a means of achieving their own personal ends—rather than a means of achieving justice.

Let me make clear that it is difficult to blame defendants for entering into these settlements. They are caught in the "speedtrap" referenced previously—they have the choice of either paying off the counsel or putting their shareholders at risk of a substantial verdict before a pro-plaintiff court, even if the claim is frivolous, or (at best) borderline (as many of the foregoing claims appear to be).[3]

By now, I'm sure you have all heard of the *Bank of Boston* case settlement in which an Alabama state court judge approved a settlement that awarded up to $8.76 each to individual class members, while the class counsel received more than $8.5 million in fees. To pay off that fee award, the court ordered that money be debited from class members' mortgage accounts, such that they ended up *losing* money on the deal. It has now been six years since one of the victims of that state court-sanctioned scam—Martha Preston—appeared before the Senate Judiciary Committee and expressed disbelief that "people who were supposed to be my lawyers, representing my interests, took my money and got away with it."[4] And in the intervening years, millions of other Americans have gotten the short end of the stick in state court class actions.

Unfortunately, it would require little effort to fill up pages and pages of testimony with examples of class action settlements that provided few—if any—benefits to class members while enriching their lawyers. I will mention just a few:

- In the settlement of an Illinois state court class action, cable television customers received no compensation whatsoever for allegedly excessive billing. The cable operator did agree to change some billing practices prospectively, but *all* of the cash paid in the settlement—*$5.6 million*—went to the class counsel.[5]
- In a class action settlement approved by a Texas state court last year, approximately 38.5 million customers nationwide who alleged that they were charged excessive video rental late fees by a national chain will receive $1 coupons off future rentals. The lawyers? They are receiving a *$9.25 million* award. Again, *all* of the cash went to the lawyers. Indeed, it seems that only the lawyers benefit from this arrangement. The settlement allows the defendant to continue its practice of charging customers for a new rental period when they return a tape late; experts predict that only a small percentage of class members will redeem the coupons; and the coupons are the sort of promotion that the defendant likely would have offered in any event.[6]
- The settlement in a class action involving souvenirs and merchandise sold at NASCAR Winston Cup stock car races gave consumers coupons toward the purchase of more merchandise. And the lawyers? They are eligible to receive more than *$2 million*.[7] Again, *all* of the cash goes to the lawyers. If coupons were adequate compensation for the allegedly injured class members, why didn't the class counsel agree to be paid in coupons instead of cash?
- In a California state court class action regarding representations about the size of computer monitor screens, the court approved a settlement that offered $13 rebates to class members who purchased new monitors. Class members who did not need to buy new monitors or who wished to buy a different brand got absolutely nothing. And the lawyers? They received approximately *$6 million* in fees.[8] Again, *all* of the cash went to the lawyers.
- Under the settlement of an Illinois state court class action involving changes to an airline frequent flyer program, participants received vouchers good for

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[3] For example, the current issue of one financial magazine recommends that investors consider selling off any stock that they hold in companies that face class actions in certain "magnet" county courts, seemingly without regard for the subject matter or merits of those actions. *See* James B. Stewart, *The Perils of Litigation,* Smart Money, June 2003, at 50–51.

[4] *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearing before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary,* 105th Cong., 1st Sess. (Oct. 30, 1977) (statement of Martha Preston).

[5] Final Order of Settlement, *Unfried* v. *Charter Communications, Inc.,* No. 99–L–48 (granted Dec. 21, 2000).

[6] *Judge OKs Blockbuster Plan On Fees,* Associated Press, Jan. 11, 2002.

[7] *Lawyers Win Big in Class-Action Suits: Is It Justice or Greed?,* Charleston (S.C.) Daily Mail, June 19, 2001, at 4A.

[8] Jerry Heaster, *Enough Already With Lawsuits,* Kansas City Star, July 10, 1999, at C10.

$25 to $75 off the price of future travel, or a similarly valued reduction in the number of miles required for an award. And the lawyers? They received up to *$25 million—all* of the cash paid in the settlement. When the settlement was announced, travel experts were quoted as saying that "the practical value of those discounts will be modest," and the airline "could end up generating enough extra revenue to more than offset the cost of the offer." [9]

- In a Georgia state court class action alleging that a manufacturer improperly added sweeteners to apple juice, the defendant was required to distribute coupons worth at least 50 cents each. The lawyers? They received *all* of the cash—*$1.5 million* in fees and costs.[10]
- In a Texas state court class action settlement, telephone company customers who alleged overcharges received three optional phone services free for three months (or a $15 credit if they already subscribed to those services). The lawyers? They pocketed *$4.5 million* in hard cash.[11]

The evidence on this point is not merely anecdotal. Empirical studies confirm that plaintiffs in state court class actions frequently come away with little or no money, while their lawyers take home bundles of cash. For example, in a study jointly funded by the plaintiffs' and defense bar, the Institute for Civil Justice/RAND took a hard look at where the money goes in class settlements. That study indicates that in state court consumer class action settlements (i.e., non-personal injury monetary relief cases), the class counsel frequently walk away with more money than all class members combined.[12] Another in-depth study found that this "lawyer takes all" phenomenon was *not* occurring in federal courts—"[i]n most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys' fees by substantial margins.[13]

Given how much money can be made from class action settlements, it should come as no surprise that more and more lawyers are getting in on the action. And given that state courts have been more receptive to these actions, it should also come as no surprise that these lawyers are concentrating their efforts in state courts (particularly in those courts that have been most receptive to nationwide class actions and coupon settlements). A number of research efforts have produced empirical evidence confirming these troubling trends:

- A preliminary report on a major empirical research project by RAND's Institute for Civil Justice ("ICJ") observed a "doubling or tripling of the number of putative class actions" that was "concentrated in the state courts." [14]
- A survey indicated that while federal court class actions had increased somewhat over the past decade, the frequency of *state court class action filings* had *increased 1,315 percent*—with most of the cases seeking to certify nationwide or multi-state classes.[15]
- The final report on the RAND/ICJ class action study confirmed the explosive growth in the number of state court class actions and concluded that class actions "were more prevalent" in certain state courts "than one would expect on the basis of population." [16]

I recently co-authored two studies regarding class actions based on research conducted by the Center For Legal Policy of the Manhattan Institute. The first study surveyed the dockets of three county courts with reputations as hotbeds for class action activity between 1998 and early 2001, and found exponential increases in the

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[9] *American Airlines Settles Lawsuits Over Frequent Flier Program,* Forth Worth Star-Telegram, June 22, 2000.

[10] *Lawyers Get $1.5 Million, Clients Get 50 Cents Off,* Fulton County (Ga.) Daily Report, Nov. 21, 1997.

[11] Editorial, *We All Pay Dearly For Costly Class Actions,* Corpus Christi (Tex.) Caller-Times, Jan. 8, 2001, at A7.

[12] Deborah R. Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15 (1999).

[13] Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 68–69 (1996).

[14] *See* Deborah R. Hensler et al., PRELIMINARY RESULTS OF RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

[15] *Analysis: Class Action Litigation,* Class Action Watch, Spring 1999, at 3 (Figure 2), available at *http://www.fed-soc.org/publicantions/classactionwatch/classaction1-2.pdf.*

[16] Deborah R. Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15 (1999) at 7.

numbers of class actions filed in recent years.[17] The second study went back to one of those courts, the Circuit Court of Madison County, Illinois, to determine whether the trends were continuing in 2001 and 2002.[18] The results were quite dramatic. In Madison County, a small rural county that covers 725 square miles and is home to less than one percent of the U.S. population, the number of class actions filed annually grew from 2 in 1998 to 39 in 2000—an increase of 3,650 percent.[19] And the follow-up study found that the number of class actions filed in the county continued to grow dramatically in 2001 and 2002.[20]

So, why are so many cases being filed in Madison County?

It isn't because Madison County is a hub of commerce. In fact, our study showed that none of the companies listed as defendants in the Madison County class action cases was based locally.[21]

It isn't because the residents of Madison County are being singled out for corporate mischief. In fact, in well over 70 percent of the cases, counsel proposed to represent nationwide classes—that is, the classes encompassed claimants from all 50 states.[22] Thus, in most instances, *over 99 percent of the claimants in the case had no relationship to Madison County whatsoever.*

And it isn't because Madison County just happens to be home to a lot of lawyers. Most of the lawyers who bring these lawsuits also have nothing to do with Madison County. To be sure, the data show that there is a small group of local Illinois lawyers who regularly assist with the filing of these cases. But among the new class actions filed during the 1988—early 2001 period, *85 percent* of the plaintiffs' counsel listed on the complaints provided office addresses outside of Madison County, mostly from major legal markets like Chicago, New York, and San Francisco.[23]

Of course, that leaves us with a curious mystery. Why are lawyers who live and practice in places like San Francisco, New York, or Chicago coming to a place like Madison County, Illinois, to file class action lawsuits on behalf of people who don't live in Madison County, Illinois, against defendants who don't reside in Madison County, Illinois, regarding events that didn't occur in Madison County, Illinois? It can't be because the law is better in Madison County. Class certification law should be the same in all Illinois state courts and does not differ radically from class action law nationwide. And the substantive law should come from the jurisdiction in which the claims arose—so that law should not be different in Madison County either. And it presumably isn't because of a perception that the juries are "better" in Madison County—it's hard to find a class action that has ever been tried in Madison County, consistent with the fact that class actions seldom go to trial anywhere.

The answer, of course, is a simple one. Lawyers think that if they go to Madison County, they'll be able to get a class certified quickly, scare defendants into a settlement, and take home a lot of money—even if they have very weak legal theories and do very little legal work.

None of this scam has been lost on American citizens—they are acutely aware that they are being short-changed by the existing state court class action system. In a national survey conducted by Penn, Schoen & Berland Associates, 73 percent of those surveyed expressed the opinion that lawyers benefit most from the current class action lawsuit system; only 7 percent thought that consumers who buy a company's products benefit most.[24] The vast majority also expressed the view that the U.S. legal system should be changed in this area.[25]

At a time when we are seeing an erosion of public confidence in many institutions, class action abuse looms large as an area in which our legal system is failing the general public. Not only are members of the general public being used as pawns to make a few lawyers rich, they are also paying the tab in the end. While it is difficult to quantify the cost to society of class action abuse, recent reports have found that Americans pay a hefty "litigation tax" on goods and services, including such things as pharmaceuticals and insurance policies, because of excessive lawsuits in this

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[17] *See* John H. Beisner and Jessica Davidson Miller, *They're Making A Federal Case Out Of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 143 (Fall 2001) *("Federal Case").*

[18] *See* John H. Beisner and Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies,* 4 BNA CLASS ACTION LITIG. R. 58 (Jan. 24, 2003) *("Allure Intensifies").*

[19] *Federal Case* at 161.

[20] *Allure Intensifies* at 58–59.

[21] *Federal Case* at 164.

[22] *Id.* at 169.

[23] *Id.* at 164.

[24] *See* the website of the Institute for Legal Reform at *www.litigationfairness.org/ pdf/america—survey.pdf.* Among the respondents, 45% thought that the "lawyers who represent the alleged victims" benefit most; 28% thought that "lawyers who represent the companies being sued" benefit most.

[25] *Id.*

country.[26] Further, the money that is paid to class counsel is siphoned away from corporate revenues that would otherwise go to shareholders—such as individual investors, mutual funds, pension funds, and charities. Thus, American consumers, whom class action lawsuits ostensibly seek to protect, end up paying for these costly settlements at the pharmacy, at the supermarket, in their retirement funds, and in their mutual funds—a cost to society that is hardly offset by the apple juice, cereal or cruise coupons they periodically receive from class action settlements.

II. H.R. 1115 IS A MODEST STEP THAT WOULD BOTH REDUCE CLASS ACTION ABUSE IN STATE COURTS AND FULFILL THE FRAMERS' CLEAR INTENT REGARDING THE PROPER JURISDICTION OF FEDERAL COURTS.

A. The Law Governing Diversity Jurisdiction Generally Excludes Class Actions From Federal Court.

The Constitution provides for federal court jurisdiction over cases of a distinctly federal character—such as cases raising issues under the Constitution or federal laws—and generally leaves to state courts the adjudication of local questions arising under state law. However, the Constitution specifically extends federal jurisdiction to include one category of cases involving issues of *state law*: suits "between Citizens of different States," which have come to be known as "diversity" cases.

The Framers established the concept of federal diversity jurisdiction to ensure that local biases would not affect the outcome of disputes between in-state plaintiffs and out-of-state defendants.[27] Diversity jurisdiction was designed not only to diminish the risk of uneven justice, but also to protect the reputation of our courts—"to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents."[28] The Framers were concerned that some state courts might discriminate against out-of-state businesses engaged in interstate commerce (the very same concerns that are being raised today with regard to class actions). They felt that such discrimination could be avoided by providing a fair, uniform and efficient forum for adjudicating interstate commercial disputes—*i.e.,* the federal courts.[29] Thus, since the nation's inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that protects interstate commerce. As one federal appellate judge noted:

> No power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts."[30]

So why aren't most class actions already being heard in federal court? The problem is that Congress enacted the first diversity jurisdiction statute back in the

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[26] *See* William Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S. TEX. L. REV. 227, 250 (April 1995).

[27] *See Barrow S.S. Co.* v. *Kane,* 170 U.S. 100, 111 (1898) ("The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal] courts . . . jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant[ ] resides."); *Pease* v. *Peck*, 59 U.S. (18 How.) 518, 520 (1856); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 307 (1816). *See also* The Federalist No. 80, at 537–38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles [up]on which it is founded.").

[28] *See* James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEX L. REV. 1, 16 (1964). *See also Bank of United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) ("[Even if] tribunals of states will administer justice as impartially as those of the nation, to the parties of every description, . . . the Constitution itself . . . entertains apprehensions of the subject . . . , [such] that it has established national tribunals for the decision of controversies between . . . citizens of different states.").

[29] John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22–28 (1948); Henry J. Friendly, *The Historic Bases of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

[30] John J. Parker, *The Federal Constitution and Recent Attacks Upon It,* 18 A.B.A. J. 433, 437 (1932).

eighteenth century, long before the dawn of today's class actions. With that statute, Congress intended to ensure that federal courts could only hear "diversity" cases that were truly interstate in nature and involved substantial sums of money. (Understandably, they didn't want the federal courts to get bogged down in small claims cases between citizens of different states or cases that were primarily intrastate in nature.) Congress did this by placing two limitations in 28 U.S.C. § 1332, the diversity jurisdiction statute. First, an action is subject to federal diversity jurisdiction only where the parties are "completely" diverse (that is, where no plaintiff is a citizen of the same state where any defendant is deemed to be a citizen). And second, diversity jurisdiction is only applicable where each plaintiff asserts claims that exceed a threshold amount in controversy—currently set at $75,000.

Unfortunately, many years later, when class actions entered the arena, federal courts interpreted the diversity statute to bar most class actions from being heard in federal court, by holding that "diversity" cases can be brought in federal court only if *each plaintiff's* claims meet the jurisdictional minimum enacted by Congress regardless of how substantial the plaintiffs' claims are in the aggregate—and if each plaintiff and defendant come from different states.

These judicial interpretations have provided a roadmap for plaintiffs' lawyers seeking to evade federal jurisdiction and to litigate class actions in what they perceive as friendly state courts. After all, as long as they seek just $74,999 in damages on behalf of each plaintiff or add a local entity to their suit as a defendant, they are virtually ensured that they will be able to remain in state court.

Last year, the Senate Judiciary Committee heard testimony from Hilda Bankston, a former pharmacy owner from Mississippi who has been joined as a defendant in numerous multi-plaintiff actions in Jefferson County, Mississippi against major out-of-state pharmaceutical companies for just this purpose—to ensure that the cases lack "complete diversity" and therefore cannot be heard in federal court. According to Mrs. Bankston:

> [I]n 1999, we were named in the national class action lawsuit brought against the manufacturer of Fen-Phen. Let me stop here to explain why we were brought into this suit. While I understand that class actions are not allowed under Mississippi state law, what is permitted is the consolidation of lawsuits. These consolidations involve Mississippi plaintiffs or defendants who are included in cases along with plaintiffs from across the country. . . . By naming us, the only drugstore in Jefferson County, the lawyers could keep the case in a place known for its lawsuit-friendly environment. I'm not a lawyer, but that sure seems like a form of class action to me. . . .

Since then, Bankston Drugstore has been named as a defendant in hundreds of lawsuits brought by individual plaintiffs against a variety of pharmaceutical manufacturers. Fen-Phen. Propulsid. Rezulin. Baycol. At times, the bookwork became so extensive that I lost track of the specific cases. And today, even though I no longer own the drugstore, I still get named as a defendant time and again. . . .[31]

In addition to naming local defendants, plaintiffs' counsel also evade federal jurisdiction by limiting the damages sought in class actions to less than $75,000. It is not uncommon to see class action complaints in which plaintiffs seek a total of $74,999 on behalf of each plaintiff—a sum which, when multiplied by the number of potential class members—can reach tens of millions of dollars (resulting, of course, in a far more substantial claim than an individual action seeking $75,001 in damages). Such damages limitations showed up repeatedly in the two Madison County surveys; in one typical case involving telephone company charges, for example, the complaint sought damages "in no event exceeding $75,000 per plaintiff or class member."[32]

Thus, judicial interpretation of the diversity statute, coupled with the pleading shenanigans engaged in by plaintiffs' lawyers, has led to an anomalous result. Under current law, federal courts have jurisdiction over a state law claim arising out of a slip-and-fall by a Maryland plaintiff at a Virginia gas station—as long as the plaintiff alleges medical bills, lost wages and other damages amounting to $75,001. But at the same time, federal jurisdiction does not encompass large-scale, interstate class actions involving thousands of plaintiffs from multiple states, defendants from many states, the laws of several states, and hundreds of millions of dollars—cases that have obvious and significant implications for the national economy. This clearly was not the intent of the Framers and the first Congress.

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[31] Testimony by Ms. Hilda Bankston, Senate Committee on the Judiciary, July 31, 2002.
[32] *Allure Intensifies* at 63.

B. Proposed Legislation Would Cure This Jurisdictional Anomaly

H.R. 1115 would correct this anomaly by amending the diversity statute to allow some of the larger class actions to be heard in federal court, while continuing to preserve state court jurisdiction over cases that involve smaller sums of money or truly interstate matters. This bill would allow federal courts to adjudicate class actions, as well as mass joinder actions (of the type in which Mrs. Bankston was frequently sued) with large numbers of plaintiffs, in which *any* of the named plaintiffs or defendants come from different states. Moreover, it would change the amount-in-controversy threshold to allow class actions into federal court as long as the *aggregate* claims exceed a substantial threshold amount. Significantly, however, the bill would not extend federal jurisdiction to encompass "*intra*-state" class actions, in which the majority of the plaintiffs and the primary defendants are citizens of that state. H.R. 1115 therefore allows federal courts to exercise jurisdiction over substantial interstate class actions with significant nationwide commercial implications, while retaining exclusive state court jurisdiction over more local class actions that principally involve parties from that state and application of that state's own laws.

I urge the members of this Committee to support H.R. 1115 for a number of reasons:

First, H.R. 1115 would fulfill the intent of the Framers when they established diversity jurisdiction. As I noted earlier, class actions squarely implicate the Framers' concern with protecting interstate commerce through the exercise of diversity jurisdiction. In fact, if Congress were starting anew to define what kinds of cases should be included within the scope of diversity jurisdiction, large-scale interstate class actions would surely top the list, since they typically involve the largest amounts in controversy, the most people, and the most substantial interstate commerce implications. Moreover, there can no longer be any question that some local judges are exhibiting bias against out-of-state defendants in class actions—the very type of bias that led to the creation of diversity jurisdiction in the first place. Thus, H.R. 1115 is not only a constitutional solution to the class action problem; it would actually comport with the Framers' intent far more than the current state of affairs, which allows federal courts to adjudicate interstate fender-benders, while leaving nationwide class actions that involve thousands of plaintiffs and millions of dollars in county courts of the lawyers' choosing.

As *The Washington Post* put it, class action cases are:

> disproportionately filed in selected counties where judges are elected—meaning that a judge accountable to a single county can make decisions regulating products distributed nationwide. . . . It is a bad system—one that irrationally taxes companies in a fashion all but unrelated to the harm their products do and that provides nothing resembling justice to victims of actual corporate misconduct."[33] In short, the existence of such "magnet" courts and troubling settlements, which undermine public confidence in our judicial system, would be greatly reduced if federal courts had jurisdiction over interstate class actions.

Second, H.R. 1115 would promote federalism principles. One of the principal objections to H.R. 1115 has been that the proposed legislation would undermine federalism interests by limiting the ability of states to experiment with class action lawsuits. In fact, however, the critics have it backwards: a key reason for *supporting* H.R. 1115 is that it would *protect* federalism by restricting state courts from dictating the laws of other states.

One of the most dangerous trends in state court class actions—and one that has had the biggest impact on the proliferation of "nationwide" lawsuits—is that many state courts are "federalizing" class actions. That is, when state courts preside over class actions involving claims of residents of more than one state (especially nationwide class actions) as they are increasingly inclined to do, they often end up dictating the *substantive* laws of other states, sometimes over the protests of officials in those other jurisdictions.

An example of this phenomenon is a nationwide insurance class action in Illinois that resulted in a $1.3 billion judgment against State Farm. In that case, plaintiffs alleged that State Farm's use of "aftermarket" parts for repairs (as opposed to parts made by the original manufacturer) was fraudulent. After certifying a nationwide class, the Illinois court applied Illinois law to claims from all fifty states and the District of Columbia even though states' policies on the use of these parts differ and even though some state insurance commissioners testified that their states encourage or even *require* insurers to use aftermarket parts to reduce insurance costs.

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[33] *Fixing Class Actions,* Washington Post, Mar. 21, 2002, at A34.

Nonetheless, the Illinois court approved the judgment and the court of appeals affirmed, effectively deciding the question for the entire nation.[34]

So what exactly did this class action achieve? For starters, an Illinois state court decided effectively to overrule other states' insurance laws, depriving the duly elected and designated regulators in those jurisdictions of their right to regulate insurance rates and policies for the citizens to whom they are accountable. In addition, auto insurance rates for most consumers likely will increase (as insurers are obliged to use more expensive OEM parts). Of course, with increased rates will come an increase in the number of uninsured drivers on our roads (since more people will be priced out of the insurance market). And finally, for the kicker, because State Farm is a mutual insurance company, owned by its customers, the people on whose behalf this class action was filed will receive nothing. Instead, the award will come out of their pockets, since they are the company's owners. Indeed, the only winners in this lawsuit are the class lawyers, who stand to gain over $500 million if the judgment is upheld and plaintiffs' lawyers are paid the 40 percent fee that some of the class counsel have said they will seek from the court. And who pays that half-billion dollar payday? Once again, the so-called winners are really the losers: the class members whom the lawyers supposedly represented ultimately will foot the bill for the lawyers' fees.

Of course, the danger posed by these efforts to federalize state law extends far beyond insurance. By way of example, the dockets of the three surveyed counties in the class action studies mentioned previously included numerous cases in which plaintiffs' counsel sought to have locally elected judges in county courts set policies in areas as diverse as warranties, land use rights, plumbing licenses, environmental protection, advertising campaigns, bank billing practices, employee investment plans, and numerous other broad-ranging issues for 49 other states in addition to their own.

H.R. 1115 would address this very serious federalism problem by expanding federal jurisdiction over interstate and nationwide class actions. Contrary to many state courts, federal courts have consistently concluded that in the case of a nationwide lawsuit, the laws of all states where purported class members were defrauded, injured, or purchased the challenged product or service must come into play.[35] And in those very few instances in which a federal district court has toyed with the idea of engaging in "false federalism" (i.e., applying a single state's law to all asserted claims), that notion has been reversed on appeal almost immediately.[36]

Third, H.R. 1115 would increase judicial efficiency, by enabling "copycat" cases to be consolidated in a single federal court, rather than leaving them to proceed in numerous state courts, as does the current system. Frequently, tens or even hundreds of overlapping or "copy-cat" class actions are filed in state courts across the country regarding the same controversy. Right now, that means that numerous state court judges around the country are duplicating each other's work, resulting in enormous inefficiencies. Further, the class action device is being abused, as lawyers vie to certify or settle overlapping nationwide class actions as cheaply as possible. In contrast, when numerous duplicative class actions are filed in different federal courts, they are typically consolidated for pretrial proceedings in a multidistrict litigation proceeding under a federal statute that allows for such coordination—28 U.S.C. § 1407. By expanding federal jurisdiction over interstate class actions, H.R. 1115 would enable duplicative cases to be removed to federal court and then consolidated under federal multidistrict litigation procedures, thereby preventing the waste and abuse that flow from the litigation of duplicative suits in multiple state courts.

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[34] *Avery* v. *State Farm Mut. Auto Ins. Co.,* 746 N.E.2d 1242 (Ill. Ct. App. 2001).

[35] *See, e.g., Georgine,* 83 F.3d at 627; *Zinser v.* Accufix Research Inst., Inc., 253 F.3d 1180, 1187–90 (9th Cir. 2001); *Zapka v.* Coca-Cola Co., No. 99 CV 8238, 2000 U.S. Dist. LEXIS 16552, at *11–13 (N.D. Ill. Oct. 26, 2000); *Fisher* v. *Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 369 (N.D. Ill. 1998); *Dhamer* v. Bristol-Myers Squibb Co., 183 F.R.D. 520, 532–34 (N.D. Ill. 1998); *Jones* v. *Allercare, Inc.*, 203 F.R.D. 290, 307 (N.D. Ohio 2001); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 346–54 (D.N.J. 1997); *Marascalco* v. *Int'l Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 338–39 (N.D. Miss. 1998); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 177 F.R.D. 360, 369–71 (E.D. La. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 214, 215–217 (E.D.N.C. 1997); *Ilhardt* v. *A.O. Smith Corp.*, 168 F.R.D. 613, 619–20 (S.D. Ohio 1996); *Harding* v. *Tambrands Inc.*, 165 F.R.D. 623, 629–30, 631–32 (D. Kan. 1996); *Walsh* v. *Ford Motor Co.*, 130 F.R.D. 260, 271–75 (D.D.C. 1990); *Feinstein* v. *The Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 608 (S.D.N.Y. 1982).

[36] *See, e.g., In re Bridgestone/Firestone, Inc.,* 288 F.3d at 1024; *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 674–75 (7th Cir. 2001); *Spence* v. *Glock, GES.m.b.H*, 227 F.3d 308, 313–15 (5th Cir. 2000); *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 741–43, 749–50 (5th Cir. 1995); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1239, 1302 (7th Cir. 1995); *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1017–19 (D.C. Cir. 1990).

Fourth, H.R. 1115 would protect consumers from abusive settlements. The growing public disgust with class actions is fed—and properly so—by a host of abusive settlement practices and by the dissemination of unintelligible class action notices. H.R. 1115 seeks to address those serious public concerns in two ways. First, as I noted earlier, federal judges have exhibited much more rigor in reviewing proposed class action settlements than some of their state court counterparts. That means the mere act of allowing more class actions to be heard in federal court will reduce class action abuse. Second, the bill includes a "consumer class action bill of rights" that affords additional protections to class action plaintiffs than those already in place in federal court. Under this section of the bill:

- Written notice of a proposed federal court class action settlement would have to be provided to class members in a clearer, simpler format;
- A federal court could not approve a coupon or other non-cash settlement unless it first holds a hearing and makes a written finding that the settlement is fair, reasonable and adequate;
- A federal court could not approve a settlement (like the Bank of Boston settlement) that results in a net loss for the class members unless it makes a written finding that non-monetary benefits to the class members outweigh any loss precipitated by the terms of the settlement; and
- A federal court could not approve a settlement that: (1) provides greater sums of money to certain class members because they are located in closer proximity to the court, or (2) provides a bounty to the class representatives.

Opponents of H.R. 1115 have suggested that Congress pass a bill that simply enacts these (or other) pro-consumer provisions, without expanding federal jurisdiction over class actions (or expanding it only slightly). (In fact, there are published reports that Senator Leahy plans to introduce such an alternative bill along these lines (although those reports also indicate that no bill has yet been drafted).) The problem with such alternative legislation is that any consumer provisions enacted by Congress will apply only to cases that are being litigated in federal court. Since that alternative legislation would leave the vast majority of interstate class actions in state court, few would be subject to these consumer protection provisions. Thus, the alternative legislation would achieve little or nothing: class action lawyers could continue to file duplicative cases, manipulate the pleadings to evade federal jurisdiction, and shop for courts willing to rubber-stamp self-serving settlement proposals.

In urging Congress to enact legislation to address the class action problem, *The Washington Post* editorialized:

> [N]o component of the legal system is more prone to abuse. For unlike normal lawyers, who are retained by people who actually feel wronged, class counsel—having alleged a product deficiency that caused some small monetary damage to some discernible group of people—largely appoint themselves. The "clients" may not even be dissatisfied with the goods or services they bought, but unless they opt out of a class of whose existence they may be unaware, they become plaintiffs anyway. Class actions permit almost infinite venue shopping; national class actions can be filed just about anywhere and are disproportionately brought in a handful of state courts whose judges get elected with lawyers' money. These judges effectively become regulators of products and services produced elsewhere and sold nationally. And when the cases are settled, the "clients" get token payments, while the lawyers get enormous fees. This is not justice. It is an extortion racket that only Congress can fix.[37]

I respectfully add my voice to that of *The Washington Post* and numerous others in urging this Committee to act favorably on H.R. 1115 so that class actions will once again become a tool of justice, instead of a blemish on our legal system.

Mr. SMITH. Thank you, Mr. Beisner.

Mr. Wolfman.

STATEMENT OF BRIAN WOLFMAN, ESQ., STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Mr. WOLFMAN. Thank you, Mr. Chairman, and Members of the Committee, for the opportunity to appear today in opposition to H.R. 1115.

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[37] *Making Justice Work,* Washington Post, Nov. 25, 2002.

In my judgment, this bill does nothing to further its stated goal of class action fairness. In my office, I and my colleagues have opposed dozens of inappropriate or collusive class settlements and excessive attorneys' fees in State and in Federal court, including the major settlements that have caught the public's attention, although we still fervently believe that the vast majority of class actions in both State and Federal court serve consumer and societal interests.

We take a back seat to no one, though, in fighting improper class actions to assure that the class action tool is not weakened. But H.R. 1115 would do just that. It will gravely harm consumers and increase the prospects for collusive settlements, which is why business wants it.

I want to turn first to section 6 of the bill, which allows an automatic appeal of all class certification decisions. Though it is tacked on at the end of the bill, I address it first because it is emblematic of what H.R. 1115 in my judgment is all about: tilting the playing field in favor of corporate defendants, making it nearly impossible for consumers to get a fair shake.

Sections 4 and 5 of the bill take almost all State class actions and put them in Federal court. Then section 6 says, okay, now that you are in Federal court where we think it will be much more difficult for you to get a class certified and much more difficult to win on the merits, any time you do get a class certified we will tie you up on appeal for years.

Practically speaking, that erects an insurmountable barrier to prompt justice. The victims of Enron and other perpetrators of the corporate crime wave will wait months and months and months for justice in the courts, and watch the value of their cases plummet.

Third Circuit Judge Anthony Scirica, who is the chair of the Judicial Conference's Committee on Rules of Practice, has reiterated recently the conference's opposition to the bill, and specifically asked this Committee to get rid of section 6.

The appeal provision he said "might tempt a party to file an interlocutory appeal solely for tactical reasons. Staying discovery and other proceedings would only increase the tactical advantages," which is another thing the bill does, "particularly because resolution of the appeal may not occur for 12 to 18 months.".

The only thing I say about that is to think Judge Scirica is being a little protective of his own branch, because in complex cases of this magnitude appeals frequently take longer than that.

In 1998, the Federal Civil Rules Committee adopted a new rule, rule 23(f), allowing discretionary review of class certification decisions. That rule allows an appeal, just like in the situation prepared by Attorney General Dinh, for review of plainly erroneous certification decisions that threaten serious harm. As Judge Scirica puts it, "The rules committees are unaware of any dissatisfaction expressed by the bench and the bar with this new rule, so there is absolutely no need for this provision, unless the intent is simply to give corporate wrongdoers a get-out-of-jail-free card."

Now, let me turn to the heart of the bill. Section 4 of the bill, when combined with section 5, its removal provision, would end almost all State court involvement in consumer class actions. Although the bill provides certain exceptions, as I have explained in

some detail in my written testimony, those exceptions would rarely kick in.

The bill's purposes section, its introductory sections, say that it is intended to deal with interstate class actions, but that is not actually what the bill does. It also puts most intrastate class actions in Federal court whenever one of the defendants is incorporated or has its headquarters out of State, even when that defendant has a substantial business presence in that very State.

So ask yourself, why in the world shouldn't a class of Florida plaintiffs be able to sue Disney under Florida law in the Florida courts? But under H.R. 1115, they can't. In fact, under H.R. 1115, in many instances, a class can't even sue Ford in its own backyard in Michigan State court.

H.R. 1115 should, in reality, be called the Defendant's Choice of Forum Act, since it allows defendants, not plaintiffs, to pick the court system it prefers.

When abuses occur in the State or the Federal system, the courts must be vigilant in stopping them. Congress in my judgment can play a limited role in consolidating overlapping class actions. But if I were a corporate wrongdoer thinking of ways to avoid liability and delay justice, H.R. 1115 would be my bill, which is exactly why it ought to be rejected.

Thank you again for the opportunity to appear today.

[The prepared statement of Mr. Wolfman follows:]

PREPARED STATEMENT OF BRIAN WOLFMAN

Chairman Sensenbrenner and members of the Committee: Thank you for the opportunity to appear today in opposition to H.R. 1115, the Class Action Fairness Act of 2003. Although Public Citizen supports the use of class actions and actively works to improve the class action process, this bill, despite its lofty title, would do nothing to further the goal of "fairness" in class actions. To the contrary, H.R. 1115 is an unwise and ill-considered incursion by the federal government on the jurisdiction of the state courts. It works a radical transformation of judicial authority between the state and federal judiciaries that is not justified by any "crisis" in state-court class action litigation. That is presumably why the official body of the federal courts—the Judicial Conference of the United States, headed by Chief Justice Rehnquist—and its state court counterpart—the Conference of State Supreme Court Justices—oppose this legislation.

Before explaining the basis for my conclusion that H.R. 1115 should not be enacted, I want to describe my experience in class action litigation. I am a staff attorney with Public Citizen Litigation Group, a non-profit, national public interest law firm founded in 1972, as the litigating arm of Public Citizen, a consumer advocacy organization with approximately 125,000 members. Although we do not bring many consumer class actions, we occasionally file them for the purpose for which they are designed: to remedy wrongdoing in situations where bringing individual claims would be economically impossible. And at no time are class actions more important than they are now, when the country is experiencing a corporate pervasive crime wave. Consumers must have effective remedies to hold the free marketplace accountable or public trust in business will decline even further than it already has.

Because we value class actions as an important tool for justice, we have, for a number of years, combated abuses in the class action system. We have increasingly devoted resources to opposing what we believe are inappropriate or collusive class action settlements, and have become the nationwide leader in fighting class action abuse. Among the more than 30 nationwide class actions settlements on which we have worked, we have served as lead or co-counsel for objectors in many of the most important cases, including *Devlin* v. *Scardelletti* (Supreme Court case establishing absolute right of objectors to appeal approval of class settlements); *Bowling* v. *Pfizer* (Bjork-Shiley heart valve); *Amchem* v. *Windsor* (settlement of future asbestos personal-injury cases, also known as Georgine); *Wish* v. *Interneuron Pharmaceutical* (*Redux* diet drug); *Hanlon* v. *Chrysler Corp.* (Chrysler mini-vans); *In re Telectronics Pacing Systems, Inc.* (pacemaker leads); *Duhaime* v. *John Hancock Mut. Life Ins.*

Co. (life insurance sales practices); *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.* (GM C/K Pickup Trucks); and *In re Ford Motor Co. Bronco II Prod. Liab. Litig.* (Ford Broncos). In these and other cases, we have objected to settlements that we thought grossly undervalued the plaintiffs' claims and/or we have opposed what we believed were the inflated fees of the plaintiffs' attorneys. In addition, we have written articles on the problems we have encountered in class action settlements for law reviews and the press.[1]

The point of these introductory comments is that Public Citizen takes a back seat to no one in fighting improper class actions, to assure that injured consumers will be justly compensated, that class action attorneys' fees are sufficient (but not excessive), and that the class action tool is not weakened. In our judgment, H.R. 1115 will not aid injured consumers or combat collusion, but it will work a massive shift of power and cases to our overburdened federal courts at the expense of the state courts, the traditional forum for hearing disputes involving state law.

Part I below discusses H.R. 1115's principal vice—the unwarranted expansion of federal jurisdiction over state-law-based class actions contained in sections 4 and 5 of the bill. Part II discusses two other serious flaws in the bill's jurisdictional provisions. Part III addresses two aspects of H.R. 1115's non-jurisdictional provisions—its automatic appeal provision and its do-nothing provision regarding coupon settlements—which, though purportedly aimed at improving class action practice, actually undermine the interests of consumers. Finally, Part IV explains an alternative approach to the problems presented by nationwide and overlapping class actions. That approach would create federal jurisdiction only for those cases in which it is truly justified, leaving most state-law class actions in state court where they belong.

I. THE ENORMOUS AND UNJUSTIFIED EXPANSION OF FEDERAL JURISDICTION.

A. Section 4 of H.R. 1115 allows proposed class actions to be filed in federal court if "any member of a class of plaintiffs is a citizen of a State different from any defendant. . . ." Building on the language in section 4, section 5 of the bill permits removal from state court to federal court of any class action meeting this expanded criterion for filing class actions in federal court. Thus, as a practical matter, section 4, when combined with section 5's removal provision, would end most state-court involvement in consumer class actions. The bill provides that the federal court may not entertain class actions only in very limited circumstances: where a "substantial majority" of the proposed class *and* all of the primary defendants are citizens of a single state, *and* the claims asserted will be governed primarily by the laws of that state.[2]

As explained below, the bill would effectively eliminate state-court jurisdiction over class actions involving *only* in-state plaintiffs and *only* that state's law, as long as *any* primary defendant's principal place of business or state of incorporation is out of state, even where that defendant does substantial in-state business. As a result, the bill effects an enormous shift in class action cases from state to federal courts at a time when the federal courts are already overwhelmed.

Two hypotheticals illustrate the kind of cases that would be removed. Assume that over the past two years a regional life insurance company, with headquarters in Massachusetts and incorporated in Delaware, and with a sales force of agents employed by the company's New York affiliate, fleeced 20,000 of its New York customers, by charging premiums higher than those promised and not paying certain benefits. On average, each customer lost about $500. The company, the New York affiliate, and the sales agents particularly targeted senior citizens. The customers file a class action against the company, the New York affiliate, and the key agents who helped perpetrate the scheme in New York state court alleging solely violations of New York law. Under H.R. 1115, any of the defendants would have the option of removing this class action to federal court, even though there is little or no federal interest in resolving such a dispute because it does not involve federal law. Moreover, the New York courts have a strong interest in resolving the case, to assure that New York law is properly enforced. That interest is usurped by H.R. 1115.

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[1] *See* Brian Wolfman & Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439 (1996); Brian Wolfman, *Foreword: The National Association of Consumer Advocates' Standards and Guidelines for Litigating and Settling Class Actions*, 176 F.R.D. 370 (1998); David C. Vladeck, *Trust the Judicial System to Do Its Job*, The Los Angeles Times, p. M5 (Apr. 30, 1995); Brian Wolfman, *Class actions for the injured classes*, The San Diego Union Leader, p. B–11 (Nov. 14, 1997).

[2] The bill would also bar federal jurisdiction over class actions where the aggregate damages asserted by *all* class members do not exceed $2 million or in which there are fewer than 100 class members. This provision would have little or (more likely) no practical effect; no significant consumer class actions fall into this category.

Indeed, this example shows that H.R. 1115 is, in reality, a "Defendants' Choice of Forum Act," since it allows the corporate defendants—not the plaintiffs—to select the court system they prefer.[3]

Similarly, suppose a class of Oklahoma property owners allege that they have been unlawfully deprived of oil and gas royalties by an Oklahoma utility company (through its Oklahoma-based sales force), and by the Oklahoma firm's parent company, a Texas-based energy conglomerate, incorporated in Delaware. The property owners, who, on average have lost $5,000 each but stand to lose much more if the companies' practices are not stopped, file suit in state court under a Oklahoma consumer protection statute and Oklahoma common law. There is no reason why an Oklahoma state court should not handle this class action. Surely, most Oklahoma trial courts, and the Oklahoma appellate courts on review, will be more familiar with the state-law issues than would a federal court sitting in Oklahoma or the relevant federal appeals court headquartered in Denver, composed mostly of judges who have little or no background in Oklahoma law. And yet H.R. 1115 virtually assures that, regardless of the plaintiffs' wishes, this one-state controversy, involving only state law, will end up in federal court.

These hypotheticals demonstrate that H.R. 1115 dishonors the proper spheres of the states and the federal government in our federal system. The bill is a resounding vote of "no confidence" in our state courts. It is premised on a deep—and misplaced—distrust in state courts' ability to uphold the law. Our Constitution properly assumes that the states are fully capable of interpreting their own laws and handing out justice impartially.

B. Although this radical revision of the allocation of authority between the state and federal courts is enough in itself to warrant the rejection of H.R. 1115, it is the inefficiencies created by the bill that may pose the largest roadblock to justice for ordinary citizens. By channeling most state-law based class actions to the federal courts, H.R. 1115 will further weaken the ability of litigants to obtain justice in our federal courts. As Chief Justice William H. Rehnquist has repeatedly explained in his annual report on the judiciary, the federal courts are already overburdened with cases that traditionally are dealt with in state courts, and the federal courts cannot bear any additional burden. *See, e.g.,* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 5–7 (Jan. 1, 1999). And the Chief Justice has particularly asked Congress to consider reducing, not expanding, federal diversity jurisdiction. *Id.* at 7.

Moreover, not only would H.R. 1115 increase the caseload of the federal courts, but it would do so with cases that are extremely complex and time consuming. Making matters even worse, these new federal cases involve solely issues of state law, with which state-court judges are intimately familiar, but federal judges generally are not.

The caseload burden imposed by H.R. 1115 would be reason enough to reject this legislation at any time, but the problem is particularly acute now, because the civil docket in some districts is severely backlogged. In short, H.R. 1115 promises that injured consumers will be put on "hold" in the overburdened federal courts, without any opportunity to litigate their cases in state courts where they properly belong.

C. The proponents of H.R. 1115 try to justify the bill on the ground that there is a class action "crisis" peculiar to the state courts. In general, the class action tool is a tremendous benefit to Americans. It is an important and powerful component of our civil justice system that can compensate ordinary citizens who, acting individually, would not have the means to challenge corporate and governmental wrongdoers. As noted at the beginning of this testimony, Public Citizen recognizes that class action abuse threatens to sour the public on class actions and harm the very people that the class action tool is supposed to help. But it is wrong to think that abuse is limited to state courts. For instance, a federal appeals court approved the Chrysler minivan settlement—where the settlement did little more than restate Chrysler's prior promise to a federal regulator to fix the class members' defective door latches, with Chrysler agreeing to pay the lawyers five million dollars in fees.[4]

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[3] Under current law, this case would remain in state court because the plaintiffs and many of the defendants are citizens of New York, and thus the diversity of citizenship necessary to establish federal jurisdiction under 28 U.S.C. 1332 does not exist. In addition, federal jurisdiction might also be lacking because each class member does not have the requisite $75,000 in controversy. *See Zahn v. Int'l Paper Co.,* 414 U.S. 291 (1973).

[4] *Hanlon* v. *Chrysler Corp.,* 150 F.3d 1011 (9th Cir. 1998).

Unfortunately, other serious abuses in settlement approval have occurred in federal trial and appellate courts.[5]

The state courts can play an important role in preventing abuse. When the corporate community began pushing the legislation that is now H.R. 1115, it relied on anecdotes from class actions in Alabama where, the argument went, the state courts had been certifying classes without following reasonable procedures. Responding to due process and forum-shopping concerns from corporate defendants, however, the Alabama Supreme Court has abolished the practice of certifying class actions before the defendant has an opportunity to answer the suit. The Alabama court made clear that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied.[6] State courts have been vigilant in other cases as well.[7] In sum, there is no crisis in the state courts.

D. There should be no mistaking why this bill's proponents want class actions moved to federal court. Businesses perceive an advantage in defending these cases in federal court. To quote from a recent law journal article written by two corporate class action defense lawyers: "As a general rule, defendants are better off in federal court . . . there is generally a greater body of federal law precedent favorable to defendants."[8]

Some of the advantages are obvious, such as the fact that federal judges often feel obliged to interpret state laws conservatively and reject novel claims. Others are more subtle. Currently, Public Citizen's Congress Watch is compiling a comprehensive report on the class action suits settled by the industries lobbying for this bill. The report's preliminary findings indicate that each of these industries, including insurance, tobacco, retail, automotive, and other giants, have fared much better in federal courts than state courts. Much of the advantage comes from the federal courts' overly restrictive interpretation of certification rules. When that report is released later this month, copies will be provided to the Committee.

As evidence of the supposed state-court class action "crisis," the supporters of H.R. 1115 rely on a few examples of settlements in which the class members were cheated at the expense of their lawyers. Although abuses do occur in state *and* federal court, those abuses generally must be fought in the courts, and certainly not through ill-advised and sweeping responses like H.R. 1115. Moreover, the anecdotes are just that—anecdotes—and much more evidence showing a systematic pattern of abuse in the state (as opposed to federal) courts is required before Congress should consider enacting anything approaching the radical transformation in our state-federal balance contemplated by H.R. 1115.

In sum, H.R. 1115 should be rejected as unwise and unnecessary. It is an unfair attack on the integrity of the state courts and their ability to provide justice to their citizens, and it comes at a time when the federal courts are unable to handle the enormous increase in caseload that H.R. 1115 would produce.

II. OTHER SERIOUS PROBLEMS WITH SECTIONS 4 AND 5 OF H.R. 1115.

Although we believe that H.R. 1115 should be defeated, it should surely not be enacted in its current form. The following amendments would improve the bill.

• **Eliminating H.R. 1115's Federalization of State-Court Private Attorney General and Joinder Actions.** In one respect, H.R. 1115 is far more ambitious than most of its predecessors in stripping the state courts of their historical jurisdiction and their role in protecting the rights of their own citizens. H.R. 1115 federalizes more than class actions: Under proposed 28 U.S.C. 1332(d)(9), this bill would

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[5] *See, e.g., In re Mexico Money Transfer Litigation,* 267 F.3d 743 (7th Cir. 2001). Some of the most questionable coupon settlements have been approved by federal courts. *See, e.g., In re Domestic Air Transp. Antitrust Litig.,* 148 F.R.D. 257 (N.D. Ga. 1993); *States of New York & Maryland* v. *Nintendo of Am.*, 775 F. Supp. 676, 682 (S.D.N.Y. 1991); *In re Cuisinart Food Processor Antitrust Litig.*, 1983 WL 153 (D. Conn. Oct. 24, 1983); *Ohio Public Interest Campaign* v. *Fisher Foods*, Inc., 546 F. Supp. 1 (N.D. Ohio 1982); *see generally* "In Camera," 16 *Class Action Reports* 369, 485–87 nn.2–8 (July-Aug. 1993). For a full discussion of this issue, see Public Citizen, "Class Action Settlements: Federal Courts Are No Better than State Courts When It Comes to Protecting Consumers" (April 15, 2003), a copy of which is attached to this testimony.

[6] *See, e.g., Ex Parte State Mutual Ins. Co.,* 715 So.2d 207 (Ala. 1997); *Ex Parte American Bankers Life Assur. Co. of Fla.*, 715 So.2d 186 (Ala. 1997).

[7] *See, e.g., Bloyed v. General Motors,* 881 S.W.2d 422 (Tex. Ct. App. 1994), *aff'd and remanded*, 916 S.W.2d 949 (Tex. 1996). *See also* http://tm0.com/LAW/sbct.cgi?s=141867472&i=504100&m=1&d=2534849 (describing April 2002 holding of Florida state trial court rejecting class action settlement on ground that plaintiffs obtained little or no value, but plaintiffs' counsel sought sizeable fee).

[8] Reid and Coutroulis, "Checkmate in Class Actions: Defensive Strategy in the Initial Moves," *Litigation* (Winter 2002).

also create federal jurisdiction for two additional categories of cases: (1) private attorney general actions brought by any organization or citizen; and (2) groups of cases in which 100 or more individuals seeking monetary relief seek to try *any* common legal or factual issue together. This provision is so extreme—and its potential effect so immense—that it deserves special consideration.[9]

Proposed section 1332(d)(9)(A) would define private attorney general actions as class actions and allow them to be removed to federal court if filed in state court. The provision is obviously aimed at actions under section 17200 of the California Business and Professions Code, which has proved an important tool for victims of unfair and deceptive business practices. In section 17200, the California Legislature has decided to provide legal standing for organizations and individuals to act as private attorneys general that is broader than the standing generally allowed in the federal courts. Apparently, the California Legislature has seen fit to allow private parties to combat corporate fraud and other malfeasance on the theory that the California Attorney General simply does not have the resources to do it all on his or her own. That policy choice, in our system of federalism, is California's prerogative,[10] at least before H.R. 1115. Proposed section 1332(d)(9)(A) would override that state policy choice and transfer California private attorney general actions to federal court, where they would be automatically deemed class actions and be subjected to federal Rule 23 certification criteria and federal standing requirements.

And that's not all. H.R. 1115's puny exclusions for federal jurisdiction—for instance, where the aggregate value of the claims is $2 million or less, or where the number of affected people is fewer than 100—do *not* apply to its private attorney general action provision. And because we know that in a state as large and as transient as California, any private attorney general action seeking compensation for all victims of a corporation's in-state misconduct will involve some significant number of out-of-state victims, virtually all 17200 actions seeking monetary relief will be removable to federal court.[11]

H.R. 1115's federalization of individual joinder actions may be even worse than its treatment of private attorney general actions. Proposed 28 U.S.C. 1332(d)(9)(B) would define damages suits filed in state court by *individual* plaintiffs as class actions if, at any time, 100 or more plaintiffs sought to try *any* common legal or factual issue. Assume, for instance, that 250 plaintiffs in Kentucky filed suit seeking an injunction under Kentucky common law against a local chemical plant spewing toxic arsenic into the adjoining neighborhoods. The plant is run by a regional chemical manufacturer with plants not only in Kentucky, but also in Indiana and Illinois, where its corporate headquarters is located. The plaintiffs also seek damages for personal injuries and compensation for damages to homes and businesses in the vicinity of the plant. Some of the plaintiffs' claims are significant, but most, particularly those involving only property damage, are valued at between $10,000 and $30,000. For purposes of efficiency, and to enable them to afford the high costs of litigation, the plaintiffs move to join their cases for a determination on common factual issues (such as the frequency and toxicity of the emissions) and common legal questions (such as whether the state's regulatory emission standards govern the common-law duty of care). Each plaintiff plans to try his or her damages claim individually because those claims are based on issues that are not shared commonly by the 250 plaintiffs.

Under current law dating back to the creation of the federal courts (and, indeed, even under most of H.R. 1115's predecessors), these individual actions could only be tried in state court. But under H.R. 1115, these 250 cases could be removed to federal court, away from the trial and appellate courts with expertise in Kentucky law, perhaps many miles from the town in which the injuries arose and, if an appeal were ever filed, to a federal court of appeals sitting in Cincinnati.

But the affront to federalism is even greater. Under proposed 28 U.S.C. 1332(d)(9), the individual joinder actions described above "shall nevertheless be deemed a class action" for the purposes of federal jurisdiction, and are thus subject to the certification requirements of Federal Rule of Civil Procedure 23 after they are removed to federal court. However, unlike the bill's treatment of genuine class actions, these individual state-law cases are not dismissed without prejudice to re-fil-

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[9] This provision surfaced once before, in the 107th Congress in H.R. 2341. It did not appear in its predecessors, such as H.R. 1875, introduced in the 106th Congress.

[10] *City of Revere* v. *Massachusetts General Hosp.*, 463 U.S. 239, 243 (1983) (state courts are free to have less restrictive standing requirements than those imposed by federal courts).

[11] States other than California permit private attorney general actions under their deceptive acts and practices statutes. H.R. 1115 would federalize such actions as well. The focus here is on the California law because it has been an important tool for consumers and it is the obvious target of proposed 28 U.S.C. 1332(d)(9)(A).

ing in state court if Rule 23's requirements are not met; rather, they remain in limbo in federal court (presumably for adjudication on the merits, although the bill does not say). See proposed 28 U.S.C. 1332(d)(9) (last sentence). This provision is unprecedented, because it would require the federal court to adjudicate dozens or even hundreds of garden-variety state tort claims on an individual basis—claims valued at far less than the $75,000 jurisdictional amount set by Congress for federal court diversity cases under 28 U.S.C. 1332(a).

• **Enacting A Meaningful Exclusion for Intrastate Class Actions.** The rationale of diversity jurisdiction when it was first enacted at the end of the 18th century was to avoid prejudice against out-of-state defendants. As the Chief Justice pointed out in his 1998 annual report, that rationale is not nearly so powerful in today's society. *See, e.g.,* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 7 (Jan. 1, 1999) (noting that in 1789, when the Judiciary Act was enacted, "there was reason to fear that out-of-state litigants might suffer prejudice at the hands of local state-court judges and juries, and there was legitimate concern about the quality of state courts. Conditions have changed drastically in two centuries.").

Under H.R. 1115, an in-state class of plaintiffs suing under their own state law can keep a state-law class action in state court *only* if the primary defendants are citizens of that state. (A corporation's citizenship is generally defined to include both the state in which it has its principal place of business and its state of incorporation). To be blunt, that makes little sense in a society in which large corporations have a significant business presence in many states. Surely, Disney should be required to defend a suit in state court in Florida, as well as in California, where it has its headquarters. Ford Motor Company should not be able to remove a suit from state court in Kentucky, where it has a substantial manufacturing plant, as well as in Michigan (where it has its headquarters). Thus, at the very least, the portion of proposed 28 U.S.C. 1332(d)(3)—which purports to, but does not in reality, bar federal jurisdiction over certain intrastate class actions—should be amended. Under the amendment, the federal court would not have jurisdiction in class actions in which a substantial majority of the class members are citizens of a single state of which the primary defendants are also citizens "or in which the primary defendants have a substantial business presence," and the claims asserted will be governed primarily by the laws of that state.

III. OTHER PROVISIONS OF H.R. 1115 UNDERMINE CONSUMER INTERESTS.

• **H.R. 1115's Automatic Appeal Provision Would Impose Grave Harm on Consumers.** Section 6 of H.R. 1115 provides an interlocutory appeal as of right to anyone adversely affected by a district court's decision to certify (or not to certify) a class action under Rule 23. Since 1998, Federal Rule of Civil Procedure 23(f) has allowed permissive interlocutory appeals of class certification decisions. Rule 23(f) is reserved for cases in which an erroneous decision threatens to impose serious harm on a litigant.[12] The courts of appeals are now in the process of setting standards governing the circumstances in which such permissive appeals should be allowed. Thus, section 6's drastic expansion of the federal appellate docket is unnecessary. In 2001, federal appellate case filings climbed to record levels, part of a decade-long trend.[13] In 2002, federal appellate filings set another record, although the rate of growth was smaller.[14] Section 6 of H.R. 1115 would add a new category of complex appeals to the already crowded appellate docket. More fundamentally, the proposal is directly contrary to Supreme Court precedent [15] and longstanding federal policy against piecemeal litigation that, with a few narrow exceptions, requires a "final decision" before an appeal may be taken.[16]

Let's be clear why this provision is in the bill: Corporate defendants want the right to appeal class certification immediately to delay the case and make sure that the merits (including any merits discovery) are not reached until years down the road. That delay, of course, undermines the plaintiffs' ability to press their cases to trial and to receive reasonable settlement offers. A federal civil appeal currently takes, on average, a year from filing to decision,[17] with some circuits having greater

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[12] *E.g., Prado-Steiman* v. *Bush,* 221 F.3d 1266 (11th Cir. 2000).

[13] *See* http://www.uscourts.gov/judbus2001/front/highlights.pdf (2001 caseload highlights: "Rising for the seventh consecutive year, appeals filings grew 5 percent to an all- time high of 57,464").

[14] *See* http://www.uscourts.gov/judbus2002/front/jdbusiness.pdf (2002 caseload highlights).

[15] *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978).

[16] 28 U.S.C. 1291; *Catlin* v. *United States*, 324 U.S. 229, 233–34 (1945).

[17] http://www.uscourts.gov/judbus2002/appendices/b04sep02.pdf.

delays.[18] Of course, class actions are not "average" cases, because of their complexity and because the parties will generally request and receive oral argument, and so the appeals to which this provision would apply will take considerably longer than average, as is the case for almost all the federal appeals in which Public Citizen is involved. If they lost on appeal, defendants could seek certiorari to the Supreme Court, which would rarely, if ever, succeed, but which would add 6 to 9 months to the delay.

Another aspect of this provision unmasks its improper purpose: Unless otherwise ordered because specific discovery is necessary to preserve evidence or prevent undue prejudice to a party, all proceedings in the district court are stayed during the pendency of the appeal. This automatic stay provision demonstrates that the bill seeks to take all pressure off the defendant for a long period of time after a district court certifies a class. Rule 23(f)—the permissive appeal provision discussed above—takes the opposite approach; it says that, unless otherwise ordered, proceedings in the district court will *not* be stayed during the pendency of an appeal.

In sum, this provision will be very harmful to plaintiffs with meritorious claims. It will increase the number of "sell out" settlements because no other kind of settlement will be offered until years of appellate proceedings have ended. It will overload the already overworked appellate courts. It has no relationship to the bill's supposed concerns about overlapping class actions in *state* court, and indeed it is hostile to one of the bill's stated purposes—to enable plaintiffs with meritorious claims to achieve justice. Even if H.R. 1115 were otherwise worth supporting—which it is not—the bill should be rejected based on section 6 alone.

• **The Bill Does Nothing to Address the Problem of Coupon Settlements.** Much of the effort by corporate defendants, and some in Congress, to convince the public of the need for class action reform, is based on stories about coupon settlements, in which the class members obtain certificates for a few dollars off a future purchase of the defendant's product, and class counsel walks away with millions of dollars in fees. Although the rhetoric regarding coupon settlements sometimes outpaces the reality, coupon settlements are a real problem when the class member has no use for, does not want, or cannot afford the product, the coupon is difficult to obtain or use, or the settlement does not include a market maker who can sell the coupon on the class member's behalf to a third party who wishes to use it. In such cases, coupon settlements are nothing more than promotions of the defendants' products rather than anything of value to the consumer as redress for prior wrongdoing.

However, the corporate community's use of stories about coupon settlements to drive the class action debate drips with irony because, as the old saying goes, "It takes two to tango." The coupon settlement is *their* creation; defendants love coupon settlements in which the coupon will have little or no value. The settlement provides a modest marketing gimmick for the defendants' products, while ridding the defendants of potentially troublesome litigation for little more than the cost of attorney's fees. The little empirical evidence that exists demonstrates that most class members get nothing from coupon settlements because redemption rates are very low.[19] Such low rates can result from indifference, lack of proper notice, a lack of desire to use the coupon to purchase another one of the defendant's products that is the subject of the lawsuit, or, in cases involving big-ticket items, an inability to afford the defendant's product. That's why defendants are willing to pay class counsel in cold, hard cash to make the litigation go away.

So, what does H.R. 1115 do about the issue? Other than lip-service, *absolutely* nothing. Under proposed 28 U.S.C. 1714, a part of the so-called "consumer class action bill of rights," a coupon settlement may be approved only after a hearing and a written judicial finding that "the settlement is fair, reasonable, and adequate for class members." But all state and federal courts already hold settlement hearings (known as "fairness hearings"), and all state and federal courts approve settlements only after issuing a written finding that the settlement is "fair, adequate, and reasonable"—the universal settlement approval standard. Thus, every time a court approves a coupon settlement, it makes a finding that the settlement is fair, adequate,

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[18] *Id.* (Sixth Circuit; Ninth Circuit).

[19] *See, e.g., Buchet* v. *ITT Consumer Financial Corp.*, 845 F. Supp. 684, 695–96 (D. Minn. 1984) (minuscule coupon redemption rates), amended, 858 F. Supp. 944, 944–45 (D. Minn. 1984) (citing additional information to same effect); "In Camera," 16 Class Action Reports 369, 485–87 nn.2–8 (July-Aug. 1993) (survey of coupon settlements, showing that settling parties generally vastly overstate expected redemption rates and that, without transferability, settlement coupons are generally worthless); B. Meier, "Fistful of Coupons—Millions for Class Action Lawyers, Scrip for Plaintiffs," *New York Times*, pp. D1, D5 (May 26, 1995) (only one percent redemption rate where coupons could be used toward purchase of new vehicle).

and reasonable. Section 1714 would add no additional "judicial scrutiny," contrary to what its title suggests.

There is a solution, however, but it is one that corporate defendants dread: Pay class counsel's fee based on a reasonable percentage of the coupons *actually* redeemed.

In some cases, class counsel have simply multiplied the number of certificates issued by the certificate's face value and asked for a "reasonable" percentage of the resulting figure. In other cases, fees have been awarded as a percentage of the plaintiffs' expert's prediction regarding the level of coupon redemption,[20] predictions that, as noted above, are at odds with what is actually known about *actual* coupon redemption rates in consumer class actions. Either way, corporate defendants have gladly paid up.

Whatever one thinks of coupon settlements—and there are arguments against their use in any case—this value-based method of awarding fees will surely eliminate the worst settlements. With the prospect of a paltry fee, no longer would class counsel agree to a settlement in which coupons are non-transferable,[21] or in which the impediments to redemption are so great as to render the coupons valueless to most class members.[22] In fact, by tying counsel's fate to that of their clients, the typical coupon settlement would become a thing of the past, and only settlements in which the coupon has a cash redemption value or the settlement includes the participation of a secondary market-maker—in other words, a settlement that actually broadly benefits the class—would be worth counsel's efforts.[23]

IV. AN ALTERNATIVE TO H.R. 1115'S ANTI-CONSUMER, OVERKILL APPROACH.

As explained above, H.R. 1115 would provide federal jurisdiction for almost all state-law class actions—even where only one class action has been filed, and the class members, who reside in one state, have sued in their own state courts for relief under that state's law. As I've said, that overkill approach is an affront to federalism, would overload the already crowded federal dockets with state-law cases, and simply makes no sense because it attacks a non-existent problem. Nevertheless, modest reform is appropriate. In recent years, critics have noted that problems arise when multiple class actions, involving many of the same class members suing the same defendants on the same or similar claims, are filed in different courts. Such overlapping class actions can be wasteful. Multiple counsel and multiple courts will be called upon to consider the same discovery issues, entertain the same motions (including class certification motions), and, in theory, try the same case (although such cases rarely are tried). Moreover, when some or all of the cases are filed in different state courts (or in state and federal courts), there is no mechanism for consolidating the actions.

Even more important, multiple class actions may, in some circumstances, hurt class members because their presence allows the defendant, in seeking settlement, to choose plaintiffs' counsel most willing to settle on terms favorable to it. This so-called reverse-auction phenomenon—in which the price of the plaintiffs' claims (though not class counsel's fee) are bid down, not up—is a serious concern in some cases.

Senator Leahy has proposed legislation that would allow most regional or national class actions—defined as cases in which significant numbers of class members reside in three or more states—to be filed in, or removed to, federal court. This legislation would have the effect of allowing the consolidation of multiple regional or national state-court class actions, after removal, by the federal Judicial Panel on Multidistrict Litigation.[24] This is the approach preferred by the Judicial Conference of the United States, which opposes H.R. 1115. Under Senator Leahy's legislation—which is modeled on the Judicial Conference's concerns—a class action filed in state court would not be removable to federal court if a principal defendant were a citizen of the forum state. That result makes perfect sense since a defendant can hardly claim "prejudice" if it is sued in its home state.[25] Senator Leahy's proposal contains other

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[20] *In re Domestic Air Transp. Antitrust Litig.,* 148 F.R.D. 297, 322 (N.D. Ga. 1993); *see General Motors*, 55 F.3d at 807–10.

[21] *Dunk* v. *Ford Motor Co.,* 48 Cal. App. 4th 1794, 1805 (1996).

[22] *General Motors,* 55 F.3d at 808–10.

[23] *See* National Ass'n of Consumer Advocates—Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375, 382–84 (1998); *General Motors*, 55 F.3d at 809.

[24] *See* 28 U.S.C. 1407.

[25] In this regard, Senator Leahy's proposal honors the traditional rule in diversity cases, which prohibits a defendant from removing a case if the defendant is a citizen of the forum state. *See* 28 U.S.C. 1441(b) (second sentence).

genuine reforms—such as taking real aim against valueless coupon settlements by requiring fees to be calculated as percentage of actual coupon redemption and by banning settlements that waive class members' future legal rights. In sum, Public Citizen is prepared to support real reform that helps consumers and protects the legitimate interests of corporate defendants in efficiency and fairness. H.R. 1115 provides none of that.

In closing, I want to reiterate our opposition to this legislation. Since the founding of the Republic and the first Judiciary Act, it has been our shared national understanding that litigation of state-law questions would, in general, be the province of state courts. The enormous expansion of federal court power envisioned by H.R. 1115 is unwise because it tears a large hole in the fabric of federal-state relations and because it imposes a considerable burden on our already overworked federal court system. If there are genuine problems with state-court class actions, Congress should work hand-in-hand with state courts and legislatures to resolve them, mindful of the vital state interests that are implicated when Congress proposes curtailing state-court jurisdiction. Senator Leahy's proposal is a good place to start. But under no circumstances should Congress adopt the heavy-handed approach embodied in H.R. 1115.

ATTACHMENT

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

Class Action Settlements: Federal Courts Are No Better than State Courts When It Comes to Protecting Consumers

A chief claim of the business lobby promoting federal class action legislation is that it will stop class action settlements that hurt consumers. While there are abuses in state court class actions, the premise that these abuses will disappear upon removal to the federal courts is flawed. Too often, proposed class action settlements in both state and federal courts are reviewed perfunctorily with little regard for consumers' interests. These abuses generally manifest themselves in two ways: the undervaluation of plaintiffs' claims and the overvaluation of plaintiffs' attorney's fees. Such arrangements often occur through collusion between the attorneys for the defendants and plaintiffs. However, nothing in proposed federal class action legislation addresses either of these issues. Allowing the removal of the majority of state-based class actions is definitely not the solution, as class action abuse occurs in the federal courts as well.

Consider the following results in the preliminary Federal Judicial Center study looking at class actions in two federal district courts:

- The rate of settlement approval was high. In the Eastern District of Pennsylvania, 34 out of 38 proposed class action settlements (89%) were approved without *any* changes. In the Northern District of California, 26 out of 30 (87%) class action settlements were approved without any changes. In the 28 cases throughout the four district courts where motions to certify and approve settlement were submitted simultaneously, 86% (24 of 28) of the settlements were approved without *any* changes.

- The median length of the fairness hearing on the class action settlement was short; 38 minutes in the Eastern District of Pennsylvania and 40 minutes in the Northern District of California.

- Attorneys fee requests were not generally scrutinized carefully. In the vast majority of cases, the court awarded the same amount as requested by the plaintiffs' attorneys. In the Eastern District of Pennsylvania and the Northern District of California, the court awarded the *exact* amount requested by the plaintiffs' attorneys in 83% of the cases.

As John C. Coffee, Jr. stated in his Columbia Law Review article, *Class Wars: The Dilemma of the Mass Tort Class Action*, these statistics demonstrate a pattern in the federal courts of "judicial passivity" regarding class action settlements. This "judicial passivity" can have a devastating impact on injured plaintiffs in federal class actions.

On the following pages are just a few examples where federal courts have approved class actions settlements that do little or nothing to help injured plaintiffs:

- In *In Re Domestic Air Trans. Antitrust Litig.*, plaintiffs filed a series of class actions alleging that a number of major airlines, including American, Continental, Delta, Northwest, TWA, United, and USAir engaged in the price fixing of passenger air transportation. The case was consolidated for pretrial matters in the Northern District of Georgia. The case settled and the District Court approved the settlement that provided plaintiffs with coupons worth between $10 and $200 for flights costing between $50 and $1,500. The plaintiffs' attorneys were awarded approximately $10 million in fees. While coupon, or "scrip" settlements like this one offering discounts on the defendant's product are popular, they often offer no greater discount than what would be available in volume purchases, cash sales, or using a particular credit card. In addition, restrictions are generally placed on the transferability of these coupons, making them even less likely to be used.

- In *Hanlon v. Chrysler Corp.*, plaintiffs filed a class action suit in federal court in San Francisco because the rear latch on Chrysler's minivan was defective and had a tendency to disengage. These latches had caused serious personal injuries to a number of plaintiffs. The case was settled on a nationwide basis; the settlement provided that Chrysler would offer class members a new improved latch if the owner presented the van to a dealer. While this sounds like an appropriate outcome, Chrysler had already previously agreed to replace the latches under an informal agreement with the National Highway Traffic Safety Administration (NHTSA). Moreover, at the time of settlement, the retrofit latch was not ready. So, class counsel apparently agreed to something it could not have properly assessed to determine its sufficiency and which the government had already obtained outside the litigation process. In addition, the agreement provided for up to $5 million in attorney's fees for the plaintiffs' counsel. The settlement was approved by the District Court in 1996 and upheld by the 9th Circuit Court of Appeals in 1998.

- In *In Re: Orthopedic Bone Screw Products Liability Litigation*, the U.S. District Court for the District of Pennsylvania approved a notice plan where the plaintiffs' attorneys only sent a full notice package to people who had already filed suit against AcroMed. Although defendant AcroMed possessed records of the physicians and hospitals to which it sold the defective screws, no effort was made to contact them or their patients. Class members who did not see the published notices in time to register were left out of the settlement, despite the fact that there was an efficient way to find them with the defendant's sales records. Those left out of the class were not allowed to file individual suits or recover anything for the injuries caused by the defendant's defective product.

  The same case contains another problematic ruling by a federal judge. Some plaintiffs allege claims against their surgeons on the ground that the surgeons should have warned of FDA refusal to approve the AcroMed bone screw implanted in their bodies. Plaintiffs also claim that surgeons and hospitals took stock from AcroMed and put those financial interests ahead of their patients in a clear conflict of interest. However, the settlement bars claims against the surgeons who implanted the screws and hospitals where the surgeries took place, despite the fact that those surgeons and hospitals were not parties to the settlement and the class received nothing in exchange for dropping their claims against those surgeons and hospitals. The settlement release goes so far as to bar claims against doctors who told their patients that the device was FDA approved when they knew it was not. AcroMed defends the release of

the surgeons and hospitals on the ground that it needs to maintain good relations with its customers to insure future profitability.

- In *Reynolds v. Beneficial National Bank* the Seventh Circuit Court of Appeals reversed a $25 million settlement of class action lawsuits over H&R Block's tax refund loan program after concluding that the federal district judge who approved the settlement did not provide the "beady-eyed scrutiny" required to ensure that the settlement was "fair, adequate, and reasonable, and not a product of collusion." The litigation arose out of refund anticipation loans (RALs) made jointly by Beneficial National Bank and H&R Block. When Block filed a refund request with the IRS for one of its customers, the refund normally arrived within a few weeks. But even a few weeks is too long for the neediest taxpayers, and so Beneficial through Block offered to lend the customer the amount of the refund for the period between the filing of the return and the receipt of the refund. The annual interest rate on such a loan often exceeded 100 percent. Block arranged the loan but Beneficial put up the money for it. Not disclosed to the customer was the fact that Beneficial paid Block a fee for arranging the loan and that Block also owned part of the loan.

  Beginning in 1990, more than 20 class actions were brought against the defendants on behalf of RAL borrowers. The suits charged a variety of statutory violations, but perhaps the most damaging charge was the claim that Block's customers were led to believe that Block was acting as their agent, when Block was in fact, without disclosure, engaged in self-dealing. Block's lawyers sought out one team of plaintiffs' attorneys who accepted a settlement that dismissed all the cases, and provided virtually no benefits to class members, but lavished high fees upon the less-than-aggressive lawyers. When the federal district judge approved the settlement, lawyers for other plaintiffs appealed.

  The appellate court found that the federal district judge failed to exercise the high degree of vigilance required in class actions; did not give the issue of the settlement's adequacy the care it deserved; relied on an unsworn report by an expert; substituted intuition for evidence; and encouraged the attorneys for the class to submit their application for attorneys fees under seal, even though there was no legal authority for such secrecy. In short, the federal judge abused his discretion in approving the settlement. The Court of Appeals set aside the settlement and the order approving attorney fees, and sent the case back to the District Court. In addition, the Court took the unusual step of ordering that a different judge be assigned to handle the case in the future.

- In the *Mexico Money Transfer Litigation*, plaintiffs filed a class action for treble damages against Western Union and MoneyGram. They claimed fraud because the advertised wire transfer fee they paid over the counter (typically $15) did not represent the full cost to customers. In practice the companies also collected and retained for themselves the difference between the retail currency exchange rate quoted to the customers and the wholesale (interbank) rate, the so-called FX spread which averaged about $25 per transaction. Class representatives estimated that defendants make as much as $300 million per year from the FX spread, and they sought treble this sum, over many years, as damages. The proposed recovery thus ran into the billions of dollars. The case settled was for much less and the settlement was challenged as being inadequate. This is one of many class

actions in which everyone other than the plaintiffs has been paid in cash. The attorneys got cash, the charitable organizations got cash, and the customers got coupons. The coupons had a face value of $400 million, but experts estimated that about half of the coupons would not be claimed, and only 20% to 30% of those claimed would be used, implying a net value of $40 million to $60 million.

- In *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, the Federal District Court in Philadelphia approved a settlement of a nationwide class action to obtain repair damages or retrofit of the 5-6 million side-saddle fuel tank GM Trucks. Class members were to receive a $1,000 coupon, good for 15 months, toward the purchase of a new GM Truck or minivan. The class included truck owners in all states except Texas. Class members could transfer the coupon to third parties, but then the coupon was worth only $500 and could not be used in conjunction with the ubiquitous GM rebates and credit deals. Other restrictions on the $500 coupon made it virtually worthless. The settling parties' expert himself conceded that 54% of the class members would get nothing at all from the settlement. Nevertheless, the district court awarded $9.5 million in attorney fees and $500,000 in expenses. Public Citizen and other groups objected to the settlement without success in the district court. They then appealed to the Court of Appeals where they were successful in overturning this settlement.

- *Kaiser v. Cigna Health Care Systems* was an attempt by Cigna to circumvent a massive lawsuit, involving all the major healthplans in the country, by offering a deal valued at between $50 million and $200 million to a group of Illinois-based lawyers who said they represented the doctors in an Illinois courtroom. The doctors' primary lawyers, presenting the case in Miami federal court in front of U.S. District Judge Federico Moreno, termed the deal woefully inadequate. They accused Cigna of corruption and collusion in trying to reach a settlement without approval by Moreno, who had previously been directed by a federal panel to deal with all the claims in the national case. Although Cigna could have attempted to push through its collusive settlement before one of several state-court judges presiding over similar cases, it instead found an Illinois federal judge, G. Patrick Murphy, to approve the settlement.

  The federal Judicial Panel on Multi-district Litigation overturned the settlement, ordering that the case be transferred to Judge Moreno. Moreno has presided over a consolidated class action against Cigna and several other health care providers for the past three years. The Miami lawsuit alleges that Cigna, Aetna, United Healthcare, Coventry Health Care, WellPoint Health Networks, Humana Health Plan, PacifiCare Health Systems and Anthem BlueCross BlueShield delayed or denied reimbursements for health services and rejected claims for medically necessary treatments as part of a racketeering conspiracy.

It is clear that there are abusive class action settlements in both state and federal court. To assume that removing the vast majority of state class actions to federal court will solve this problem is erroneous. Nothing in either of these bills takes this into account and they are not the way to solve anti-consumer abuses in the class action system.

April 15, 2003

Mr. SMITH. Thank you, Mr. Wolfman.

Mr. Beisner, let me address a question to you, and it is this. As I understand it, H.R. 1115 obviously applies only to cases that have been certified as class actions that have been filed after the date of enactment.

But my question goes to the pending cases where you have suits that have been filed that have not been certified as class actions. If this bill did not apply to those, then you have a situation where individuals, consumers, could be made part of a pending case and therefore forfeit their rights under H.R. 1115 because it has not been made applicable to the pending cases.

Don't you feel that H.R. 1115 should apply to pending cases that have not been certified as class actions?

Mr. BEISNER. It seems to me that that is something the Committee should consider during the markup process. I think there are a lot of cases out there that are posing these problems. I also think that there is legitimate concern about the potential that, if the bill is enacted, you will have many new cases that will be filed just before the effective date of the statute. We have seen that happen in other situations, so I think that is something that the Committee should seriously consider.

Mr. SMITH. Okay. Thank you, Mr. Beisner. I have several more questions that I would like to submit to you all in writing and ask you to respond within 10 days, if you would. Thank you.

Now we will recognize the gentleman from Virginia, Mr. Boucher, for his questions.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Mr. Beisner, I also have some questions for you. First of all, I would appreciate it if you could survey the landscape that perhaps may have involved changes during the course of the last 2 years since this Committee had its last hearing on class action reform legislation. Have the problems that we are seeking to address increased in volume? Have they decreased? What changes have we seen?

Secondly, before you answer, let me just propound two others, and then you can have the balance of the time in responding.

I would appreciate your response to two of the arguments that Mr. Wolfman has raised. First, he has suggested in his testimony that if this bill passes there will be a flood of cases entering the Federal courts, and that increased volume of Federal court litigation would constitute a tax on resources and disadvantage other litigants.

Could you respond to that and let us know if, in your view, that is likely to happen; and if not, why not? That would be helpful.

Third, Mr. Wolfman has objected to the provision in the bill that provides an appeal as a right on an interlocutory basis for decisions to certify or not to certify classes in Federal court, and has suggested that this appeal as a right would disadvantage consumers. My personal view is that it would actually help to protect the interests of consumers, but I would appreciate your statement as to whether you agree or disagree, and why.

So those three questions, and I would appreciate your answer.

Mr. BEISNER. As to question number one, I think the situation with State court class actions certainly has not improved over the

last few years, and I think there are clear indications it has gotten worse. The volume of cases, from all indications, in magnet courts based on the studies that have been done are increasing dramatically in a number of locations.

The problem that was noted by several of the speakers about particular courts dictating the laws of other jurisdictions seems to be continuing. For example, just within the last month the Supreme Court of Oklahoma affirmed a trial court decision that says that the law of one State in that particular case shall be applied to the class members who hail from all 50 States.

So if you bought a vehicle, which was the matter at issue in that particular State, in Massachusetts, the law that you thought was going to apply when you bought that car, presumably the law of Massachusetts, won't; according to the law of Oklahoma, the law of some other jurisdiction will be imposed.

So I think that the concerns that have been expressed here are actually growing worse.

With respect to the allegations about the flood of class actions into Federal court, I guess I would make three points.

One is that I think that there is an erroneous assumption that all class actions will be removed to Federal court. Defendants, as it stands now, don't always remove cases that they can remove to Federal court, and I don't think that that will necessarily occur here. It is expensive to remove cases to Federal court. I think they will make a judgment and in some cases they will, in some cases they won't.

Secondly, I think the notion of a flood is overstated, because so many of the class actions that are filed now are copycat class actions. The record documents that in many instances you will have a single issue, and you will have 100 virtually identical class actions filed in courts all over the country with all these judges out there litigating the same cases over and over again, with a dramatic duplication of effort.

If this bill was enacted, those cases presumably would be in Federal court and could be drawn together very efficiently before a single Federal judge, and I think thereby obviating any of the workload concerns that would be there.

Finally, I would note that I think that the workload concerns are overplayed and they ignore the great burdens that are faced by our State courts. For example, I note the statistics indicate that, on average, in most jurisdictions, each statutory judge is assigned, on average, over 1,500 new cases a year compared to an average of 454 new cases to our Federal judges last year.

I think that these concerns about workload ignore the fact that class actions are burdening the entire system and are focusing too much on the impact on the Federal judges.

On the appeal of right issue, I would simply note the following. I think that the concerns expressed by Mr. Wolfman ignore the fact that a class action—if the class certification is denied, that may be appealed under this bill to Federal court or to the appellate court, as well.

As it stands right now, the plaintiffs have to wait to the very end of the case, try the claims, and they never get a chance to appeal that, whereas under this bill that could be done right away, which

would, I think, hasten the termination of the litigation and the resolution of the rights of all the parties.

Mr. BOUCHER. Thank you very much, Mr. Beisner. Thank you, Mr. Chairman.

Mr. SMITH. Thank you.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. I have two meetings going on simultaneously, so I have to run back and forth. Good to have you all with us, gentlemen.

Let me put a two-part question to you, Mr. Dinh.

Opponents of the bill contend that the passage of this bill will result in the complete federalization of class action standards. Let me hear your response about that question.

And let me follow up with another question. Are opponents of the bill correct in suggesting that the bill would result in another sort of federalization; that is, Federal courts dictating substantive State law?

Mr. DINH. Thank you very much, sir. I will take the second question first, because it is much simpler to answer, and then I will take the first part second.

With respect to the substantive law, absolutely not. The class action mechanism is simply a procedural mechanism in order to aggregate claims under the applicable laws. H.R. 1115 in no way seeks to alter the substantive law that would apply, or even the choice of law rules that would apply when the case is heard in Federal court. The choice of law and substantive law would depend on the traditional State laws of the applicable forum State.

With respect to the federalization of class action standard, yes, the bill does amend existing Federal law; that is, rule 23(f) of the Federal Rules of Civil Procedure. That law is Federal in nature because the rule applies only in Federal court.

It does expand the jurisdiction of the Federal courts by changing the current rule of total diversity to one of minimal diversity. We think that this expansion advances the Federal interest not only in uniformity of class action procedures, but, much more importantly, in the protection of individual State interests.

Currently, the system exists whereby one State can impose its judgment, and thereby alter the law of the other 49 States. I think one of the more celebrated cases is the case in Illinois, whereby in a case regarding the after-market auto parts in a nationwide class action, that court approved a settlement that was opposed by the Attorney General and the Governors of a number of States, as well as defendants and plaintiffs, simply because that judgment altered the autonomy and regulation of a number of those States.

So in that sense, the Federal interest here is strong or only—not at all in imposing Federal substantive law, but in protecting the substantive law of the various States.

Mr. COBLE. Thank you, Mr. Dinh.

Mr. Wolfman, Mr. Beisner addressed the question about increased workload. Let me give you a chance to insert your oars into these waters.

Do you believe that the concern about increased workload that will be imposed upon Federal judges is a valid one, and do you be-

lieve that enactment of this bill will significantly affect the speed or pace at which cases move through the Federal court system?

Mr. WOLFMAN. I do, and here is why, sir. You can't just look at these cases and say, well, there are going to be 3,000 more cases. It is the difficulty and complexity of these cases. They are complicated cases, they are important cases. So in our experience, we litigate principally in the Federal courts all the time, the delays are getting greater.

Let me say one other thing. I think this is driving the Judicial Conference's opposition in part to this legislation over the years. It is not just the federalism concerns, although that is important; but they are concerned that not all of these cases that would be transferred under this bill comes from the Federal court, and a much more balanced, narrow approach should be taken.

Mr. COBLE. Mr. Mirel?

Mr. MIREL. On the issue of whether it is going to affect the State courts?

Mr. COBLE. Yes.

Mr. MIREL. The problem Mr. Dinh talked about having decisions in one State court undo the carefully put together legislation that I and my fellow commissioners have to deal with every day in our jurisdictions is a very serious concern.

We have to look at the large picture. We have to make sure not only that a particular plaintiff is made whole, but that the insurance system continues to function and function well on behalf of all the policyholders we are supposed to protect. It is hard to do when you have a State court in another State overturning decisions we have made.

Mr. COBLE. Thank you, sir.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Coble.

The gentleman from Virginia, Mr. Scott, is recognized for his questions.

Mr. SCOTT. Thank you, Mr. Chairman.

Let me just set an idea. If you catch a corporation stealing a lot of money, but just a little bit from each person, and you want to get them—let's see how this thing works.

First of all, when can a group of defendants or one defendant remove? What is the latest they can actually remove?

Mr. Dinh, are you representing the Department of Justice today?

Mr. DINH. I am, indeed.

Mr. SCOTT. What is the latest that the removal can take place?

Mr. DINH. I do not know the latest, but I think the removal is there available. Perhaps Mr. Beisner can talk to that more clearly.

Mr. BEISNER. The bill would not change current law, which says that you have to remove the action to Federal court within 30 days after you receive notification of the justification for removing the case to Federal court, which is normally 30 days after—within 30 days after the action is filed.

Mr. SCOTT. Now, they said a plaintiff can—somebody who finds they are in the class, when they get noticed, after everything is done and certified, then the plaintiff can jump up—they can pick a plaintiff to get him to remove it, is that right? If you are trying to get your case done, what is the latest it can be removed?

Mr. BEISNER. A plaintiff under this bill may remove it within 30 days after they receive notification of the lawsuit.

Mr. SCOTT. That could be well down the line?

Mr. BEISNER. That could be later in the lawsuit, that is correct.

Mr. SCOTT. Then you get over to Federal court and start arguing, and the Federal court makes the decision. Who can appeal?

Mr. BEISNER. On class certification?

Mr. SCOTT. Yes.

Mr. BEISNER. Any party of record in the action may appeal that if they are a losing party on class certification.

Mr. SCOTT. Okay. Now, suppose the original plaintiffs win and it gets sent back to State court after the removal, the appeal, back, and you finally win. It should have been in State court. Can you start all over again and somebody else try to remove it, or is it res judicata on the decision that it is not a Federal case?

Mr. BEISNER. It is res judicata that it is not a Federal case if they don't change anything, if the case in State court isn't changed in any way.

Mr. SCOTT. So there is no way you can go back and forth between the Federal court and the State court, and then somebody trying to get you back in the Federal court?

Mr. BEISNER. If the Federal court determines that jurisdiction doesn't exist over the case and the case is remanded to State court, if no facts change in the State court—that is, if the plaintiff doesn't amend the complaint—you can't remove again.

Mr. WOLFMAN. Representative, I think what you were referring to is the fact that under this bill, if the Federal court decides that the case can't be certified under Federal standards and the case is dismissed, and if the same class refiles in Federal court, it will then be removed again—in State court, it will then be removed again to Federal court and we will be in, I think, what you are referring to as a merry-go-round type of situation; that is correct.

Mr. SCOTT. Mr. Beisner, is that not true?

Mr. BEISNER. If you are talking about the court, I think the situation you had posited was the court remands to State court because jurisdiction doesn't exist, I think the answer I gave was correct to that.

I think what Mr. Wolfman is positing is a different hypothetical; that is, that the Federal court denies class certification. He is correct that in that situation the case is then dismissed. It doesn't get remanded to State court under the bill, it would be dismissed. If the plaintiffs then refile a new action, as it would be always the case if it is subject to Federal jurisdiction, it may be removed.

Mr. SCOTT. So you can go back and forth.

If you get into Federal court, Virginia has contributory negligence, other States have comparative negligence.

If it is a tort case, how do you decide which law applies if you are in Federal court?

Mr. BEISNER. The Federal court applies the choice of law principles in the jurisdiction where the action is filed, as it does in any diversity case, and as any State court would be obliged to do.

Mr. SCOTT. Where it is filed?

Mr. BEISNER. Yes.

Mr. SCOTT. So you are applying State law.

Mr. BEISNER. If it is a State law based claim, you would be applying State law, and you would decide which law applies to the particular claims in the action based on the choice of law principles.

Mr. SCOTT. The Federal court may have to certify the question back to the State court to find out what the State law is?

Mr. BEISNER. As would a State court if it was having to deal with the law of another jurisdiction. That is the problem we are dealing with here, is that often you will have an Illinois court trying to figure out what the law of Oregon is because that is what applies to these claims.

The problem is that a lot of State courts don't have authority to ask the courts of those States what their law is, they just have to make a decision. The Federal courts, though, have a greater ability to ask the State courts of the other jurisdictions what their laws are and what law should be applied.

Mr. SMITH. Thank you, Mr. Scott.

The gentleman from Arizona, Mr. Flake, is recognized for his questions.

Mr. FLAKE. Thank you, Mr. Chairman. Forgive me for coming in late, and forgive me if some of these questions have been addressed.

Mr. Beisner, the Supreme Court approved some changes to rule 23 that may or may not be compatible with this legislation.

In your opinion, are the changes to rule 23 helpful to the class action or are they compatible with this legislation, and how does it mix?

Mr. BEISNER. The changes that the Supreme Court has sent over to Congress, I think, are indicative of the reason why this bill is so important, because the Federal courts have been taking these issues of class action abuse very seriously. They have adopted these rule changes, which would go into effect under normal procedures in December of this year, and I think they indicate the dedication of the Federal courts to addressing class action abuse problems.

My view is that the rule changes are complementary of what is in the bill. I do think the Committee should take a careful look to ensure that there are no conflicts between the two. I think that the consumer protection provisions of the bill are actually quite complementary of what the Supreme Court has sent over to Congress, but I would encourage a review of that.

I would further encourage the Committee to put a provision in the bill that would accelerate the effective date of those amendments to be consistent with the effective date of the law if it passes so that those new Federal provisions, which I think are an improvement in the class action context, would be applicable simultaneously with the effective date of the bill.

Mr. FLAKE. All right.

Another question. Many of us, I think all of us, have constituents who find out that they are part of a class action class and it is too late for them to opt out, or they receive notices that they simply don't understand and throw it away.

Does this legislation address that concern?

Mr. BEISNER. Yes. The legislation has in it provisions thatit would improve the notice that is being sent to class members: a re-

quirement that it be in plain English; an encouragement to courts to provide clearer notice to class members.

I would note that the rules that have come over from the Supreme Court also have provisions of that sort in them, as well, and that, in particular, would be the area where I would urge that a review be made to ensure that they are all consistent.

But I think together what is in the bill and the Federal rule change provisions are all intended to make sure that people understand what their rights are in class actions, and can timely take action to deal with them.

Mr. FLAKE. Mr. Mirel, I am interested on your opinion of the effect of this legislation on the insurance industry.

Mr. MIREL. On the insurance industry?

Mr. FLAKE. Yes.

Mr. MIREL. I think it will give the insurance industry a chance to contest some of these suits on the merits, with more hope of having a fair hearing than happens in some of the State courts where they are now filed.

[11:01 a.m.]

Mr. MIREL. I think that—I mean, there is no guarantee, of course, of fairness in any court, including Federal courts. But I think that Federal courts with appointed judges have a broader viewpoint and are more likely to weigh the merits more fairly. Even on procedural issues now, the industry often settles cases for multimillions of dollars because the procedural hurdles of getting heard on the merits are so high that they really haven't got a chance. And that would, I think, be helped by this bill.

Mr. FLAKE. Thank you, Mr. Chairman.

Mr. SMITH. [Presiding.] Thank you, Mr. Flake.

The gentleman from New York, Mr. Nadler, is recognized for his questions.

Mr. NADLER. Thank you.

Mr. Dinh, I am going to ask a number of questions, so please answer briefly, if you can.

Mr. DINH. If I can.

Mr. NADLER. You state that the removal to Federal court—well, one objection to this is that removal to Federal court could leave, as was said a moment ago, could leave a litigant, the plaintiff, shuffling from State to Federal court and back if they meet the State certification requirements but don't meet the Federal certification requirements.

Why not say that the Federal court shall apply the State certification requirements and not have to develop a Federal common law certification? I mean, if you are suing in New York, if you have an—why shouldn't—if the plaintiff—if the suit is filed in New York and removed from New York courts, why not have the Federal court apply the New York certification requirements?

Mr. DINH. I think the simple answer is that the courts of the United States apply the procedural rules of the Federal courts. And, the normal choice of law only apply to substantive rules, not procedural rules. And rule 23——

Mr. NADLER. But of course—excuse me—certification is a substantive rule in effect.

Mr. DINH. Certification——

Mr. NADLER. It tells you whether you can have a class action suit or not.

Mr. DINH. If——

Mr. NADLER. Unless your real purpose is to eliminate class action suits, why not allow the application of the State certification?

Mr. DINH. Sir, with respect, I think rule 23 is a procedural rule. That is why it is a rule rather than a law. And whether or not to determine——

Mr. NADLER. Would you object to an amendment to allow to have the Federal courts apply the State certification rule?

Mr. DINH. I would not object to anything you do, but I think that would just——

Mr. NADLER. Well, would the Administration support or oppose such an amendment?

Mr. DINH. I think that the entire purpose of the bill would be vitiated by such an amendment, because it would not serve any purpose, in that——

Mr. NADLER. So what you are really saying is that the purpose of the bill is to vitiate State certification rules.

Mr. DINH. No, sir. The purpose of the bill is to reform a class action mechanism that——

Mr. NADLER. But that is rhetoric. I mean, you just said the entire purpose of the bill would be vitiated if the bill were amended to apply—to instruct the Federal courts to apply State certification rules.

Mr. DINH. The purpose of the bill is to reform the class action mechanism by amending Federal rule 23, as Mr. Beisner noted. If you amend Federal Rule 23 but then make it inapplicable to a majority of cases, then there is no point in amending rule 23. That is my point.

Mr. NADLER. Well, the bill does a lot of other things besides that. All right. So basically you are saying, in effect, that the admittedly much more difficult—Federal certification, which is more difficult than many States', should apply. And that is one of the purposes of the bill, which is to make it harder to get a class certification. Correct?

Mr. DINH. In order to protect——

Mr. NADLER. Whatever reason.

Mr. DINH. And also——

Mr. NADLER. Sir, yes or no?

Mr. DINH. That the Federal rules apply in Federal court.

Mr. NADLER. And you will concede that the Federal certification rule is much tougher than many State rules.

Mr. DINH. I have not conducted a survey of all 50 States' certification rules. I do know that the Federal certification rule asked—propounded in the bill, is to ensure that certifications are done to protect the interests of consumers and victims. And that is why we support this bill.

Mr. NADLER. Okay. I will take that as a—since everybody knows, whether you claim ignorance or not, that Federal certification rules are much stricter than many States', that the Administration intends and that the proponents of this bill intend that many suits that are certified under State law should not be certified.

Let me ask you a second question. This bill, unlike prior versions of the bill, this year's version would define private Attorney General actions as class actions and allow them to be removed to Federal court if filed in State court. Now, California for instance has a section 17,200, which has proved an important tool for victims of unfair and deceptive business practice. The legislature has apparently seen fit to allow private parties to combat corporate fraud and other malfeasance on the theory that the California attorney general does not have the sources to do it all on their own.

Until this bill, federalism says that that is California's choice. This bill would override that State policy choice and transfer California private attorney general's actions to Federal courts where they would automatically be deemed class actions and be subject to the certification criteria and Federal standing requirements.

Why is it necessary to do that, in effect abolish the California and other States' private attorney generals sections, which has not been in prior versions of this bill?

Mr. DINH. I think the principle is very simple. If it looks like a duck and quacks like a duck, it is a duck and should be treated as such. Whether——

Mr. NADLER. And would Mr. Wolfman comment on that? Thank you.

Mr. WOLFMAN. I mean, it is not a duck. That is the problem. I mean, these are different types of actions. They have a different view of standing. It is very consistent with your previous question, which is, some States apply class certification rules differently. The State of California has deemed it important that private attorneys general can get into court——

Mr. NADLER. Thank you. Let me ask one more question of Mr. Dinh before my time runs out.

You talk, all the proponents of this bill talk about abuse of settlements that—coupon settlements, other settlements that give nothing to the plaintiffs and give everything to the lawyers. Yet this bill, aside from saying that the courts should have a hearing on whether the fair—the settlement is fair, adequate, and reasonable, does nothing about that. But, of course, the courts already hold hearings on whether it is fair, adequate, and reasonable, and find these coupon settlements to be fair, adequate, and reasonable. So why does this bill do nothing about that problem?

Mr. DINH. I think part of the Bill of Rights under section 3 includes the provision whereby the—where they are what I call the net gain/net loss benefit. That is where a noneconomic benefit purports to outweigh the economic cost that the class members have to pay, that that has to be made explicit, and it has to be substantial——

Mr. NADLER. Mr. Wolfman is shaking his head.

Mr. WOLFMAN. Well, I mean, that is a different provision. That is not the coupon provision. The coupon provision does absolutely nothing. The net gain provision is just a different ball of wax.

Mr. NADLER. So this bill does nothing about this problem, which is allegedly one of the main reasons for this bill.

Mr. WOLFMAN. That is absolutely correct.

Mr. NADLER. Thank you.

Mr. SMITH. Thank you, Mr. Nadler.

The gentlewoman from Pennsylvania, Ms. Hart, is recognized for her questions.

Ms. HART. Thank you, Mr. Chairman.

I have a couple of questions I guess initially to Mr. Beisner. There appear to be, as we have discussed—I happen to agree—abuse of diversity jurisdiction rules. What in your mind was the original intent of those rules to begin with?

Mr. BEISNER. I think the original intent of the concept of diversity jurisdiction was to allow to be heard in Federal court major disputes among citizens of different States. And, nothing satisfies those criteria more than class actions.

Ms. HART. So, in your opinion, the original intent ought to be carried out as a result if this bill becomes law?

Mr. BEISNER. I think if the framers were making the list of cases that they thought should be in Federal court, and if class actions had existed back in the late 1700's, as they do now, these would be at the top of the list of the cases they would want to move there. They are classic interstate controversies.

Ms. HART. Thank you. Critics say that moving these class actions to Federal court might result in fewer classes actually being certified, which, in their explanation, would deprive the consumer of an important tool for bringing these small claims. How would you respond to that criticism?

Mr. BEISNER. I don't think there is any basis for that assertion at all. Mr. Nadler stated earlier that the standards for class certification in State courts are more lax than they are in Federal courts.

I happen to strongly disagree with that. The Federal courts invented the current form of class actions in adopting rule 23. The vast majority of States have adopted that rule virtually verbatim. A couple States, maybe arguably, have laxer standards, some have slightly more stringent standards. But by and large the rules are quite similar.

And before the Senate, Professor Dellinger last year submitted a substantial amount of information about the certification of classes in Federal court. And, the assumption that classes don't get certified in Federal court is just absolutely wrong if you look at the record that he submitted.

Ms. HART. Okay. So that will avoid—well, excuse me. It won't avoid cases that are legitimate then being filed?

Mr. BEISNER. I think that legitimate cases, where the certification requirements are satisfied, will be certified. And the requirements bump up against due process requirements. I don't think you can go much further constitutionally than what the Federal courts permit.

Ms. HART. Okay. Finally, I just want to touch on the issue of copycat cases. What has been stated by a lot of those, a number of those who support the legislation, is that copycat cases are filed in several courts across the country where a group of lawyers will get a class certified in one area and another area, and so there are a number of cases that are the same proceeding in different venues across the country.

I just want some thoughts on how these cases actually are harmful to consumers and how this problem would be taken care of by this legislation.

Mr. BEISNER. I think the cases are harmful to consumers because what you have then are lawyers competing to settle the case for the cheapest amount. I have personally had calls from lawyers saying, you know, we will give you, your client, the best deal in terms of making a settlement so long as I get my fees out of it.

Ms. HART. Okay.

Mr. BEISNER. And this bill would prevent that by putting these cases together before a single judge where that sort of reverse auction situation can't occur.

Ms. HART. That is a good thing.

I would like to ask Mr. Dinh also a question regarding the goal of the legislation, making sure—and, in fact, Mr. Beisner as well, if you have thoughts on this—being sure that the injured party, when there actually is an injured party, receives compensation. The concern is the coupon settlements, and that there is really no award; that the only award really goes to the lawyers.

Mr. Wolfman mentioned several Federal cases that have approved coupon settlements. Could you comment on these settlements, and do you think that this bill would actually make a difference and ensure that if cases were moved to Federal court, the injured party actually does receive fair compensation as opposed to what they receive now in these coupon settlements?

Mr. DINH. Thank you very much for that question. There is no dispute that the class action mechanism is not only necessary but essential to efficient functioning of the legal system by aggregating small claims and providing proper incentives for those claims to be properly heard so that wrongdoing is deterred and victims are compensated and consumers thereby protected.

I think that the form of compensation, of course, can take cash, noncash, or structural reforms. The entire panoply of remedies is available in Federal courts just as they are in State courts, I think. But this bill goes a long way to ensure that such compensation, whatever form they take, go to the benefit of the consumers and the victims rather than to the intermediaries in the system.

Ms. HART. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Ms. Hart.

The gentlewoman from California, Ms. Sánchez, is recognized for her questions.

Ms. SÁNCHEZ. Thank you, Mr. Chairman. I might ask that I reserve my right to ask questions and allow somebody else to go ahead of me.

Mr. SMITH. We will be happy to accommodate the gentlewoman from California, and instead recognize the gentleman from North Carolina, Mr. Watt, for his questions.

Mr. WATT. Thank you, Mr. Chairman. I thank the witnesses for being here.

I confess to believing that we are elected to come here from various backgrounds and experiences to try to put things like this in the context that we have experienced in life. And I will say to each of the four gentlemen who testified that there are aspects of what each of you have said that I can identify with, but there are also some aspects that I am having trouble identifying with.

I detect not only in this legislation but in a number of different areas a growing arrogance about the Federal Government and its

role vis-a-vis the States. And it seems to me, particularly in light of what Mr. Beisner said, if you take Federal rule 23, it is essentially the same rule that governs actions in States. Theoretically, if that is the case, you should be getting the same result whether you are in Federal court or State court. And there is just genuine arrogance, I think, in the belief that somehow the Federal court is going to give you a different or better or worse result.

And I relate to that, because I actually started my law practice in 1970 assuming that the Federal courts would give you a much better result. So I had that arrogance for a number of years but at least it was based on some historical experience. We were litigating a lot of civil rights cases, and a lot of the southern judges didn't necessarily give you the same result that what we believed were more enlightened Federal judges would give you if you filed your case in Federal court. There was a time in which we changed our view of that for a couple of different reasons: Number one, the people who were being appointed to Federal courts didn't necessarily keep pace, and the people who were appointed to State court judgeships started to catch up and equalize.

So, I mean, I just don't have this kind of arrogant feeling that somehow everything is better if it is done in Federal court. And my experience is such that most of the class action notices and opt-in or opt-out letters that I get saying you can be a member of this class or you can opt out of the class, are actually coming from Federal courts. They are not coming from State courts.

So I guess the question I would address to Mr. Wolfman and Mr. Beisner—not to discriminate against the other two gentlemen—I would just like to hear the different sides of it.

Mr. Beisner, how could you say that the rules are essentially the same, yet the result is going to be somehow different?

And then, Mr. Wolfman, would you give me the other side? I presume there will be another side to what he says.

Mr. BEISNER. I want to respond, first of all, by noting I don't think this is a Federal courts are better than State courts discussion. What we are seeing is, and the studies indicate this, there are certain magnet State courts that are drawing huge——

Mr. WATT. So this is in response—this legislation is in response to a couple of really bad situations, and we are letting the tail wag the dog?

Mr. BEISNER. No. It is more than a couple. It is quite a few. But it is like certain counties in certain States that are drawing these cases.

Mr. WATT. Oh, that is even worse; we are letting the tail wag the dog.

Mr. BEISNER. Well, it is a dog that is eating a lot of consumers, and it needs to be addressed. And you are having particular courts that are basically setting themselves up as supreme courts of class actions. We have discovered one place, this Committee heard testimony several years ago of one court——

Mr. WATT. Can you answer the question, because the Chairman is going to cut me off here.

Mr. BEISNER. Well, I would simply say I would not view it as completely a comparison of the two, and let Mr. Wolfman give his comments.

Mr. WOLFMAN. Well, let me just say—I mean, I jotted down what Mr. Mirel said, and I am quoting: He said "The Federal courts are more likely to do these cases more fairly."

And that is just not my experience. And this is a slap in the face to the State courts. There is a limited role when there are overlapping classes for Federal jurisdiction. This bill, though, essentially takes them all from State court and moves them into Federal court. And that is just not what we ought to be doing.

Mr. WATT. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Watt, for your questions.

The gentleman from Virginia, Mr. Goodlatte, is recognized for his questions.

Mr. GOODLATTE. Thank you, Mr. Chairman.

First let me clarify that that is not the case at all. This bill gives the Federal court judge the discretion to send any of the cases back to State court if they think it is appropriate. The amendment offered in the Senate has a clear definition of cases that will stay in State court because they are predominantly State court actions.

But, Mr. Mirel, let me just ask you. You say on page 6 of your testimony that our Constitution properly assumes that the States are fully capable of interpreting their own laws and handing out justice impartially. I certainly agree with that assertion, but when it is applied to that State's dealings with its own citizens.

However, wouldn't you agree that article 3 of the Constitution indicates that the framers foresaw and were concerned about potential conflicts of interest arising when a State court is adjudicating a claim between one of its own citizens and a citizen from a different State?

Mr. MIREL. You directed that question to me, but I don't believe it was my testimony.

Mr. GOODLATTE. Oh. Mr. Wolfman. I am sorry. Did you hear the question, Mr. Wolfman?

Mr. WOLFMAN. It was directed to Mr. Mirel, you had used his name. And if you——

Mr. GOODLATTE. I apologize. The question to you is, you said in your statement that the Constitution properly assumes that the States are fully capable of interpreting their own laws and handing out justice impartially. And I fully agree with that. And I don't think that this legislation at all impugns the ability of the States to do that. But article 3 of the Constitution clearly recognizes, in my opinion—and I want to know if you share that opinion—that the reason for having diversity jurisdiction and the reason for allowing Federal courts to handle disputes between different citizens of different States is to address the very problem that it cannot be addressed in class action lawsuits today because of the $75,000-per-plaintiff requirement to remove the most abundantly diverse cases to Federal court.

Mr. WOLFMAN. Well, I agree with you in principle but not in the reality. Let me use just one very brief example. Take for instance, a case where all the plaintiffs are from Kentucky and they sue Ford in Kentucky. I understand that formally Ford is a citizen of Delaware and Michigan, but they have a plant in Kentucky. And to say that that is an interstate case just because—just to give it that name I think defies reality.

And as I have said in my testimony, there is a limited role for overlapping our national classes to have limited Federal jurisdiction. But to bring all of these, what I consider essentially in-State cases into Federal court, I think is a mistake.

Mr. GOODLATTE. Well, I think that is an example that is not based on an actual case. Let me give you two that are based in on actual case. You have got the State Farm case brought in an Illinois court. One Illinois judge decides that it is inappropriate for State Farm to be requiring the use of aftermarket parts, even though some States like Massachusetts require insurance companies to use aftermarket parts. But this one judge in one State has overridden the laws of 49 other States.

A second example, the same thing: The case that I mentioned in my opening statement is Massachusetts Mutual Life Insurance before a State court judge in New Mexico who has held that not only Massachusetts Mutual but dozens of other national life insurance companies who sell insurance where you can either pay a lump sum up front or you can pay in installments, because they don't—even though it is plain on the face of the bill that the combined total of the 12 monthly payments or four quarterly payments is more than the up-front, because they didn't spell that out in the bill, that that is a violation of the law, and that they should pay damages; whereas all 50 insurance commissioners, including the Insurance Commissioner of New Mexico, have held to the contrary.

Now, he certainly has the ability as a court judge in New Mexico to override his own insurance commissioner. But why should he have the authority to override the other 49 insurance commissioners in making that finding, which is going to cost billions of dollars to those insurance companies and to the owners of those insurance companies, including me?

Mr. Beisner, do you want to respond to this example?

Mr. BEISNER. Yes. And I think it is a great example, because it illustrates exactly why that sort of case ought to be in Federal court. You have a class action where thousands, as I understand the example correctly, of Kentucky residents are suing Ford—got a plant there, but it is fundamentally an out-of-State company. The judge is looking at this. You have got a case brought by thousands of voters who are going to determine whether that judge stays on the bench or not. Now, I think most State court judges wouldn't let that affect them, but you have the appearance that it might.

And that is exactly what article 3 was getting at, is that when the home-State folks are electing and selecting the judges, that is not the person you want deciding a case against an out-of-State resident who can't vote for the judge.

And that is exactly what diversity jurisdiction is about, and I think that is why that is a classic example of exactly the kind of case that ought to be in Federal court to avoid any potential, even, appearance of bias whether it exists or not.

Mr. GOODLATTE. I thank the gentleman, and I thank the Chairman.

Mr. SMITH. Thank you, Mr. Goodlatte.

The gentlewoman from California Ms. Lofgren is recognized for her questions.

Ms. LOFGREN. Thank you, Mr. Chairman. There have been many good questions asked today. And before I ask mine, I will need to say that I think there are legitimate concerns about certain elements of class action activity. I think that there are problems that need a remedy, but I am not at all convinced that this bill is the appropriate remedy.

And I guess I was "bemused," I guess is the word, that when California Attorney General Bill Lockyer and Chief Justice William Rehnquist agree that they oppose a bill, it does cause you to pay some attention to the fine print to find out why.

I want to ask actually a rather narrow question, and it relates to the impact of this proposed legislation to California in particular. As you know, the bill would federalize cases brought under California Business and Professions Code, section 17–200. California, like many other States, has enacted strong consumer protection and antitrust laws that prohibit unfair combinations and unlawful restraints of trade. But in California, in addition to the State attorney general, which has been acknowledged in the bill, local district attorneys are permitted to enforce the code section, as are individuals. And this bill I think would usurp California's choice in that matter.

I am wondering—well, and actually I was—the last time a similar bill was considered in the House, I mentioned a case brought by the district attorney of San Francisco against Providian Bank that actually resulted in a payment of more than $300 million to consumers because of deceptive practices. And that is not chump change, in my judgment, nor is that a frivolous case. I mean, that is a significant settlement. And I believe that under the proposed legislation, that type of action by a district attorney would be preempted.

So I guess my question to you, Mr. Dinh, would be: Would the Administration support a change to the proposed legislation that would permit district attorneys and individuals to be exempt from the provisions of the act?

Mr. DINH. Thank you very much, Congresswoman. I know that that concern is a significant one for the State of California. Senator Feinstein has raised a similar concern on this particular provision on the Senate side, and we are very cognizant of those concerns.

Earlier I said that the bill seeks to make things that look like class action to be treated like class actions. And I think that the class actions of other States are similar to that, and in some respects section 17–200 is like that, because it allows one citizen to be representative of the entire population, so the entire population is the class, if you will, and the citizen bringing suit is the representative class member. And so in that respect it is quite similar.

In another respect, as you pointed out, where it is not a private attorney general but actually a public attorney general, he or she doing the protection of the public good, I think there may be some distinction. And we would welcome any opportunity to review modifications that you or Senator Feinstein may have, and will work out the details.

Ms. LOFGREN. Well, don't get me wrong. I think there are problems with the bill anyhow, which is why the Chief Justice opposes it relative to its impact on the court system. But, I do believe that

on page 15 of the bill, to outline State attorney generals but to overlook district attorneys just doesn't to me make any sense, and I would hope that that—I will offer an amendment relative to that when we—if we mark up—and I would hope to get the Administration's support.

And before my red light goes on, I would just like to offer my congratulations to you for your return to your career teaching law. That will probably be a lot more fun than what you have done in the last several years.

Mr. DINH. A lot more fun but not as important. I thank you very much for the congratulations.

Ms. LOFGREN. Thank you.

And I yield back, Mr. Chairman.

Mr. GOODLATTE. [Presiding.] The gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much.

Mr. Dinh, when did the Department of Justice realize there was a crisis in State court action litigation, class action litigation?

Mr. DINH. I cannot tell you exactly when in the collective consciousness we made the realization. But I do know that we have participated in these class actions as the litigator for the Federal Government for a number of years.

Ms. WATERS. Is Mr. Goodlatte carrying this bill because the Department of Justice realized there was a crisis and put together something and asked him to carry the bill?

Mr. DINH. I do not know the exact derivation of the feedback loop in legislation here, but I do recall specifically drafting or supervising the drafting of the support letter in the last—107th Congress.

Ms. WATERS. Has the Department of Justice done a study that documents this crisis that you have come to realize in some way?

Mr. DINH. We have relied upon the very excellent studies that are conducted, for example, by the Institute of Civil Justice at the RAND Corporation as well as a number of other empirical studies done——

Ms. WATERS. So it was these studies that you put together and decided to use to ask Mr. Goodlatte to help you to deal with this crisis?

Mr. DINH. I do not think that a specific request was made to Mr. Goodlatte for his leadership, nor Mr. Boucher, for their leadership. But I think that——

Ms. WATERS. Okay. And I hate to seem as if I am cutting you off, but once you get past the first sentence I kind of get it. Let me ask, have you done any studies to determine the impact of this legislation on the caseloads in our Federal courts?

Mr. DINH. We have not. But let me say that the Judicial Conference has proposed an additional bill in order to increase the number of judges in our Federal system, and the present Attorney General has expressed support for such a measure.

Ms. WATERS. So you have not done a study to determine that there is a crisis. You did not organize a response to a crisis that you suspected by asking Mr. Goodlatte or any other legislator to carry this legislation. This legislation basically originates from the private sector. You don't know the impact that it is going to have

on the Federal courts, but you are willing to advance the notion that there needs to be more Federal judges to take care of a perceived increase in the caseloads.

Mr. DINH. No, ma'am. My answer to the last question is in response to the current judicial need that the Judicial Conference has noted with respect to derivation of this legislation and its support. We know a good idea when we see one, and it does not necessarily have to come from our own head for us to support it. We have no pride in authorship.

Ms. WATERS. It would be helpful, even though you may have a greater sense of what a good idea is, to come with some documentation for the good idea, so that some of us could understand the nature of the crisis and the degree that the crisis is supposedly being described.

All right.

Mr. DINH. I would refer you to the letter of Assistant Attorney General Dan Bryant to Chairman Sensenbrenner in the 107th Congress with that documentation as to fully explaining our basis for support.

Ms. WATERS. I thank you for that reference. Perhaps it would be good for you to be able to cite it so that we could take advantage of these hearings when we have it. The whole idea of the hearings is to gather as much information as possible, particularly from the experts and those who are advancing the legislation. What I am unable to determine at this moment is whether or not the Department of Justice who is weighing in on this bill today has really done its homework and they have really been involved in doing the kind of studies that could credibly come—so they could credibly come before this Committee and represent that crisis and what impact it is going to have on the Federal courts.

Mr. DINH. Let me be very clear about my answer. Even though we have not done our specific studies—and it is a matter that we are addressing in all of our studies for civil justice—most of our work is in criminal justice, and we would like to do more work on the civil justice side. We have reviewed the excellent studies out there that I think are quite credible and quite excellent. And it is in our collective judgment of the Department of Justice and the Administration that we support this bill based on that evidence and based on the reforms that are common sense and reasonably advanced by the sponsors of this bill.

Ms. WATERS. Yes. I understood that. You had said that before.

Mr. GOODLATTE. The time of the gentlewoman has expired.

Ms. WATERS. Thank you very much.

Mr. GOODLATTE. Thank you.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman, and thank you very much for hosting this hearing.

Mr. Chairman, I would ask unanimous consent to submit my opening statement into the record.

Mr. GOODLATTE. Without objection.

Ms. JACKSON LEE. Thank you very much.

It is important for the collegiality of this Committee to qualify my remarks, because I have the greatest respect for the Chair and,

as well, Mr. Boucher in the work that they have done. And I glean that they may be supportive of this legislation.

But I do want to place in the record that we have been under siege. We have literally been under siege. And let me lay out—and I may not be as encompassing as I would like to. We have misrepresented to the medical professionals, primarily our good friends, the physicians, with a dastardly medical malpractice legislation that is making its way through this body. We have left people who have lost limbs and loved ones dangling in courthouses around the Nation on the basis that we are attacking our good medical profession in undermining the survival of hospitals.

In every legislative initiative that we have had, we have ensured that the loser has always been the poor petitioner and plaintiff, and the winner has been the guy with the money in his pocket all the time. In our States across the Nation, we are fighting the proponents of a despotic tort reform that indicates to people who have no money in their pocket that the doors of justice are closed to you.

We now come to this plea of a class action, if you will, debacle where we again close the doors of the last bastion to some of us of justice. And that is, of course, in some instances, the Federal courts. And, of course, the idea of a class action. And when I say the Federal courts, the Federal courts in their place and the State courts in their place.

And so I am concerned that we are following a pathway where the heavyweights are in charge and the little guys are struggling.

Let me pose a question to Mr. Wolfman, who I hope is a student of what I have said more so than your expertise on class actions. Can you—and, again, our time is short—give any substance and credence to my limited chronicling of what seems to be happening with the justice system around the Nation?

Let me just add, I remember when we were discussing tort reform here and the Contract With America about 6 or 7 years ago, and they cited Alabama and Mississippi, and it was this big hurrah that plaintiffs were running into the courtroom and tearing away bags of money, similar to what we saw with the Iraqis who took billions of dollars out of the tombs that they had there—not the tombs, but the safes. And so the claims of America were running away and that is why we needed to move.

I understand that statistics show that the predominant victors in any civil case are in fact the defendants and/or the cases are settled.

So if you would just provide me any anecdotal data, some percentages, or anything of the sort that would contribute to what I have just done, given anecdotally, to the fact that we have no crisis and that plaintiffs are actually the victims in many instances when they are trying to seek justice in our courts.

Mr. Wolfman, would you, please?

Mr. WOLFMAN. Sure. Let me give you three quick responses. The first is that I think you are absolutely right. The evidence is that there are more defense verdicts than there are plaintiff's verdicts. I think that is true.

The second thing is that if you just look at this legislation in terms of one State which the defendants don't like, California, where there is a vibrant proconsumer class action practice, it takes

the private attorneys general actions and moves them to Federal court. And it moves all the cases in which Californians sue one—only one out-of-State corporation under California law, which is the province of State—California State courts; it moves them into Federal court as well.

And finally I will add, I found some irony in Attorney General Dinh's statement that they would rely on the RAND Corporation study, because that study found that there was no significant evidence of a crisis in the State courts, and frowned on the notion that the way to resolve class action problems was through minimal diversity.

Ms. JACKSON LEE. Let me—I may get back with you. I want you to clarify that California point. But let me get quickly to Mr. Dinh. Am I pronouncing that correctly?

Mr. DINH. Yes, ma'am.

Ms. JACKSON LEE. Thank you, sir, very much. We are in a budget crisis. And I imagine that if these cases were moved to the Federal courts—I understand that we are not only in a budget crisis, but we are in a log jam on the numbers of district court appointees and appellate court appointees. In fact, my good friends in the circuit that I am involved in are begging for relief.

Is the Justice Department and the Federal Government simply looking for work? And have you done a financial analysis of the cost of this new structuring with respect to new Federal judges, the building of new courthouses, and the speed of which—since we have developed a log jam both on the Democratic and Republican side in terms of the advice and consent of the Senate—of the logistical nightmare of trying to deal with these new cases in light of the one affirmation or confirmation of a judge per 100 years? I think that is about the pace we are moving. But have you done a financial assessment?

And let me do this. Let me request formally a financial analysis of this legislation as it relates to building courthouses, new judges, offices, staffs, et cetera, as to the impact of this bill.

Mr. DINH. I take your request very seriously, and we will consider that. Let me start addressing the point that you make by noting, first of all, that the removal to Federal court will significantly reduce the multiplicity and duplicativeness of competing class actions in the various States. They can be removed to the Federal courts, and where there are multiple removals, they can be consolidated in the current multidistrict litigation mechanism; and so therefore the numbers should decrease dramatically because of the elimination of copycat or similar class actions being filed.

With respect to the judicial vacancy crisis that you noted, we share your concern. And, of course, the DOJ reauthorization bill authorized 15 new judges, primarily in the southwest sector. The judiciary has requested 56 additional judges. We are evaluating that request in light of the need and also the cost.

And the President—what the President and Attorney General have said is that they are inclined to support the judiciary in its request for the additional judges. But we will take the additional step that you requested.

Ms. JACKSON LEE. Will the Chairman be kind enough—I see Mr. Wolfman is trying to answer—would he be kind enough to yield me an additional——

Mr. GOODLATTE. We will give Mr. Wolfman a brief opportunity. We are about 2½ minutes over right now. Go ahead.

Ms. JACKSON LEE. Let me just say this to Mr. Dinh. First of all, thank you for your kindness of giving a response back. And the request, of course, doesn't answer the question. I would like a precise cost, but it doesn't answer the procedure—not the procedure, the process of those judges being in place.

Mr. Wolfman, could you just, as you give that summary of California again, with the creativity of lawyers I would imagine that if you can talk about removing the multiparty or the multidistrict filing, creative lawyers could find ways to just pile up filings in one area, if you will, to stop up the court system on the basis of those filings.

So could you give me that California problem again, or that California issue again? And, if you want to comment on the resource question of moving these cases to the Federal court. We are already backlogged with drug cases and everything else.

Mr. WOLFMAN. To be a little clearer on the California situation, there is a vibrant in-State class action and private attorney general practice in California. It has immeasurably helped the consumers in California. These are not principally national cases; these are cases brought by Californians under California law, sometimes against in-State defendants, sometimes against out-of-State defendants. Under this bill, if there is any principal out-of-State defendant, then the case is going to come into Federal court and obviously will increase the numbers.

I think we are talking about apples and oranges when we are talking about the situation Professor Dinh speaks of. There is a role for the consolidation of national or overlapping cases. We say that in our testimony, we consistently say that. But this bill is overkill. It takes the in-State cases and brings them into Federal court as well.

Mr. GOODLATTE. The time of the gentlewoman has expired.

The gentleman from Michigan.

Mr. CONYERS. I thank you, Mr. Chairman. It is, I think, your inclination to have another round of questions; is that not correct?

Mr. GOODLATTE. If time permits. I know there is going to be a vote here pretty soon, and that may disrupt everything. But please go ahead with yours, and we will see what time allows.

Mr. CONYERS. Well, we can come back after a vote. I mean, the votes don't stop the Committee from working after the votes.

Mr. GOODLATTE. We will see what the time allows. I would encourage the gentleman to use the time available.

Mr. CONYERS. Well, thanks for your encouragement.

Now, I would like to begin with the gentleman that was working with the Department of Justice, I believe, and is now back as a law professor. And I——

Mr. DINH. Not yet, sir. I am still representing the Department of Justice.

Mr. CONYERS. You are still working there.

Mr. DINH. Yes, sir.

Mr. CONYERS. And how much longer will you be there?

Mr. DINH. Approximately 2 weeks, 1 day, and counting.

Mr. CONYERS. Okay.

Ms. WATERS. Thanks for that clarification.

Mr. CONYERS. Yeah. I am, too, because I remember your generous contribution to the creation of the PATRIOT Act and its drafting.

Mr. DINH. And I remember testifying before you as a law professor prior to that, too.

Mr. CONYERS. Well, you will be able to come up here even after you go back to law school.

Mr. DINH. I would appreciate the opportunity whenever you need help. I mean, testimony.

Mr. CONYERS. Well, thank you very much. I am glad that you are volunteering your services. The first thing we have to do is to find a subject that we agree on.

Mr. DINH. Well, as you recall, my first testimony before you was on the Felon Reenfranchisement Act, H.R. 621, I believe, where I expressed agreement with your intent, but suggested some ways to do it within the constitutional framework of our Government.

Mr. CONYERS. Well, that is my problem. I am always being unconstitutional and you are being constitutional.

Now, let me get to the questions at hand, though. I just wanted to remember you kindly for the record.

Now, members of the witness panel, what is not clear to me is who is in support of this bill. Since the Federal judiciary is opposed to it, starting with the Chief Justice of the United States, the State judges, the State judiciary is opposed to it, who in the court systems in America are for it? And I would like to ask Attorney Wolfman to guide me here.

Mr. WOLFMAN. Well, the answer to that is the judiciaries are not in favor of this bill. The bill is driven by the defendant corporate community. There is just no question about that.

Mr. CONYERS. Well, in the interest of fairness, what do you say to that, Mr. Mirel?

Mr. MIREL. Mr. Conyers, I have a particular interest in this as a State regulator, in my case for the District of Columbia. And I can tell you that there is a lot of concern on the part of those of us who are in the business of trying to implement and enforce State law when there are courts in other jurisdictions that are undoing our efforts.

Mr. CONYERS. But you are not a judge.

Mr. MIREL. I am not a judge and I——

Mr. CONYERS. And I am referring to the organizations and associations that are comprised of judges.

Mr. MIREL. I believe, Mr. Conyers——

Mr. CONYERS. What is it that they don't get?

Mr. MIREL. Judges have a different role in our system than legislators and administrators do, in my view. Judges are enjoined to do justice to the people who are before them, without regard to what else is out there, outside the courtroom. We have a broader view as administrators of laws passed by legislators, who are presumably taking into account——

Mr. CONYERS. Well, I recognize and respect your point, your broader point of view. But what is it that the judges in both systems of court don't seem to understand? If you know.

Mr. MIREL. I can't speak for the judges. But I believe that the judges are looking at what they have to do, and properly so.

Mr. CONYERS. Well, what is wrong with that?

Mr. MIREL. Nothing's wrong with that. It is just that——

Mr. CONYERS. Well, they have looked at it, and they say no to this bill at the Federal level and the State level, starting with the Chief Justice of the United States of America. I mean, does he got it wrong? He is the one that comes and begs me and the Chairman of this Committee to fill the vacancies. That is without—with this humongous proposal coming down the tracks. I mean, we are 50, 60 judges short right now. The Chairman of Judiciary in the Senate does the same thing.

So, could that—might that affect the Federal judges' attitude in this respect? You don't know?

Mr. MIREL. As I say, I can't speak for the judges.

Mr. CONYERS. I don't ask you to speak for the judges. I am not speaking for anybody but myself. But it would seem that they would—and they are conservative judges, by the way. These aren't—you know. So there is something out of whack here. Nobody wants this proposal as it has been crafted but, as one of the witnesses said, the corporate sector. Could there be any grain of truth in that assertion by Mr. Wolfman?

Mr. MIREL. I think that it is true to say that the corporate sector is involved in it and interested in it. But so are many sectors.

Mr. CONYERS. Like what?

Mr. MIREL. Like the administrators, like State legislators, like other legislators who have seen their laws that are passed being ignored by——

Mr. CONYERS. What about consumers' organizations?

Mr. MIREL. I see consumers' organizations on both sides on this issue.

Mr. CONYERS. You do?

Mr. MIREL. Yes, sir.

Mr. CONYERS. Well, all the consumers' organizations that have written me are pretty clearly opposed to the bill.

Mr. MIREL. I don't know about their position on this bill, per se, Mr. Conyers, but I do know that the Consumer Federation of America has been very concerned about the case in Illinois which prohibits the use of non—OEM crash parts, because they think it will cost consumers more than the use of OEM parts. And I think that is an example of the fact that consumers can be hurt by these class action lawsuits.

Mr. CONYERS. Could I point out to you, of national organizations opposed to Federal class action is the Consumer Federation of America. Did you know that? I guess you didn't know it.

Mr. MIREL. I don't know that. I do know——

Mr. CONYERS. Well, could I correct you now? Could I send you their letter or testimony?

Mr. MIREL. I would be happy to see it.

Mr. CONYERS. Would you believe me if I didn't send it to you?

Mr. MIREL. I would believe you if you didn't send it to me. Yes, sir; absolutely.

Mr. CONYERS. Well, that is good to know. Okay. So now back to my question. All the consumers' organizations that I know are opposed to this bill. How come? You don't know that? You are not speaking for the consumers. Are you? Okay. Let me tell——

Mr. MIREL. I can't pretend to speak for the organizations that you are mentioning. I do know that consumers get hurt when their prices for insurance go up.

Mr. CONYERS. But why don't they know it? I am glad you know it and I know it, but how come they are opposed to this bill? And by the way, what makes you think that insurance is going to go down if we pass this bill?

Mr. MIREL. I don't know that insurance will go down if we pass this bill. But I do know that the cost of insurance will go up sharply if these kinds of multimillion dollar settlements are continued to be allowed to happen, because somebody has to pay for those. And the only people who pay for them are the people who buy insurance. And their rates are going up. And, you know, that is a problem that we have to deal with.

Mr. CONYERS. Well, okay.

Mr. GOODLATTE. The gentlemen's time has expired, and we have been generous with him.

Let me do this, if I may. We will start a second round of questions, and we will make sure that at least I and one Member of your side, you, has the opportunity to proceed further. And then we will go on to others as the time allows.

Ms. WATERS. I have a unanimous consent request.

Mr. GOODLATTE. What is your request?

Ms. WATERS. I would like Mr. Wolfman to identify the particular RAND study that he referenced in his response to my question about whether or not any studies have been done. And then I would like to—I will get a copy of that, and I would like unanimous consent to insert it into the record.

Mr. GOODLATTE. We will get that, and we will get it inserted into the record. And Mr. Wolfman, you can provide that to the clerk at the conclusion of the hearing.

Let me talk about the extortionate nature of the current system, because when you are talking about what happens to consumers, obviously, if the cost of doing business or the cost of ensuring your business is increased, you pass that on to the consumers. There are consumer organizations with points of view and there are consumers with points of view about how their money is spent.

The fact of the matter is this: Under the current system, because of the current diversity rules, if the plaintiff's attorney has 4,000 jurisdictions to choose from, they pick the jurisdiction they are going into. In most cases, if the defendant or another plaintiff to the case feels they are being treated unfairly, there are other courts that they can choose to seek to remove the case to.

In these circumstances, there are none. The reason for that is the Federal diversity rule. So what happens is the attorneys lock in the jurisdiction with one of a handful of judges that they are very familiar with that treat these cases favorably. We are not impugning

the State courts, we are impugning a system that allows them to forum shop to that degree of abuse.

Then once they have done that and the case is brought in a very hostile environment, the attorney for the plaintiffs goes to the defendants and says, if you will settle this case by paying us $13 million, or giving the plaintiffs a coupon or a promise, and by the way, our named plaintiff, one or two will get one or two hundred thousand, or the plaintiffs in this State will get a higher award than the plaintiffs outside the State, we will do all that, do you really want to take the risk of going before this judge and this hostile court and getting a multi-million or multi-billion dollar judgment against you?

Mr. Wolfman, what is the recourse for defendants, or plaintiffs who don't agree with the approach of the plaintiff's attorney in cases like that where they have no ability to seek review in another court? That it seems to me is the very purpose of our Federal court system. Why wouldn't you want to recognize it in these types of cases when you have the greatest degree of potential abuse by the plaintiffs being able to choose from thousands of different jurisdictions?

Mr. WOLFMAN. I think that is a fair question. I have two answers to that.

The first is that, in the hypothetical that you use, as my testimony outlines, some of the very worst coupon settlements have been in Federal, not State court. We have established that in our testimony. I would be happy to provide additional information. Those abuses should be dealt with.

Mr. GOODLATTE. They are dealt with in this legislation.

Mr. WOLFMAN. I respectfully disagree. I think the coupon provision merely restates the current law. I have suggested a proposed amendment in that regard.

Additionally, I have said on a number of occasions I think there is a limited role for Federal court jurisdiction where there is a potential for a multiplicity of litigation in overlapping cases.

That would be far more limited than in this legislation, because it removes and allows the filing in Federal court of all those in-State California cases that I talked about, or in-State Kentucky cases, where there is one case on file and all the plaintiffs are there in one State.

Mr. GOODLATTE. If there is one plaintiff in California and one out-of-State defendant, that defendant can remove the case to Federal court. Why is that different than when there is a multitude of plaintiffs and an out-of-State defendant?

Mr. WOLFMAN. That simply restates—that restates a problem with diversity jurisdiction in general.

The Chief Justice is on the record in his annual report saying that some of the uses of diversity jurisdiction need to be narrowed. This is one situation where it should not be greatly expanded, as this bill envisions. As I have said, there is some role for additional expansion, but not to the degree that this bill portends.

Mr. GOODLATTE. What would you say in response to that, Mr. Beisner?

Mr. BEISNER. I would make a couple of comments on that. First of all, with respect to this notion that the Federal courts are doing

a bad job in approving coupon settlements, I think the list Mr. Wolfman submitted makes very clear that the Federal courts are doing a superior job on that because the examples they use don't demonstrate the point.

The H&R Block case, the Federal courts ultimately rejected that coupon settlement. They didn't permit it.

They talk about a Western Union wire transfer case. The Federal court did allow that settlement to go through, but only after determining that the plaintiffs really didn't have a claim; it was windfall that they received.

I guess the final point, I am a little concerned about the ongoing statements that the Federal judiciary is opposed to the concepts in the bill. There were several letters this Committee has received in past sessions indicating opposition. The letter that was sent to the Senate from the Judicial Conference earlier for the first time acknowledges that there is a significant problem with statutory class actions and endorses the notion of minimal diversity, the core concept in this bill, as a means of addressing it. There is some dispute about where the precise lines ought to be drawn, but that is a substantial change in position, I believe, on the part of the Federal judiciary.

Mr. GOODLATTE. Thank you.

Mr. Conyers, you are going to get the last word. We will certainly take any other questions in writing, unless you yield some of your time to Mr. Scott. We just have the vote. I know some of the witnesses need to leave.

So we will finish with Mr. Conyers and any time he might yield to Mr. Scott, and any other questions will certainly be submitted for the record, and the witnesses will be asked to respond in a timely fashion.

Mr. CONYERS. Thank you very much, Mr. Chairman.

Could I ask all of the four witnesses who have been so generous with their time, can anyone come back after the vote? Is there anyone who cannot come back after the vote?

Mr. DINH. Unfortunately, I cannot. I have to meet with Coalition Bar Association this afternoon.

Mr. CONYERS. I see.

Mr. MIREL. I can do that.

Mr. GOODLATTE. The Committee is going to adjourn. If you wish to meet with Mr. Conyers, that will be appropriate. We are going to end the hearing after Mr. Conyers' question so we can go and vote. There is another hearing that I need to attend in the near future. I don't know if there is anybody else available to continue the hearing.

Mr. CONYERS. I am here to help, Mr. Acting Chairman. There is someone that can actually replace you as the temporary Chairman.

But I concede to the fact that Mr. Dinh has to leave, and so that takes care of that. I will yield any time we have remaining before the vote to Bobby Scott.

Mr. SCOTT. Thank you, Mr. Conyers, and Mr. Chairman.

Mr. Dinh, we are trying to help the consumers. You are representing the consumer interests, are you not?

Mr. DINH. We represent the interests of consumers and an efficient judicial system, yes, sir.

Mr. SCOTT. Explain to me how—in the present law, if you file a lawsuit in class action, present law, in a State court in Virginia, you have a couple of weeks when they respond, a couple of weeks you try to get a date with the judge to certify the class, and he certifies the class, and within a matter of days you are beginning the litigation process; that is, you are taking depositions, interrogatories. As soon as you finish that, you can get a trial date.

Now, on page 19 of the bill, the appellate situation, you have a situation where, when you have gotten to that point and you are ready to go, somebody wants to remove it to Federal court. Now, the plaintiffs have a slam-dunk case. If they can just get it to the jury, they are going to win; but look what happens. You have to round up everybody and find a date with the Federal judge. The Federal judge has to hear all the arguments about the class action and then makes a decision. That is further down the line. When he makes the decision, somebody within 10 days can stay everything and send it up to the appellate court.

How long does the appellate court—how do you think the appellate court would take to decide the case?

Mr. DINH. It varies from jurisdiction to jurisdiction, sir.

Mr. SCOTT. About.

Mr. DINH. Anywhere from within a matter of months, I would imagine.

Mr. SCOTT. Months, up to a year?

Mr. DINH. Perhaps. I have seen that.

Mr. SCOTT. Do you have an appeal to the Supreme Court while everything is stayed?

Mr. DINH. It depends on how the appellate court rules. You can always have an appeal to the Supreme Court; whether it takes cert or not is a different question.

Mr. SCOTT. While they are waiting to decide, the language is: All discovery and other proceedings shall be stayed during the pendency of any appeal. Are you still stayed while somebody is arguing with the Supreme Court?

Mr. DINH. Yes, except in exceptional circumstances.

Mr. SCOTT. Possibly a year or two down the line?

Mr. DINH. Perhaps.

Mr. SCOTT. When you finally get back to the trial court, everybody decides it should have been in State court to begin with, like you said.

Mr. DINH. That is one eventuality. Another eventuality may well be that the State court system right now is inadequately protecting the interests of consumers by approving inadequate settlements.

Mr. SCOTT. I think we have already heard that both sides do—you can get bad settlements in Federal court. I am just talking about the time it takes to get your case presented to the jury. You have just asserted it could be the better part of 2 years during which the plaintiff with the slam-dunk case is stopped from proceeding with the litigation. Is that right?

Mr. DINH. It depends on whether or not—let me make clear that a plaintiff with a slam-dunk case, presenting that case as an individual action is in no way affected by this bill.

Mr. SCOTT. If the company is ripping people off right and left, just a little bit, but you need a class action to be able to get any amount of money, when do you get to present your case to a jury?

Mr. DINH. You get to present your case if the Federal court certifies the class, and if, under the conditions——

Mr. SCOTT. If they certified, they can still appeal?

Mr. DINH. They can still appeal that decision.

Mr. SCOTT. And insert the 2 years into the process.

Mr. DINH. The one thing to keep in mind is that it is essential or necessary for orderly litigation, except in exceptional circumstances. That does not mean that the interests of the plaintiffs or defendants are in any way affected.

Mr. SCOTT. Mr. Wolfman, do you want to comment on what happens to the plaintiff's case if they have to gratuitously insert 2 years into the process?

Mr. WOLFMAN. Delay is the defendant's best friend. Any litigator knows that.

Mr. GOODLATTE. The gentleman's time has expired. The legislative record will remain open for 7 days.

The Committee will now adjourn. I thank all of the members of the panel for their participation today.

[Whereupon, at 12:15 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Thank you, Mr. Chairman, for holding this important hearing on the Class Action Fairness Act of 2003. I introduced this legislation, along with Chairman Sensenbrenner, and my fellow Judiciary Committee member, Mr. Boucher, Mr. Hyde, and Mr. Smith.

This much-needed bipartisan legislation corrects a serious flaw in our Federal jurisdiction statutes. At present, those statutes forbid our Federal courts from hearing most interstate class actions—the lawsuits that involve more money and touch more Americans than virtually any other type of litigation in our legal system.

The class action device is a necessary and important part of our legal system. It promotes efficiency by allowing plaintiffs with similar claims to adjudicate their cases in one proceeding. It also allows claims to be heard in cases where there are small harms to a large number of people, which would otherwise go unaddressed because the cost to the individuals suing could far exceed the benefit to the individual. However, class actions are increasingly being used in ways that do not promote the interests they were intended to serve.

In recent years, state courts have been flooded with class actions. As a result of the adoption of different class action certification standards in the various states, the same class might be certifiable in one state and not another, or certifiable in State court but not in Federal court. This creates the potential for abuse of the class action device, particularly when the case involves parties from multiple states or requires the application of the laws or many States.

For example, some State courts routinely certify classes before the defendant is even served with a complaint and given a chance to defend itself. Other state courts employ very lax class certification criteria, rendering virtually any controversy subject to class action treatment. There are instances where a State court, in order to certify a class, has determined that the law of that State applies to all claims, including those of purported class members who live in other jurisdictions. This has the effect of making the law of that State applicable nationwide.

The existence of State courts that loosely apply class certification rules encourages plaintiffs to forum shop for the court that is most likely to certify a purported class. In addition to forum shopping, parties frequently exploit major loopholes in Federal jurisdiction statutes to block the removal of class actions that belong in Federal court. For example, plaintiffs' counsel may name parties that are not really relevant to the class claims in an effort to destroy diversity. In other cases, counsel may waive Federal law claims or shave the amount of damages claimed to ensure that the action will remain in State court.

Another problem created by the ability of State courts to certify class actions which adjudicate the rights of citizens of many states is that often times more than one case involving the same class is certified at the same time. In the Federal court system, those cases involving common questions of fact may be transferred to one district for coordinated or consolidated pretrial proceedings.

When these class actions are pending in State courts, however, there is no corresponding mechanism for consolidating the competing suits. Instead, a settlement or judgment in any of the cases makes the other class actions moot. This creates an incentive for each class counsel to obtain a quick settlement of the case, and an opportunity for the defendant to play the various class counsels against each other and drive the settlement value down. The loser in this system is the class member whose claim is extinguished by the settlement at the expense of counsel seeking to be the one entitled to recovery of fees.

Our bill is designed to prevent these abuses by allowing large interstate class action cases to be heard in Federal court. It would expand the statutory diversity jurisdiction of the Federal Courts to allow class actions cases involving minimal diversity—that is, when any plaintiff and any defendant are citizens of different States—to be brought in or removed to Federal court.

Article III of the Constitution empowers Congress to establish Federal jurisdiction over diversity cases—cases between citizens of different States. The grant of Federal diversity jurisdiction was premised on concerns that State courts might discriminate against out of State defendants. In a class action, only the citizenship of the named plaintiffs is considered for determining diversity, which means that Federal diversity jurisdiction will not exist if the named plaintiff is a citizen of the same State as the defendant, regardless of the citizenship of the rest of the class. Congress also imposes a monetary threshold—now $75,000—for Federal diversity claims. However, the amount in controversy requirement is satisfied in a class action only if all of the class members are seeking damages in excess of the statutory minimum.

These jurisdictional statutes were originally enacted years ago, well before the modern class action arose, and they now lead to perverse results. For example, under current law, a citizen of one State may bring in Federal Court a simple $75,001 slip-and-fall claim against a party from another State. But if a class of 25 million product owners living in all 50 states brings claims collectively worth $15 billion against the manufacturer, the lawsuit usually must be heard in State court.

This result is certainly not what the framers had in mind when they established Federal diversity jurisdiction. Our bill offers a solution by making it easier for plaintiff class members and defendants to remove class actions to Federal Court, where cases involving multiple State laws are more appropriately heard. Under our bill, if a removed class action is found not to meet the requirements for proceeding on a class basis, the Federal Court would dismiss the action without prejudice and the action could be re-filed in State Court.

In addition, the bill provides a number of new protections for plaintiff class members including a requirement that notices sent to class members be written in plain English and provide essential information that is easily understood. Furthermore, the bill provides judicial scrutiny for settlements that provide class members only coupons as relief for their injuries, and bars approval of settlements in which class members suffer a net loss. The bill also includes provisions that protect consumers from being disadvantaged by living far away from the courthouse. These additional consumer protections will ensure that class action lawsuits benefit the consumers they are intended to compensate.

This legislation does not limit the ability of anyone to file a class action lawsuit. It does not change anyone's right to recovery. Our bill specifically provides that it will not alter the substantive law governing any claims as to which jurisdiction is conferred. Our legislation merely closes the loophole, allowing Federal Courts to hear big lawsuits involving truly interstate issues, while ensuring that purely local controversies remain in State Courts. This is exactly what the framers of the Constitution had in mind when they established Federal diversity jurisdiction

I urge each of my colleagues to support this very important bipartisan legislation.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you Chairman Sensenbrenner and Ranking Member Conyers for convening this hearing today. We are considering H.R. 1115, the Class Action Fairness Act of 2003. I oppose H.R. 1115 for several policy reasons including severe infringement on the discretion of the judiciary. I remain steadfast in my belief that this legislation is yet another example of the legislature interfering in the affairs of the judiciary.

The Members of this committee on the other side of the aisle have always espoused the wisdom of allowing state courts and legislatures to decide for their own citizens what is best for them. They have professed that, as much as possible, the Federal government should not interfere in state business. But H.R. 1115 does exactly that by broadening Federal jurisdiction over state class action lawsuits.

H.R. 1115 makes severe changes to diversity jurisdiction requirements. The bill also makes substantial revisions to the rules governing aggregation of claims. Both of these changes would result in significantly more state court actions being removed to federal courts thereby overburdening the federal caseload.

H.R. 1115 also provides a party to a class action lawsuit with the right to an interlocutory appeal of the court's class certification decision provided an appeal notice is filed within 10 days. The appeal would stay discovery and other proceedings dur-

ing the pendency of the appeal. This is a substantial change to Rule 23(f) which presently provides the court with discretion to allow an appeal of the class certification order without staying other proceedings. The automatic stay under H.R.1115 provides defendants with another delaying tactic and another tool to increase the expense for plaintiffs.

These delay tactics and other provisions give a decisive advantage to well-financed corporate defendants. I am deeply concerned that if we pass HR 1115 we would eliminate the means by which innocent victims of corporate giants can find justice. First, I believe that before we consider this legislation, Congress should insist on receiving objective and comprehensive data justifying such a dramatic intrusion into state court prerogatives. This legislation has the potential to damage federal and state court systems. H.R. 1115 will expand federal class action jurisdiction to include most state class actions. H.R. 1115 will dramatically increase the number of cases in the already overburdened federal courts.

For example, as of February 2, 2002, there were 68 federal judicial vacancies. Judicial vacancies mean other courts must assume the workload. Assuming this additional burden contributes to federal district court judges having a backlogged docket with an average of 416 pending civil cases. These workload problems caused Supreme Court Chief Justice Rehnquist to criticize Congress for taking actions that have exacerbated the courts' workload problem.

H.R. 1115 also raises serious constitutional issues because it strips state courts of the discretion to decide when to utilize the class action format. In those cases where a federal court chooses not to certify the state class action, the bill prohibits the states from using class actions to resolve the underlying state causes of action. Federal courts have indicated in numerous decisions that efforts by Congress to dictate such state court procedures implicate important Tenth Amendment federalism issues and should be avoided. The Supreme Court has already made clear that state courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases

H.R. 1115 also adversely impacts the ability of consumers and other victims to receive compensation in cases concerning extensive damages. The bill has the potential to force state class actions into federal courts which may result in increase litigation expenses. Corporate defendants may attempt to force less-financed plaintiffs to travel great distances to participate in court proceedings. There are also added pleading costs for plaintiffs. For example, under the bill, individuals are required to plead with particularity the nature of the injuries suffered by class members in their initial complaints. The plaintiff must even prove the defendant's "state of mind," such as fraud or deception, to be included in the initial complaint. This is a very high standard to impose on plaintiffs who may not yet have had the benefit of formal discovery. If the pleading requirements are not met, the judge is required to dismiss the plaintiff's complaint.

Additionally, plaintiffs under H.R. 1115 will face a far more arduous task of certifying their class actions in the federal court system. Fourteen states, representing some 29% of the nation's population, have adopted different criteria for class action rules than Rule 23 of the federal rules of civil procedure. Plaintiffs may also be disadvantaged by the vague terms used in the legislation, such as "substantial majority" of plaintiffs, "primary defendants," and claims "primarily" governed by a state's laws, as they are entirely new and undefined phrases with no precedent in the United States Code or the case law.

Mr. Chairman, H.R. 1115 is riddled with provisions that are burdensome to potential plaintiffs and that potentially infringe on the discretion of state courts. I urge all of my colleagues to reject H.R. 1115 as it is presently written. I commend my colleagues for proposing numerous amendments to this bill and I hope that these amendments will address the gross inequities in this legislation.

EXECUTIVE SUMMARY OF CLASS ACTION DILEMMAS:
PURSUING PUBLIC GOALS FOR PRIVATE GAIN

Class Action Dilemmas
Pursuing Public Goals for Private Gain

Executive Summary

THE INSTITUTE FOR CIVIL JUSTICE

The mission of the RAND Institute for Civil Justice is to improve private and public decisionmaking on civil legal issues by supplying policymakers and the public with the results of objective, empirically based, analytic research. The ICJ facilitates change in the civil justice system by analyzing trends and outcomes, identifying and evaluating policy options, and bringing together representatives of different interests to debate alternative solutions to policy problems. The Institute builds on a long tradition of RAND research characterized by an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence.

ICJ research is supported by pooled grants from corporations, trade and professional associations, and individuals; by government grants and contracts; and by private foundations. The Institute disseminates its work widely to the legal, business, and research communities, and to the general public. In accordance with RAND policy, all Institute research products are subject to peer review before publication. ICJ publications do not necessarily reflect the opinions or policies of the research sponsors or of the ICJ Board of Overseers.

BOARD OF OVERSEERS

FOREWORD

When the RAND Institute for Civil Justice approached Neuberger Berman with a proposal to fund a study of class action litigation, we were intrigued. Billions of dollars were being spent on these suits, and nobody really understood the implications: What types of lawsuits should be handled in a class action format? Were class participants receiving their fair share of settlements? On what basis should plaintiff lawyers be paid? There were many opinions on what was right and wrong with the class action system, but little objective research on which to base policy recommendations.

We knew that for this type of research to be valuable, it had to be conducted by an independent organization, above reproach and experienced in civil justice issues. The ICJ seemed ideal. From 1988 to 1994 I sat on the ICJ Board and experienced firsthand the quality and thoroughness of the ICJ's work. I saw and respected its groundbreaking research on aviation accident and asbestos litigation, and alternative dispute resolution. Confident in the ICJ's capabilities and credentials, Neuberger Berman agreed to fund a disciplined study that could help shed light on an arcane and controversial part of our legal and economic system.

The ICJ worked on the study from 1996 to early 1999. During that time, Neuberger Berman's involvement was limited to being given study completion dates, as it was important to both organizations that the ICJ's work remain totally independent. The results you are about to read fulfill Neuberger Berman's goal to provide all who are interested in class action policy with legislative recommendations based on research by a nonpartisan authority on civil justice. We hope this study will be a valuable addition to every law school library, law firm, and corporate boardroom, and the subject of active, enlightened debate.

Lawrence Zicklin
Managing Principal
Neuberger Berman, LLC
March 24, 1999

PREFACE TO THE EXECUTIVE SUMMARY

This document summarizes the major findings and recommendations of our book-length study of class actions, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, a work that represents the product of more than three years' research into the current policy controversy over class action lawsuits for money damages.

In the interests of producing a summary that can be quickly read by policymakers and others, we focus here on findings and recommendations that we believe will contribute most to ongoing discussions about how and whether Rule 23 and other rules relevant to class actions should be amended. Consequently, we have made only passing mention of some features of the complete manuscript. For example, in the course of the research, we conducted ten intensive case studies of recently settled class action lawsuits. Although the summary contains information derived from this portion of our research, it includes few details about the cases themselves. The full book contains a narrative of each of the case studies as well as a comparative analysis of them. Similarly, this summary makes only a few references to the cases, court documents, and other published materials that we consulted during our research, which are extensively documented in the book.

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ACKNOWLEDGMENTS

We are grateful to the many lawyers, judges, other public officials, and business, consumer, and other public interest representatives who gave generously of their time and shared their perspectives, experiences, and information about class action litigation with us. We could not have conducted the study summarized here without their help.

We also want to thank Neuberger Berman, the New York–based investment management firm, for its generous financial support for our research and writing. Without their support, this project would not have been possible.

Additional support for the study was provided by more than a dozen law firms, corporations, and individuals, and by core funds from the Institute for Civil Justice. The names of all of the donors are listed at the conclusion of these acknowledgments.

All of those who helped fund the study did so without placing any conditions upon the design or conduct of our research, and none had any control over the publication of the results. We gratefully acknowledge these donors' willingness to support independent research in the public interest.

Many people encouraged us to undertake the study and offered advice along the way. We particularly want to thank Judge Patrick Higginbotham, whose interest in the use of empirical research in legal procedural reform stimulated us to consider such a project, and Sheila Birnbaum, Francis Hare, Judyth Pendell, Paul Rheingold, and Judith Resnik, who offered helpful counsel as the study progressed. Portions of the book manuscript were written while Deborah Hensler was on the faculty at the University of Southern California Law School. She gratefully acknowledges the advice of her colleagues and the assistance of USC's wonderful law librarians.

We also wish to thank those who reviewed drafts of the book manuscript and provided us with written and oral comments: Professors Janet Alexander, Jennifer Arlen, Stephen Burbank, Francis McGovern, Arthur Miller, Judith Resnik, and Tom Rowe; John Aldock, John Beisner, Sheila Birnbaum, Kim Brunner, Elisabeth Cabraser, James Greer, William Montgomery, Paul Rheingold, and Brian Wolfman; and RAND colleagues Alan Charles, David Kanouse, and Barbara Williams.

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THE ONCE AND FUTURE CONTROVERSY

The current controversy was ignited in 1966 when the federal rule that governs class action lawsuits for money was changed.

Class action litigation—lawsuits filed by one or a few plaintiffs on behalf of a larger number of people who together seek a legal remedy for some perceived wrong—is as old as the medieval English roots of the United States civil legal system.[1] The controversy over class actions is long-lived as well: Allowing a few individuals to represent the legal interests of many others who do not participate in the lawsuit but who are nonetheless bound by its outcome has always seemed like a dubious proposition to some. But the current controversy over class actions roared to life in 1966 when Rule 23, the procedural rule that provides for class actions in federal courts, was significantly revised. Amidst a host of other rule revisions were a few words that presaged a dramatic change in the class action litigation landscape: Whereas previously, all individuals seeking money damages with a class action lawsuit needed to sign on affirmatively ("opt in"), now those whom the plaintiffs claimed to represent would be deemed part of the lawsuit unless they explicitly withdrew ("opted out"). Overnight the scope of money damage lawsuits—and hence the financial exposure of the corporations against whom they usually were brought—multiplied many times over.

Before 1966, only those who said they wanted to be part of a class were included in such lawsuits; after 1966, all those who met the class description were included unless they explicitly declined. The change substantially increased the financial exposure of corporate defendants.

In the decade that followed, a wave of consumer rights statutes, enacted by Congress and state legislatures, expanded the substantive legal grounds for money damage class actions. State courts revised their own class action rules to match the changes in the federal rule. Both federal and state courts interpreted the new rules expansively. By the mid 1970s the business community was up in arms, and there were calls for legislative action and a new round of rule revision. But as the years passed, the legal system gradually acclimated itself to the 1966 rule. Courts pulled back from their initial enthusiastic support, litigation patterns became more predictable and therefore easier for corporations to adjust to, and the clamor for rule revision died down.

Then, in the 1980s, the landscape shifted again with the advent of large-scale product defect litigation, now known as "mass torts." Asbestos lawsuits, brought by thousands of workers who had been exposed to asbestos in shipyards, petrochemical plants, and other industrial settings, inundated federal and state courts in areas of the country where such work was concentrated. The litigation was characterized by features not seen before then: large numbers of individual lawsuits, litigated in a coordinated fashion by a small number of plaintiff law firms, against a

[1] Class action lawsuits can be filed on behalf of individuals, businesses, or other organizations. They may be filed by public officials, such as state attorneys general, or private citizens. Defendants may also seek class action status, but class certification is most often sought by plaintiffs.

A new controversy emerged in the 1980s, when some judges began certifying mass tort class actions, breaking with previous practice. In 1991, the Civil Rules Advisory Committee took up the issue of mass tort class actions.

small number of defendants, before a few judges. As the lawyers, parties, and judges sought to reduce litigation expense by aggregating the cases and resolving them on a group basis—rather than individually—the balance of power between individual tort lawyers and corporate defendants tilted. Whereas once defendants clearly had the superior resources, now they faced organized networks of well-heeled tort lawyers. It was not long until the attorneys applied the lessons they had learned—and the resources they had earned—from asbestos litigation to lawsuits arising out of the use of drugs and medical devices and exposure to toxic substances.

In an advisory note, the committee that revised the class action rule in 1966 had rejected the notion of using class actions for personal injury litigation except in very limited circumstances.[2] But with courts awash in large-scale product defect and environmental exposure litigation, some judges, lawyers, and defendants began to rethink that position. Class actions, they thought, offered vehicles for efficiently resolving the large numbers of new suits. Some judges certified mass tort class actions, but others ruled that certification was barred by the 1966 committee's advisory note. In 1991, the Civil Rules Advisory Committee took up the issue of class action reform with an eye to resolving this question.

FAIRNESS ISSUES CATALYZE AN IDEOLOGICAL DEBATE

What began as an effort to find better ways to manage mass torts became an ideological debate about the social purposes of class actions.

Soon after the committee began its work, its members started to question the wisdom of proposals to facilitate certification of mass tort class actions. Advice poured into the committee from practitioners and scholars alike. Some defendants argued that once a mass tort was certified as a class action, their exposure to damages increased so dramatically that they had no recourse but to settle even when little or no scientific evidence existed that their products had caused the harms alleged by class members. Some tort attorneys argued that class certification of mass torts denied people an opportunity to pursue claims individually, an approach that might gain these plaintiffs larger awards than they would receive from class action settlements. Law professors and public interest attorneys questioned the fairness of some of the mass tort settlements that had been negotiated by plaintiff class action attorneys and defendants.

As controversy over mass tort class actions continued to grow, corporate representatives pressed for other changes in Rule 23 to respond to a new wave of class actions in which consumers sought compensation for small financial losses. They found allies in unlikely quarters: lawyers outside the corporate defense bar who argued that too many of these consumer

[2]While such notes do not have the force of law, judges look to them for guidance in applying the rules.

suits served only to line the pockets of class action attorneys. As the committee shifted its attention from proposals to expand the scope of Rule 23 to proposals to restrict damage class actions, consumer advocacy groups became alarmed that some of their gains of the past several decades would be lost. Over time, the tenor of discourse about Rule 23 revision became increasingly adversarial. When the committee issued a set of proposed rule revisions for public comment in 1996, a full-scale political battle erupted, echoing the controversy of the 1970s.

Sharp disagreement within the legal community over proposed rule changes brought the reform process to a halt in 1996. The debate over class actions shifted to Congress.

When the dust settled a year later, only one technical revision to the rule had survived. The debate had revealed deep political rifts within the legal community about the merits of consumer class actions and continued uncertainty about how to solve the mass tort problem. The committee tabled proposals to raise the bar for damage class actions. Chief Justice Rehnquist appointed another committee to consider mass tort issues, including but not limited to class actions. The battle over damage class action reform shifted to Congress, which is now considering class action legislation.

BRINGING POLICY ANALYSIS TO BEAR

The class action controversy is characterized by disagreement on what the facts are and what they imply for policy. Policy analysis can aid decisionmakers by sorting out the facts and explaining contending positions—and offering a disinterested perspective.

The debate over damage class actions is characterized by charges and countercharges about the merits of these lawsuits, the fairness of settlements, and the costs and benefits to society. Anecdotes abound, and certain cases are held up repeatedly as exemplars of class actions' great value or worst excesses. In the fervor of debate, it is difficult to separate fact from fiction, aberrational from ordinary. The debate implicates deep beliefs about our social and political systems: the need for regulation, the proper role of the courts, what constitutes fair legal process. These beliefs exert such strong influence over people's reactions to class action law suits that different observers sometimes will describe the same lawsuit in starkly different terms. The protagonists disagree not only about the facts, but also about what to make of them. In a democracy such as ours, these kinds of controversies are extraordinarily difficult to resolve.

Policy analysis can sometimes help decisionmakers faced with such a controversy by objectively describing the facts and what information is missing; identifying the issues at the heart of the debate and laying out different perspectives on these issues; and exploring the likely consequences of proposed policy changes. We undertook this study of damage class actions in the hope that we could provide such help. Specifically, we sought to:

- describe the pattern of current damage class actions, including state and federal class actions
- place the current controversy and reform efforts in a historical context

- investigate the bases for charges that many class actions are frivolous and many settlements are improper
- obtain information on the benefits and costs of damage class actions
- recommend changes in class action rules or practices, if necessary.

Methods

There is a dearth of statistical information about class action activity.

Enormous methodological obstacles confront anyone conducting research on class action litigation. The first obstacle is a dearth of statistical information. No national register of lawsuits filed with class action claims exists. Until recently, data on the number of federal class actions were substantially incomplete, and data on the number and types of state class actions are still virtually nonexistent. Consequently, no one can reliably estimate how much class action litigation exists or how the number of lawsuits has changed over time. Incomplete reporting of cases also means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis. But even if there were a registry of class actions, it would not provide a detailed picture of class action practices. Such information is critical because charges about class action litigation practices are central to the debate. Such practices are not recorded publicly and must be studied by qualitative methods.

We used a variety of research methods to describe class action practices, identify problems, and propose solutions.

To address the special problems of conducting research on class actions, we used a combination of methods.

- We assembled data on the number and types of class action lawsuits from a variety of electronic sources, including LEXIS (for reported judicial opinions) and the general and business news media. None of these sources is comprehensive and the contents of each reflect the interests of its compilers. But by piecing together these fragmentary data, we can discern the shape of the class action litigation terrain in the 1990s.
- We interviewed more than 70 individuals in more than 40 law firms, corporations, and other organizations to learn about class action practices. Many of the nation's leading class action practitioners, on both the plaintiff and defense sides, were among those we interviewed.
- We reviewed commentary following the adoption of amendments to Rule 23 in 1966, congressional testimony from that period on legislation that was proposed in response to the new rule amendments, minutes of the Advisory Committee's meetings on the rule from 1991 to the present, and testimony before the committee. We also attended Advisory Committee meetings and hearings. Our historical analysis allowed us to identify the persistent themes in the controversy.

- We conducted an extensive literature review of the rich scholarly commentary on damage class actions, which provided a theoretical framework for our analysis of qualitative data.
- Drawing on the insights gained from our data collection and interviews, we selected ten recently settled class action lawsuits for intensive "case study" investigation. For each of these cases, we reviewed public court documents and interviewed key players in the litigation (sometimes more than once), including outside and corporate defense counsel, plaintiff class counsel, judges, special masters, and sometimes objectors, regulators, and reporters. In all, we interviewed about 80 litigation participants and others.

By combining these data, we are able to paint a picture of damage class action practice and problems at the close of the century. Our interpretations of all these data—taken together—shape our policy recommendations.

THE CURRENT CLASS ACTION LANDSCAPE

Though quantitative data are not available to calculate growth trends, our research persuaded us that there has been a surge of damage class actions in the past several years.

A common thread in the current controversy is that class action litigation has increased dramatically, imposing new costs for business and new burdens for courts. We found no quantitative data to permit us to calculate growth trends. But we are persuaded by our interviews with plaintiff and defense counsel that there has been a surge in damage class actions in the past several years, particularly in state courts and in the consumer area. Many practitioners trace this growth to the curbs on securities litigation enacted by Congress in 1995.[3] Faced with these curbs, they say, plaintiff attorneys looked for new types of suits to bring and found their opportunities in consumer complaints against business practices and products. The shift toward consumer cases gained impetus from the increasing availability of information on consumer complaints and regulatory investigations from the internet.

It is important to note that when plaintiff and defense lawyers talk about the number of class actions in which they are involved, they are often referring to the number of cases in which a class action claim—or the threat of one—exists, rather than only cases that have been certified as class actions. Our interviews suggest that a significant fraction of cases in which class action status is sought are dropped when the plaintiff attorney concludes that the case cannot be certified or settled for money, when the case is dismissed by the court, or when the claims of representative plaintiffs are settled. Sometimes the latter cases are dropped with an agreement by the plaintiff attorney not to pursue class litigation on this charge again. Lawsuits with class action claims that are not certified

[3] *Private Securities Litigation Reform Act of 1995*, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

nonetheless result in legal transaction costs. Plaintiff attorneys invest resources in exploring the grounds for these suits and, because of the threat of certification, defendants are likely to spend more preparing to defend these cases than they would individual lawsuits. Consequently, these lawsuits are included in class counsel's and defense attorneys' estimates of the amount of class action litigation, even though they might not be counted in a tally of formal class action lawsuits.

Damage class actions predominated over civil rights and other social policy reform litigation in the mid-1990s.

The electronic databases of class action activity that we assembled provide a rough picture of the variety and relative proportions of different types of litigation in the mid-1990s. Figure S.1 describes the variety of class action activity as it was reported in judicial decisions and in the business and general press. The data indicate that damage class actions—suits for money, as opposed to suits seeking only injunctions or changes in business or public agency practices—predominated over civil rights and other social policy reform litigation. For example, civil rights cases accounted for just 14 percent of reported judicial opinions, while securities, consumer, and tort cases accounted for about 50 percent.

Different pictures of class action activity emerge from published judicial decisions, the business press, and the general press.

Figure S.1 also suggests that the landscape of class action litigation looks different according to one's vantage point; judges deciding cases are likely to be aware of different trends and features than general newspaper readers and businesspersons. For instance, securities class actions preoccupied the business community in 1995–1996—not surprising, since Congress had just adopted legislation to rein in securities cases. However, securities cases figured much less prominently in the general press and in reported judicial opinions, accounting for about a fifth of the cases in each during the same period. Similarly, tort cases accounted for only 9 percent of reported judicial opinions, but figured more prominently in the general and business press, constituting 14 percent of class actions reported in the general press and almost 20 percent of the cases reported by the business press. Consumer cases, however, received about equal play; they comprised a quarter of each of the three databases.

More consumer, citizens' rights, and tort cases appear to be filed in state courts. Federal courts hear a larger share of securities, employment, and civil rights cases than state courts.

From the database on judicial decisions for 1995–1996, we estimate that nearly 60 percent of reported class action decisions arose in state courts, implying that a large share of class action litigation takes place there.[4] Although variety characterized the caseload in both federal and state courts, when state and federal class action activity is examined separately, important differences emerge. More consumer, citizens' rights, and tort cases appear to be filed in state courts, while federal courts hear larger shares of securities, employment, and civil rights cases (see Figure S.2).

Our analyses of the databases also highlight the importance of consumer cases brought against corporations, particularly in state courts. These

[4]Our estimate takes into account differences in federal and state reporting of judicial decisions.

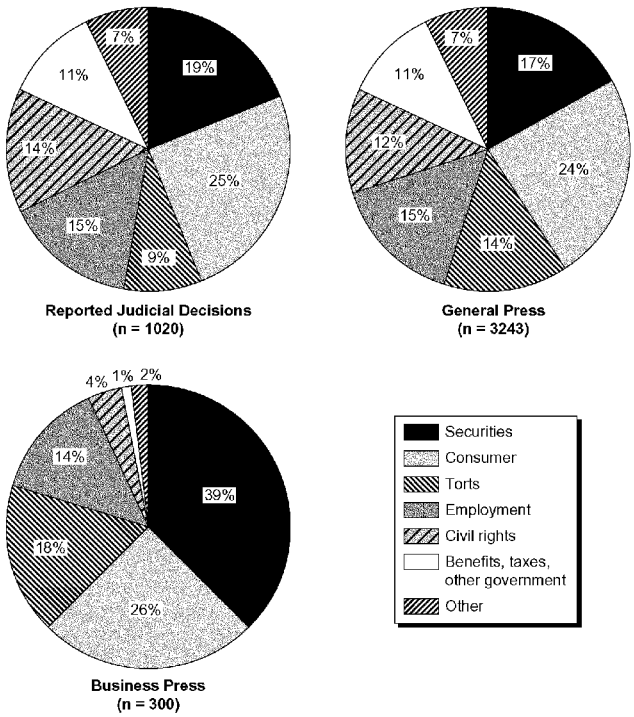

Figure S.1—Surveying the Class Action Landscape (1995–1996)

include cases alleging illegal fee calculations, fraudulent business practices, and false advertising. Our research suggests that the number of consumer cases is much larger than the number of mass tort cases and that the proportion of consumer cases in state courts is considerably larger than the proportion in federal courts.

Particularly in the state courts, consumer cases outnumber mass tort class actions.

Critics claim that class action attorneys "shop" for judges who are more favorable to class actions, and find them most often in state courts, particularly in the Gulf region. We found evidence of such patterns in our 1995–1996 data: Consumer class actions were more prevalent in Alabama than one would expect on the basis of population, and Louisiana led in the number and rate of mass tort class actions.[5] In a later section, we discuss the strategic choices that drive filing patterns.

[5] A concentration of mass torts in Louisiana may also reflect the concentration of petrochemical factories that might stimulate toxic exposure litigation in that state.

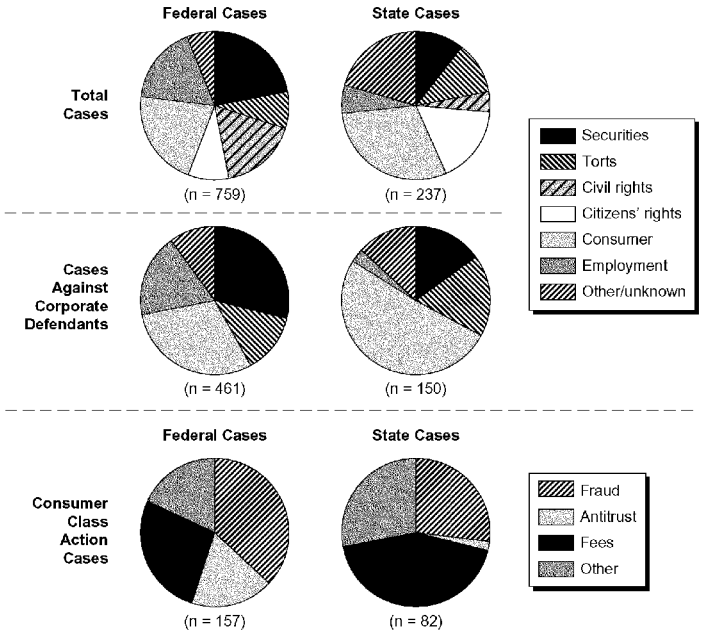

Figure S.2—Distribution of Cases Among Federal and State Courts (reported judicial decisions)

Class action practices are currently in flux. We cannot say whether the class action landscape will stabilize soon, or whether cases will continue to grow in number and variety.

At the time of our interviews, class action practices were in flux. Virtually all those with whom we talked felt that they were litigating at the leading edge of the civil justice system. As one practitioner put it: "The ground is shifting under us as we speak." Whether what we observed was a shift in a landscape that will soon stabilize—consistent with history—or whether damage class action litigation is on a growth trajectory cannot be determined from the information we collected.

CLASS ACTION DILEMMAS ARISE FROM THE INCENTIVES OF LAWYERS, PARTIES, AND JUDGES

Private class actions for money damages, particularly those lawsuits in which each class member claims a small loss but aggregate claimed losses are huge, pose multiple dilemmas for public policy. Many believe that these lawsuits serve important public purposes by supplementing

the work of government regulators whose budgets are usually quite limited and who are subject to political constraints. Hence, these are sometimes called "private attorneys general" lawsuits. Consumer advocates argue that without the threat of such lawsuits, businesses would be free to engage in illegal practices that significantly increase their profits as long as no one individual suffered a substantial loss. This notion of the purpose of damage class actions is sharply contested. In our view, the evidence regarding the historical intent of damage class actions is ambiguous. But whatever the rulemakers may have intended, the corporate representatives whom we interviewed said that the burst of new damage class action lawsuits has played a regulatory role by causing them to review their financial and employment practices. Likewise, some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions.

The purposes of damage class actions are sharply contested. Our research suggests that such lawsuits do play a regulatory enforcement role in the consumer arena.

Relying on private attorneys to bring litigation for regulatory enforcement has important consequences. When class action lawsuits are successful, they may yield enormous fees for attorneys because fees are usually calculated as a percentage of the total dollars paid by defendants. So, attorneys have substantial incentives to seek out opportunities for litigation, rather than waiting for clients to come to them. Over the years, class action specialists have developed extensive monitoring strategies to improve their ability to detect situations that seem to offer attractive grounds for litigation. To spread the costs of monitoring, they look for opportunities to litigate multiple class action lawsuits alleging the same type of harm by different defendants or in different jurisdictions. Success in previous suits provides the wherewithal for investigating the potential for more and different types of suits suits that test the boundaries of existing law. Thus, the financial incentives that damage class actions provide to private attorneys tend to drive the frequency and variety of class action litigation upwards. In our interviews, attorneys talked candidly about how these incentives operated in their practices and the practices of those who litigated against them. The key public policy question is whether the entrepreneurial behavior of private attorneys produces litigation that is, on balance, socially beneficial. Whereas public attorneys general may be reluctant to bring meritorious suits because of financial or political constraints, private attorneys general may be too willing to bring nonmeritorious suits if these suits produce generous financial rewards for them.

The substantial financial incentives that damage class actions provide to private attorneys tend to drive the frequency and variety of class action litigation upwards.

The key policy question is whether "private attorneys general" lawsuits are, on balance, socially beneficial.

Most consumer class members have only a small financial stake in the lit igation. And, because of the way the class action rules are commonly applied, the class members may not even learn of the litigation until it is almost over. Even representative plaintiffs (i.e., those in whose name the suit is filed) may play little role in the litigation. As a result, there are few if any consumer class members who actively monitor the class action

Class members typically play a small role in class action litigation. Their virtual absence may lead lawyers to questionable practices.

Plaintiff attorneys can be motivated by the prospect of substantial fees for relatively little effort. For their part, defendants may want to settle early and inexpensively. When these incentives intersect, the settlements reached may send inappropriate deterrence signals, waste resources, and encourage future frivolous litigation.

attorney's behavior. Such "clientless" litigation holds within itself the seeds for questionable practices. The powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the least publicity. These incentives can produce settlements that are arrived at without adequate investigation of facts and law and that create little value for class members or society. For class counsel, the rewards are fees disproportionate to the effort they actually invested in the case. For defendants, the rewards are a less-expensive settlement than they may have anticipated, given the merits of the case, and the ability to get back to business rather than engage in continued litigation. For society, however, there are substantial costs: lost opportunities for deterrence (if class counsel settled too quickly and too cheaply), wasted resources (if defendants settled simply to get rid of the lawsuit at an attractive price, rather than because the case was meritorious), and—over the long run—increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers.

Though judges have special responsibilities for supervising class action litigation, they may not have the resources or inclination to scrutinize settlements for self-dealing and collusion among attorneys.

Recognizing the potential for conflicts of interest in representative litigation, legal rulemakers have assigned judges special oversight responsibilities for class action litigation, including deciding class counsel's fees, and have devised other procedural safeguards as well. But procedural rules, such as the requirements for notice, judicial approval of settlements, and opportunities for class members and others to object to settlements, provide only a weak bulwark against self dealing. Notices may obscure more than they reveal to class members. Fees may be set formulaically without regard to the value actually produced by the litigation. Whether class settlements are actually collected by class members or returned to defendants, whether the awards are in the form of cash or coupons, may receive little judicial attention. Those who might object to the settlement may not be granted sufficient time or information to make an effective case. Individuals who do step forward to challenge a less-than-optimal resolution or a larger-than-appropriate fee award may have a price at which they will agree to go away or join forces with the settling attorneys. Judges whose resources are limited, who are constantly urged to clear their dockets, and who increasingly believe that the justice system is better served by settlement than adjudication may find it difficult to switch gears and turn a cold eye toward deals that from a public policy perspective may be better left undone.

Our data do not provide a basis for estimating the proportion of litigation in which questionable practices obtain. But because both plaintiff class counsel and defense and corporate counsel related experiences to us pertaining to such practices, often in vivid terms, and because there is documentary evidence of such practices in some cases, we believe that they occur frequently enough to deserve policymakers' attention.

MASS TORT CLASS ACTIONS INJECT ADDITIONAL INCENTIVES

The multiplicity of parties and high financial stakes of mass tort class actions exacerbate the incentive problems of class action practice.

Rather than solving the incentive problems posed by clientless consumer class actions, mass torts bring an additional set of problems to class action practice. Although mass tort plaintiffs have significant financial as well as nonmonetary stakes in their litigation, their role is typically little larger than that of consumer class members, regardless of whether a class is certified or whether the litigation is pursued in some other aggregative form. The history of mass torts—which we detail in our book—has created a contentious bar comprising class action practitioners, individual practitioners who take on large numbers of cases of varying strength and pursue them aggregatively, and more-selective tort attorneys who represent individual clients with strong claims and large damages. The multiplicity of lawyers with different strategic interests provides additional opportunities for dealmaking, which may or may not benefit the class members themselves. The need to satisfy so many legal representatives tends to drive up the total transaction costs of the litigation. The size of individual class members' claims—tens or hundreds of thousands of dollars, rather than the modest amounts of consumer class actions means that the financial stakes of the litigation are enormous, measured in hundreds of millions, or billions, of dollars. Defendants' drive to fix their ultimate financial exposure leads them to put huge amounts of money on the table in order to settle class litigation, an investment of resources that serves society's interests only when the class members' injuries are, in fact, caused by the defendants' products. Plaintiff class action attorneys are hard put to reject the largess that flows from fees calculated as a percentage of such enormous sums, even when the deals that defendants offer are not necessarily the best that the class counsel could obtain for injured class members if they were to invest more effort and resources in the litigation. Defendants' incentives to settle mass tort class actions even when scientific evidence of causation is weak, and class action attorneys' incentives to settle for less than the individual claims taken together are worth, diminish the deterrence value of product litigation and lead to both over and underdeterrence.

In mass tort class actions, notice campaigns that attract large numbers of class members and settlement formulae may result in outcomes that overcompensate some claimants while undercompensating others.

The tendency of damage class actions to expand the claimant population also has special consequences for mass torts. In consumer class actions, a successful notice campaign will increase the cost of litigation for defendants if more claimants come forward, but may have little impact on the amount that class members collect, since the individual financial losses that lead to such class actions are usually modest and the remedies commensurately small. But in mass tort litigation, the expansion of the claimant population as a result of class certification affects both defendants *and* plaintiffs. Defendants will probably pay more to settle a class action than they would absent the class certification, because more claimants come forward in response to notices and the media attention

that class actions often receive and because some of those who secure payment might not have been able to win individual lawsuits. Individual class members whose claims have merit are likely to get *less* than if they sued individually because mass tort settlements are often "capped" and the money will have to be shared with many other claimants, including those with less serious or questionable injuries. Those class members with the most serious injuries and strongest legal claims are likely to lose the most.

Allocating damages to mass tort class members also raises special questions. In consumer classes, if the primary goal is regulatory enforcement, carefully matching damages to losses is not a great concern. As long as defendants pay enough to deter bad behavior, economic theorists tell us, it does not matter how their payment is distributed. But the primary objective of tort damages is to make the victim whole, meaning that compensation should match loss (adjusted for factors such as the strength of the legal claim). When class members' injuries vary in nature and severity, finding a means of allocating damages proportional to loss without expending huge amounts of money on administration is a tall challenge. The need to save transaction costs drives attorneys towards formulaic allocation schemes. But resolutions that lack individualization challenge a fundamental reason for dealing with mass injuries through the tort liability system, rather than using a public administrative approach.

HOW INCENTIVES SHAPE OUTCOMES

We conducted extensive research on ten recently resolved class action suits to gain a richer understanding of class action practices, costs and benefits, and outcomes. The group included six consumer class actions, two mass product class actions, and two mass personal injury cases. The remarkable variation we found in these cases provided insight into the public policy dilemmas posed by damage class actions.

To develop a better understanding of how these incentives play out in class action litigation, we selected a small number of class action lawsuits for intensive analysis. Because critics claim that damage class actions are simply vehicles for entrepreneurial attorneys to obtain fees, we investigated the factors that contributed to the inception and organization of the lawsuits and their underlying substantive allegations. Because critics claim that damage class actions achieve little in the way of benefits for class members and society—while imposing significant costs on defendants, courts, and society—we examined the outcomes of the cases in detail. And because critics and supporters debate whether current class action rules, as implemented by judges, provide adequate protection for class members and the public interest, we studied notices, fairness hearings, judicial approval of settlements, and fee awards.

Because practitioners had told us that class action practice is in flux, we studied *recently filed* class action lawsuits, which best reflect current practices. Because so much of the controversy over damage class actions focuses on alleged shortcomings in their resolution, we studied cases that were *certified* and *resolved* as class actions. This means that our research did not tell us anything about an important segment of the class action universe: lawsuits that are filed and *not* certified. What happens to those cases remains a question for further research. Our interest in outcomes

also meant that we needed to study substantially *terminated* cases. Had litigation still been underway, we would not have been able to answer questions about benefits and costs. Finally, we decided to study cases that had *not* been the subject of widespread controversy. It is through large numbers of mundane cases, rather than through a few notorious lawsuits, we reasoned, that class actions bring about broad social and economic effects.

Because of resource constraints, we could conduct only ten case studies. We focused on two types of cases: consumer class actions because they were so numerous and such a source of contention and mass tort class actions because of the central role they have played in the controversy over class actions during the 1990s. Ultimately, we studied six consumer class actions, two mass product damage cases, and two mass personal injury cases. Table S.1 lists the cases and their subjects. Five were settled in federal court, and the other half was settled in state court.[6] Four of the five federal cases were nationwide class actions, as was one state case; one of the federal cases and two of the state cases were statewide class actions; the remaining cases were regional and were brought in state court. In six of the ten cases either the settling lawyers or other lawyers filed similar class action lawsuits in other jurisdictions. At the time we selected these cases, we did not know their outcomes other than that they had reportedly reached resolution. Our book details the facts that gave rise to these cases, their course of litigation, and their outcomes.

Although our case study investigation was limited to ten lawsuits, we found a rich variety of facts and law, practices and outcomes. The case studies provided a concrete basis for considering the claims that are central to the controversy over damage class actions: that these lawsuits are solely the creatures of class action attorneys' entrepreneurial incentives; that nonmeritorious class actions are easily identified—and that most suits fit in that category; that the benefits of class actions accrue primarily to the lawyers who bring them; that transaction costs far outweigh benefits to the class; and that existing rules are not adequate to insure that class actions serve their public goals. By arraying the facts of the class actions that we studied closely alongside the claims of critics, we were better able understand the public policy dilemmas posed by damage class actions.

Class Actions Are Complex Social Dramas

Class actions arise in diverse circumstances. But plaintiff attorneys drive the litigation.

The image of class action lawyers as "bounty hunters" pervades the debate over damage class actions. Without greedy lawyers to search them out, the argument goes, few, if any, such lawsuits would ever be filed.

[6]Because of controversy over whether class actions are triable, we would have liked to study some cases that were tried; however, it turned out that all of the cases we identified as candidates for study—like most civil cases and most class actions—never reached trial.

Table S.1

PROFILE OF CLASS ACTION CASE STUDIES

Short Case Title	Subject	(Court) Jurisdiction, Filing Year	Scope
	Consumer Class Actions		
Roberts v. Bausch and Lomb	Contact lens pricing	(Federal) Northern District of Alabama, 1994	Nationwide
Pinney v. Great Western Bank	Brokerage product sales	(Federal) Central District of California, 1995	Statewide
Graham v. Security Pacific Housing Services, Inc.	Collateral protection insurance charges	(Federal) Southern District of Mississippi, 1996	Nationwide
Selnick v. Sacramento Cable	Cable TV late charges	(State) Sacramento County, California, 1994	Metropolitan area subscribers
Inman v. Heilig-Meyers	Credit life insurance premium charges	(State) Fayette County, Alabama, 1994	Statewide
Martinez v. Allstate Insurance; Sendejo v. Farmers Insurance	Automobile insurance premium charges	(State) Zavala County, Texas, 1995	Statewide
	Mass Tort Class Actions		
In re Factor VIII or IX Blood Products	Personal injury, product defect, blood products	(Federal) Northern District of Illinois, 1996	Nationwide
Atkins v. Harcros	Personal injury and property damage, toxic exposure, chemical factory	(State) Orleans Parish, Louisiana, 1989	Current and former neighborhood residents
In re Louisiana-Pacific Siding Litigation	Property damage, product defect, manufactured wood siding	(Federal) District of Oregon, 1995	Nationwide
Cox et al. v. Shell et al.	Property damage, product defect, polybutylene pipes	(State) Obion County, Tennessee, 1995	Nationwide

Our case studies tell a more textured tale of how damage class actions arise and obtain certification.

In the ten case study lawsuits, class action attorneys played myriad roles. Some class actions arose after extensive individual litigation or efforts to resolve consumer complaints outside the courts; others were the first and only form of litigation resulting from a perceived problem. Sometimes class action attorneys uncovered an allegedly illegal practice on their own; sometimes angry consumers (or their attorneys) contacted them. Sometimes the lawyers first found out about a potential case from regulators or the media. Sometimes they jumped onto a litigation bandwagon that had been constructed by other class action attorneys. When they came later to the process, class action attorneys sometimes brought resources and expertise that helped conclude the case successfully for the class, but sometimes they seemingly appeared simply to claim a share of the spoils.

Defendants' responses to the class actions varied from case to case. In seven of the cases, they opposed class litigation vigorously, not only

seeking to have the case dismissed on substantive legal grounds but also contesting certification, sometimes all the way up to the highest appellate courts. Once they lost the initial battle(s) over certification, however, defendants joined with plaintiff attorneys in pursuing certification of a settlement class. In the remaining three cases, from the moment of filing, defendants seemed about as eager as plaintiff attorneys to settle the litigation against them by means of a class action, which followed either extensive individual litigation, or previously filed class actions, or both. Once defendants decided to support class action treatment of the litigation against them, they (not surprisingly) favored as broad a definition of the class as possible. Some defendants also sought to bind class members definitively by seeking certification of non-opt-out classes or subclasses.

Defendants may energetically fight class certification, but sometimes see classwide settlement as advantageous.

Critics charge that class action attorneys file lawsuits in certain courts simply because they believe that judges there are most likely to grant certification. As with many other aspects of damage class actions, the dynamics of case filing are more complicated than this critique suggests.

Forum choice is an important strategic decision in all civil lawsuits. But class action attorneys often have greater latitude in their choice of forum or venue than their counterparts in traditional litigation. Under some circumstances, an attorney filing a statewide class action can file in any county of a state and an attorney filing a nationwide class action can file in virtually any state in the country, and perhaps any county in that state as well. In addition, class action attorneys often can file duplicative suits and pursue them simultaneously. These are powerful tools for shaping litigation, providing opportunities not only to seek out favorable law and positively disposed decisionmakers, but also to maintain (or wrest) control over high stakes litigation from other class action lawyers.

Forum choice allows plaintiff class action attorneys to wrest control over litigation from competing attorneys and allows defendants to seek out plaintiff attorneys who are attractive settlement partners.

As a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward. But defendants then may also choose among competing lawyers—and among jurisdictions, venues, and judges—by deciding to negotiate with one set of class action attorneys rather than another.

The availability of multiple fora dilutes judicial control over class action certification and settlement, as attorneys and parties who are unhappy with the outcome in one jurisdiction move on to seek more favorable outcomes in another. Broad forum choice enables both plaintiff class action attorneys and defendants to seek better deals for themselves, which may or may not be in the best interests of class members or the public.

Broad forum choice weakens judicial control over class action litigation.

The Merits Are in the Eyes of the Beholders

A central theme of the testimony before the Civil Rules Advisory Committee in 1996–1997 was the notion that a large fraction of such lawsuits "just ain't worth it" because the alleged damages to class members are

Arguments about the merits of damage class actions often confound the merits of the underlying claims with the merits of the settlements that are negotiated.

"trivial," "technical," or just plain make-believe. In the policy debate, questions about lawsuits' merits—which pertain to the facts and law—are often confused with criticism of their outcomes—which are a product of the incentive structure that we reviewed above, as well as of the merits. In our case studies, we looked at the claims themselves and the allegations that parties made about practices and products to assess the seriousness of the claims underlying the class actions, rather than at the way the claims were settled. We could not fully evaluate the validity of every assertion or counter-assertion by the parties, but we did examine the materials in court records, discuss the claims and evidence with the litigators and, in some cases, talk also with consumer advocates and regulators about plaintiffs' charges and defendants' counter-assertions.

Observers often disagree about the merits of particular class actions.

Although many of these class action lawsuits were vigorously contested, at the time of settlement considerable uncertainty remained about the defendants' culpability and plaintiff class members' damages. To us, it seems unclear which, if any, of the ten class actions "just weren't worth it"—and which were. Viewed from one perspective, the claims appear meritorious and the behavior of the defendant blameworthy; viewed from another, the claims appear trivial or even trumped up, and the defendant's behavior seems proper. The complexity of the stories behind these lawsuits and the ambiguity of the facts underlying them provide partial explanations of why reaching a consensus over what sorts of damage class actions should be entertained by the courts is so difficult.

In the lawsuits we examined, class members' estimated losses ranged widely. Though they were generally too modest to have supported individual legal representation on a contingency-fee basis, they often numbered in the hundreds or thousands of dollars.

Among the ten class actions, the estimated losses to individuals varied enormously. Among consumer suits, the estimated individual dollar losses ranged from an average of $3.83 to an average of $4550; in five of the six cases the average was probably[7] less than $1000 (see Table S.2). It is highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense. By comparison with the consumer cases, the individual losses estimated in the mass tort class actions varied more in character and quantity, ranging from less than $5000 to death. In the latter case, had plaintiff attorneys been confident that they could prevail on liability, individuals would have been able to secure legal representation on a contingency-fee basis. In cases like the other three mass tort class actions, where damages were relatively modest, securing individual legal representation on a contingency fee basis would have been more problematic unless plaintiff attorneys were prepared to pursue individual claims in a mass but non class litigation.

The defendants' practices that led to the consumer class actions ranged from modest alleged overcharges on individual transactions to sales practices that were allegedly calculated to deceive. Depending on how one tells the story of what defendants did, they appear more or less cul-

[7]Information on losses was not available in all cases.

Table S.2
CLAIMS UNDERLYING THE TEN CLASS ACTIONS

	Nature of Alleged Harm[a]	Regulators' Assessment of Whether Practice Violated the Law	Estimated Loss to Individual Class Members[b]	Estimated Alleged Gain to Defendants[b]
Consumer Class Actions				
Roberts v. Bausch & Lomb	Labeled same product differently and sold at different prices.	FDA held that labeling complied with regulations; state attorneys general held practice unlawful.	At retail price, loss ranged from $7 to $62 per pair; over the period covered by suit approximately $210–$310 per lens wearer.	Estimated at $33.5 million by plaintiff attorneys and defendant, based on wholesale price differences.
Pinney v. Great Western Bank	Encouraged depositors to convert savings to riskier investments while implying FDIC insurance.	SEC reportedly conducted investigation; no public record available.	Approx. $4550 per eligible claimant.	Not estimated in lawsuit; Great Western reportedly drew $2.8 billion into the mutual funds.
Graham v. Security Pacific Housing Services, Inc.	Purchased more coverage than necessary for loan-holders, increasing premium.	No regulatory action.	Representative plaintiffs claimed damage ranging from several hundred dollars to nearly $1000.	Not estimated. Plaintiff attorneys alleged that insurance charges were ten times market rate.
Selnick v. Sacramento Cable	Charged excessive late fees.	Cable commission investigation led to change in policy.	$5 per late payment; could have totaled $250 if all payments were late.	$5 million.
Inman v. Heilig-Meyers	Sold more coverage than needed.	Insurance and banking dept. staff said practice was in compliance; state supreme court held practice contravened "plain meaning" of statute.	$3.83 on average.	Not estimated in settlement, but probably less than $1 million.
Martinez v. Allstate/Sendejo v. Farmers	Overcharged for policies.	Insurance commission said current regulations were ambiguous; refused to take action but issued order requiring single rounding in future.	$3 per year on average, with a maximum of $14; could have totaled $30 on average over ten years, or a maximum of $140.	Estimates ranged from $18 million (defendants') to $46 million (plaintiffs'); parties compromised on $42 million.
Mass Tort Class Actions				
In re Factor VIII or IX Blood Products	Sold HIV-contaminated products.	No dispute that blood products were HIV contaminated.	At time of suit, HIV infection was viewed as invariably fatal.	No allegations re defendants' gain.
Atkins v. Harcros	Chemical factory contaminated property around site.	La. Dept. of Environmental Quality required remediation.	Illnesses due to exposure, diminished property value, and fear.	No allegations re defendants' gain.
In re Louisiana-Pacific Siding Litigation	Product deteriorated, requiring replacement.	Defendant settled attorney general complaints in Oregon and Washington by paying penalties and revising advertising and warranty practices.	$4367 per structure.[c]	No allegations re defendants' gain.
Cox et al. v. Shell et al.	Product deteriorated, requiring replacement and property repairs.	Federal Trade Commission reportedly conducted investigation. No public record of outcome.	Costs to replumb: $1200 per mobile home; $3700 per single home.[d]	No allegation re defendants' gain.

[a]Based on plaintiffs' complaints. Defendants never admitted liability in any of these cases.

[b]Alleged losses and gains were the subject of contentious litigation. The numbers in this table indicate the general magnitude of losses and gains alleged by the parties in settlement negotiations and are presented to provide some general sense of the economic values at stake. In the *credit life insurance* case, individual losses were not estimated on the record; we estimated the average alleged overcharge based on public reports of class size and the total value of all premiums paid. In most of the mass tort cases, plaintiffs' claims of personal injury or property damage were disputed by defendants. For bases of parties' estimates, see case studies and Appendix E in the book.

[c]Average value of claims paid in 1997.

[d]Average value of claims paid through June 1998 by administrative claims facility established by settlement.

Defendants' culpability for alleged harms was sharply contested and remains unresolved since none of the cases we examined—as is typical with class actions—went to trial.

pable. Whether defendants' practices violated applicable statutes, regulations, and case law was the most contentious issue in the consumer class actions we studied, one that was never fully resolved because none of these cases went to trial.

Three of the mass tort class actions alleged manufacturing defects and the fourth concerned disposal of toxic factory waste products. In three of the four cases, defendants did not contest plaintiffs' assertions that the products involved were defective, although defendants did contest their liability for these defects. The battles over scientific evidence that have characterized many high-profile mass tort class actions—and that go to the heart of the question of their merit—were largely absent from these cases.

The Benefits and Costs Are Difficult to Assess

The outcomes of the cases we studied varied dramatically, challenging the assertion that all class action lawsuits result in pennies for class members and huge profits for attorneys.

The notion that class action attorneys are the prime beneficiaries of damage class actions is widespread. Tales abound of lawsuits in which class members receive checks for a few dollars—or even a few cents—while lawyers reap millions in fees. The "aroma of gross profiteering" that many perceive rising from damage class actions troubles even those who support continuance of damage class actions and fuels the controversy over them.

Among the damage class actions we studied, we found enormous variety in the amounts of money that class members received and in the suits' nonmonetary consequences. Class action attorneys received substantial fees in all of the suits, but both the amount of their fees and their share of the monetary funds created as a result of the settlements varied dramatically.

The way these outcomes were reached challenges the assertion that class actions are instruments for public good, rather than private gain.

The wide range of outcomes that we found in the lawsuits contradicts the view that damage class actions invariably produce little for class members, and that class action attorneys routinely garner the lion's share of settlements. But what we learned about the process of reaching these outcomes suggests that class counsel were sometimes simply interested in finding a settlement price that the defendants would agree to—rather than in finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement based on the answers to these questions. Such instances undermine the social utility of class actions, which depends on how effectively the lawsuits compensate injured consumers and—many would argue—deter wrongful practices. Moreover, among the class actions we studied, some settlements appeared at first reading to provide more for class members and consumers than they actually did, and class action attorneys' financial rewards sometimes were based on the settlements' apparent value

rather than on the real outcomes of the cases. Such outcomes contribute to public cynicism about the actual goals of damage class actions as compared to the aspirations articulated for them by class action advocates.

1. Negotiated Compensation Amounts Varied Dramatically

In one of the ten class actions, no public record exists of the total amount the defendant had agreed to pay class members, although there was a record of the attorney fee award. In the nine remaining cases, the total compensation defendants offered class members ranged from just under $1 million to more than $800 million. One of these cases included a substantial coupon component; depending on how one valued these coupons, the settlement was worth close to $70 million or just about $35 million (see Table S.3).

Table S.3

TOTAL COMPENSATION OFFERED AND COLLECTED BY CLASS MEMBERS, AND AVERAGE CASH PAYMENTS

	Total Amount Defendants Agreed to Pay in Compensation ($M)	Total Amount Collected by Class Members ($M)	Average Cash Payment
Consumer Class Actions			
Roberts v. Bausch & Lomb	$33.500 plus $33.500 in coupons	$9.175, plus $9.175 in coupons[a]	Unknown
Pinney v. Great Western Bank	$11.232	$11.232	$1478.89
Graham v. Security Pacific Housing Services, Inc.	$7.868	$7.868[c]	$130.71
Selnick v. Sacramento Cable	$0.929	$0.271[e]	$35.58
Inman v. Heilig-Meyers	Unknown	$0.272[b]	$45.79[b]
Martinez v. Allstate/Sendejo v. Farmers	$25.235	$8.914	$5.75
Mass Tort Actions			
In re Factor VIII or IX Blood Products	$650.000	$620.000[c]	$100,000
Atkins v. Harcros	$25.175	$25.175	$6404.22
In re Louisiana-Pacific Siding Litigation	$470.054	$470.054[c]	$4367.27[d]
Cox et al. v. Shell et al.	$838.000	$838.000[c]	$1433.29[d]

[a]Uses midpoint of range estimated from financial reports and other public documents.

[b]Information not from public records.

[c]Projected.

[d]To June 1998.

[e]All unclaimed compensation was awarded to a nonprofit organization.

When reviewing class action settlements, judges must consider their "adequacy" and "fairness." Comparing a proposed settlement amount to the estimated total class losses provides one basis for such an assessment. However, in six of the class actions we studied, the attorneys never offered a public estimate of the total amount of these losses.

2. In Some Cases, Actual Compensation Was a Lot Less Than the Amount Negotiated

In three cases, all or almost all of the money set aside for compensation already has been claimed by class members; in three others, apparently all or almost all of the funds committed by the defendants for class compensation will ultimately be claimed. But in another three cases, class members claimed one third or less of the funds set aside for compensation. In a fourth case, although the total compensation made available to the class was not reported to the court, we believe that less than half was claimed.[8] In three of these four cases the remaining money was returned to the defendants; in a fourth it was awarded to a nonprofit organization.

The total amount of compensation dollars collected or projected to be collected by class members in the cases we studied ranged from about $270,000 to about $840 million. Average payments to individual class members ranged from about $6 to $1500 in consumer suits, and from about $6400 to $100,000 in mass tort suits (see Table S.3).

3. Consumer Litigation Was Associated with Changes in Practice—but Some Changes May Have Had Other Explanations

In all six consumer cases, the litigation was associated with changes in the defendants' business practices. In four of the six cases the evidence strongly suggests that the litigation directly or indirectly produced the changes in practice. In the two other lawsuits, the evidence of whether the instant class action led to the change is more ambiguous. Three of the consumer cases also led to changes in state consumer law, although in one case the revision was arguably pro-business. In three of the mass tort cases we studied, the class litigation followed removal of the product from the market or change in the product; in the fourth, the manufacturer changed the product (which is still marketed) after state attorneys general investigations and litigation commenced.

4. Class Counsel's Fees Were a Modest Share of the Negotiated Settlements

Awards to class action attorneys for fees and expenses ranged from about half a million dollars to $75 million.[9] Under law judges award

[8]Our calculation is based on estimates from public financial data.

[9]We could not obtain data on how much defense attorneys earned from these lawsuits because these fees were not a matter of public record and most defendants were unwilling

class counsel fees, calculated either by taking a percentage of the total monetary value of the settlement, or by adding hours, assigning an hourly rate (sometimes adjusted by a factor to reflect the quality of the work), and adding in expenses. Generally, the total monetary value of the settlement is defined as including monies made available for compensation to class members, payments to other beneficiaries, class counsel's fees and expenses, and all of the costs required to administer the settlement, including those for notice. In all of our case studies, judges apparently used the percentage-of-fund (POF) method. In the nine cases for which we know both the total amount of the negotiated settlement and the total amount awarded or set aside for class counsel, class counsel fee-and-expense awards ranged from 5 percent to about 50 percent of the total settlement value. In eight of the nine cases, class counsel received one-third or less of the total settlement value[10] (see Figure S.3).

5. In Some Cases, Class Counsel Got a Larger Share of the Actual Dollars Paid Out Than Indicated by the Negotiated Settlement

As we have seen, class members do not always come forward to claim the full amount defendants make available for compensation. Class counsel received one third or less of the actual settlement value in six of the ten cases;[11] in the remaining four cases, class counsel's share of the actual settlement value was about one-half. In three of the mass tort cases, class counsel were awarded less than 10 percent of the actual settlement value, but the absolute dollar amount of fees was very large, because these settlements were huge (see Figure S.3).

6. In a Few Cases, Class Counsel Got More Than the Total Collected by Class Members

Critics often use yet a third benchmark to assess plaintiff class action attorney fees: the amount the attorneys are awarded compared to the amount class members receive. Because class counsel are paid for what they accomplish for the class as a whole, their fee awards will almost certainly be greater than any individual class member's award, even in a mass tort class action where class members sometimes receive substantial settlements. But in three of the cases we studied, class counsel received more than class members received altogether (see Table S.4).

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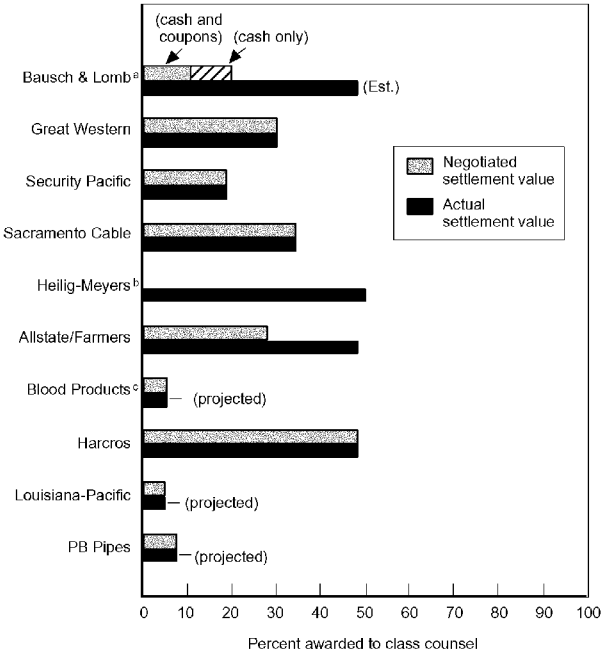
to share the information with us. In the three cases in which defendants shared information on their outside-attorney charges, those amounts were one-fifth, two-fifths, and equal to the amount of class counsel's fees and expenses, respectively.

[10]In the tenth case, the judge apparently was not provided with any means for comparing the fee request with this benchmark, because there was no public estimate of the aggregate common benefit.

[11]Although we do not know the total negotiated settlement value in one case, the defendant shared information with us on its actual value. Hence, we can compute these shares for all ten cases.



[a] Defendant's costs of administration, notice, and other settlement-related expenses are unknown.
[b] Negotiated settlement value not available.
[c] Assumes $36.5 million available for class counsel fees + costs.

Figure S.3—Class Counsel Fees and Expenses as a Percentage of Negotiated and Actual Settlement Value

7. Total Transaction Costs Are Unknown

Class actions are costly. We estimate that total costs in the ten cases, excluding defendants' own legal expenses, ranged from about $1 million to over $1 billion. Eight of the cases cost more than $10 million; four cost more than $50 million; three cost more than half a billion dollars.

Transaction costs in class action lawsuits include not only fees and expenses for the plaintiff class action attorneys and defense attorneys, but also the costs of notice and settlement administration, which can be substantial. Because most defendants declined to share data on their own legal expenses, we could not calculate a transaction cost ratio that ac-

Table S.4

TOTAL AWARDED TO CLASS COUNSEL, COMPARED WITH TOTAL PAID TO CLASS

	Class Counsel Award for Fees & Expenses ($M)	Total Cash Payment to Class Members ($M)
Consumer Class Actions		
Roberts v. Bausch & Lomb	$8.500	$9.175[b]
Pinney v. Great Western Bank	$5.223	$11.232
Graham v. Security Pacific Housing Services, Inc.	$1.920	$7.583
Selnick v. Sacramento Cable	$0.511	$0.271
Inman v. Heilig-Meyers	$0.580	$0.272[c]
Martinez v. Allstate/Sendejo v. Farmers	$11.288	$8.914
Mass Tort Class Actions		
In re Factor VIII or IX Blood Products	$36.500[a]	$620.000[a]
Atkins v. Harcros	$24.900	$25.175
In re Louisiana-Pacific Siding Litigation	$25.200	$470.054[a]
Cox et al. v. Shell et al.	$75.000	$838.000[a]

[a]Projected.

[b]Estimated from financial reports and other public documents.

[c]Information not from public records.

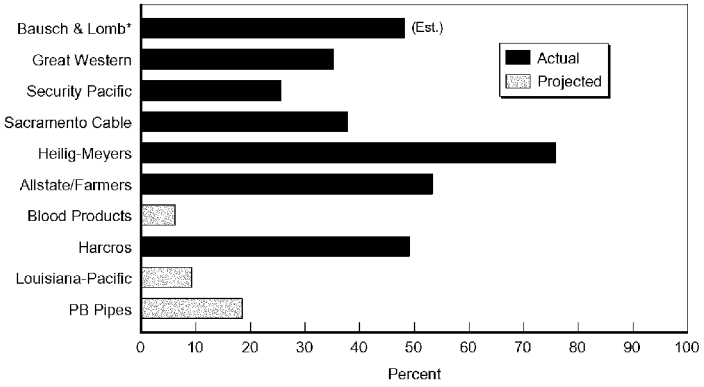
counted for all dollars spent on these lawsuits.[12] As a share of the total bill excluding defendants' legal fees and expenses but including plaintiff attorneys' fees and expenses and administrative costs, transaction costs were lowest in three of the four mass tort class actions, and highest in the consumer class actions (see Figure S.4). But because mass tort cases are likely to impose large defense costs, these differences may be illusory. Because they exclude defendants' legal costs for all ten cases, the percentages shown in Figure S.4 represent the lower bound on transaction cost ratios.

JUDGES' ACTIONS DETERMINE THE COST-BENEFIT RATIO

When judges fully exercise their oversight responsibilities, the quality of class action settlements and the social benefits of the litigation are improved.

Assessing whether the benefits of Rule 23 damage class actions outweigh their costs—even in ten lawsuits—turns out to be enormously difficult. Whether the corporate behaviors that consumer class actions sought to change were worth changing, whether the dollars that plaintiff class action attorneys sought to obtain for consumer class members were worth recouping, and whether the changes in corporate behavior that were achieved and the amounts of compensation consumers collected were significant are, to a considerable extent, matters of judgment. Whether

[12]In three cases, we do know outside defense attorneys' charges. Including those expenses increases the transaction cost ratio by just 10 percent in one case, by about one-third in the second, and by 85 percent in the third.



NOTES: Transaction costs include payments to plaintiffs' attorneys and costs of administration, notice, and other expenditures.

*Defendants' costs of administration, notice, and other settlement-related expenses are unknown.

Figure S.4—Proportion of the Settlement, Excluding Defendants' Own Legal Fees and Expenses, Attributable to Transaction Costs

the damages claimed by mass tort class members were legitimate, whether defendants should have been held responsible for these damages, and whether plaintiffs were better served by class litigation than they would have been by individual litigation are also matters of judgment.

However one assesses the bottom line, the evidence from our case studies suggests strongly that what judges do is the key to determining the benefit-cost ratio. In the class actions we studied, we found considerable variation in what judges required of attorneys and parties. From a societal perspective, the balance of benefits and costs was more salutary when judges:

- required clear and detailed notices
- closely scrutinized the details of settlements including distribution strategies
- invited the participation of legitimate objectors and intervenors
- took responsibility for determining attorney fees, rather than simply rubber-stamping previously negotiated agreements
- determined fees in relation to the actual benefits created by the lawsuit

- required ongoing reporting of the actual distribution of settlement benefits.

How judges exercise their responsibilities not only determines the outcomes of the class actions that come before them, but more important, also determines the shape of class actions to come. Lawyers and parties learn from judges' actions what types of claims may be certified as class actions, what types of settlements will pass muster, and what the rewards of bringing class actions will be.

FINDING COMMON GROUND BY FOCUSING ON PRACTICE

Because the controversy over class action litigation springs from sharp differences in political and social values, it is difficult to resolve. The continuing focus on these questions squanders opportunities for reforming practices.

Damage class actions pose a dilemma for public policy because of their capacity to do both good and ill for society. The central issue for policymakers is how to respond to this dilemma.

Those who believe that the social costs of damage class actions outweigh their social benefits think that the best course of action would be to abandon the notion of using private collective litigation to obtain monetary damages in consumer and mass tort cases. We should rely, say these critics, on administrative agencies and public attorneys general to enforce regulations, and on individual litigation to secure financial compensation for individuals' financial losses.

Those who believe that the social benefits of damage class actions outweigh their costs say that prohibiting private collective litigation in these circumstances would be unacceptable. They have less faith in the capacity of regulatory agencies and public attorneys to enforce regulations. And they argue that some federal and many state consumer protection statutes were enacted with the understanding that claims brought under the statutes would be so small that the only practical way for individuals to assert the rights granted by the statutes would be through collective litigation.

The current controversy over damage class actions reflects this clash of views. History suggests that it will be difficult to resolve the fundamental conflict between them. But many on both sides of the political divide share concerns about current damage class action practices. We think this argues for refocusing the policy debate on proposals to better regulate such practices, so as to achieve a better balance between the public and private gains of damage class actions. Below, we assess the leading proposals for damage class action reform that have been put forward in recent years, seeking to identify those that might attract support from actors on opposite sides of the policy divide and that might make a difference in outcomes.

Adding a Cost-Benefit Test for Certification Would Yield Unpredictable Outcomes

One of the Civil Rules Advisory Committee's proposed rule changes would have encouraged judges to deny certification when they believe the likely benefits of class action litigation are not worth the likely costs. This proposal evoked sharp controversy, arraying business representatives against consumer advocates, and was ultimately tabled by the committee. We think such a proposal would also yield unpredictable outcomes.

The ambiguity of case facts revealed by our case studies illuminates the problems associated with asking a judge to assess likely benefits and costs when deciding whether to certify a damage class action. Under current law, a judge is not authorized to adjudicate the legal merits of a case when he or she rules on certification. Without such adjudication, we do not think it is at all certain that we could depend on judges who have different social attitudes and beliefs to arrive at the same assessment of the costs and benefits of lawsuits such as these. Judges presiding over class actions should use their summary judgment and dismissal powers, when appropriate—as many do now. Preserving the line between certification based on the form of the litigation (e.g., numerosity, commonality, superiority) and dismissal and summary judgment based on the substantive law and facts seems more likely to produce consistent signals to parties as to what types of cases will be certified than conflating the two decisions.

Requiring Class Members to Opt In Would Array Business Representatives Against Consumer Advocates

Some critics have proposed amending Rule 23 to require that those who wish to join a damage class action proactively assert their desire by opting in, thereby returning to pre-1966 practice. In consumer class actions involving small individual losses, requiring class members to opt in would lead to smaller classes that would likely obtain smaller aggregate settlements; in turn, class counsel would probably receive smaller fee awards. The social science research on active versus passive assent suggests that minority and low-income individuals might be disproportionately affected by an opt in requirement, a worrisome possibility.

Reduced financial incentives flowing from smaller class actions would discourage attorneys from bringing suit. How one feels about this result depends on one's judgment about the social value of small dollar consumer class actions, meaning that this proposal is unlikely to attract broad political support.

Prohibiting Settlement Classes Might Not Cure Any Problems

One of the most hotly debated issues pertaining to class action procedure during the 1990s was whether judges should be permitted to certify classes for settlement purposes only. Rule 23 makes no provision for such classes, although it does provide for certification to be conditionally granted and to be withdrawn if a judge subsequently decides it is inappropriate. But certification for settlement purposes had apparently become a common practice by the 1990s. Generally, such certification is granted preliminarily[13] after the class counsel and defendants have negotiated a settlement. In a recent decision, the Supreme Court found that Rule 23 permits such certification.[14]

Settlement classes have attracted two types of criticism, the first implicating the broad social policy question about when damage class actions should be permitted, and the second focusing more on class action practices. If judges certify classes for settlement that they would not agree to certify for trial, we would expect to see, over time, more damage class actions. Certification of settlement classes also has financial benefits for class counsel—for example, when a class is not certified until a settlement is preliminarily approved, the defendant will generally bear the notice costs. Settlement class certification might therefore encourage damage class action litigation by reducing plaintiff class action attorneys' financial risk.

Critics also argue that certification for settlement only facilitates collusion between plaintiff class action attorneys and defendants. The critics suggest that the former are at a strategic disadvantage when they negotiate a settlement without knowing whether the judge will ultimately grant class certification. Attorneys we interviewed argued to the contrary that uncertainty about the judge's ultimate decision on certification can disadvantage defendants as well. Some attorneys told us that the availability of settlement class certification has different import, depending on the evolution of the litigation. For example, in some lawsuits there has been extensive individual litigation or significant legal skirmishes prior to settlement. In both instances, class counsel and defendants know a good deal about the strength of the case by the time of settlement.

[13]The judge grants preliminary approval for the purpose of noticing class members and inviting objections. Final approval is granted after a fairness hearing.

[14]*Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). The Court held that settlement classes must satisfy the same criteria as cases certified for all purposes, including trial, although the criteria may apply differently to settlement class certification. Some trial judges had previously held that the fact of settlement itself satisfied key certification criteria; the Court rejected this interpretation.

Our analysis suggests that the key to forestalling improper settlements is the amount and quality of judicial scrutiny, rather than whether a class is certified for trial or settlement only. Settlement class certification may enhance the risk that class counsel and defendants will negotiate settlements that are not in class members' best interests, but certifying a class unconditionally (i.e., for trial) will not automatically eliminate this risk. Conversely, when a lawsuit has been fiercely contested by the defendant, when a significant amount of factual investigation has taken place, and when class counsel have and are willing to spend resources to obtain a fair resolution, settlement class certification may facilitate settlements that are in the interest of class members as well as defendants.

Broadening Federal Court Jurisdiction Would Give Federal Judges More Control, but Would Not Address Other Important Issues

A fourth proposal for class action reform, which passed the House of Representatives in 1999, is to broaden federal court jurisdiction over class actions so that many class actions that are now brought in state court could be removed by defendants to federal court, where they would be governed by federal rules, practices, and judges.[15] Some critics of class actions believe that federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly. Others suggest that state judges may not have adequate resources to oversee and manage class actions with a national scope.[16] Still others suggest that if a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in federal court than in a state court. The proposed new legislation is animated by these beliefs.

Because there are no systematic data on state court class actions, there is no empirical basis for assessing the arguments that federal judges are more likely than state judges to deny class certification, or that federal judges generally manage damage class actions better than state judges. But the current situation, in which plaintiff class action attorneys can file multiple competing class actions in a number of different state and federal courts, has other important consequences. Duplicative litigation drives up the public and private costs of damage class actions. Perhaps more important, class action attorneys and defendants who negotiate agreements that do not pass muster with one judge may take their law-

[15] H.R. 1875, 106th Cong., 1st Sess. (1999). Similar bills were introduced in the previous Congress.

[16] In its study of class actions in four district courts, the Federal Judicial Center found that federal judges spend about five times as many hours on class actions as on an "average" civil case. See Thomas Willging, Laurel Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts*, Washington, D.C.: Federal Judicial Center, 1996.

suit to another jurisdiction and another judge. Under most circumstances, none of the judges in the different courts in which the case is filed has the authority to preclude action by another judge as long as all cases are still in progress. A class action settlement approved by a judge in one court often cannot be overturned by another court, even if the claims settled in the first court are subject to the jurisdiction of the second court. If we look to judges to rigorously scrutinize class action settlements and attorney fee requests—as we argue below that we should—finding a way to preclude "end-runs" around appropriately demanding judges is critical.

Deciding how to handle duplicative multistate class actions is a difficult problem in our system of federal and state courts. In the federal courts, duplicative class actions can be assigned to a single judge by the Judicial Panel on Multi-District Litigation (MDL).[17] However, under the MDL statute, the transferee judge does not currently have the power to try all the cases assigned to her, but only to manage them for pretrial purposes. Although MDL transferee judges can and do preside over settlements of aggregate litigation, the fact that an MDL judge cannot try cases that were not originally filed in her court may undercut her ability to regulate class action outcomes. To address this issue, Congress could amend the statute that authorizes multidistricting to give the panel authority to assign multiple competing federal class actions to a single federal judge for all purposes, including trial.[18] Some states have already developed procedures for collecting like cases within their states, analogous to the federal multidistricting procedure. States could adapt these mechanisms, or develop new ones, to assign multiple, competing class actions within their state to a single judge for all purposes, including trial. But consolidating cases *within* federal or individual state courts would not solve the problem of competing federal *and* state class actions, which may be filed within a single state or in different states by the same or competing groups of class action practitioners. By facilitating removal of multistate class actions to federal court, the proposed legislation would provide a means of collecting duplicative class actions, at least for pretrial purposes, using the MDL provision.[19] But the proposed legislation leaves other important issues unresolved.

First, a key issue pertaining to multistate class actions that arises whether they are brought in state or federal court is what law to apply when class members' claims allege violations of different state laws. In some class

[17] 28 U.S.C. § 1407.

[18] In 1999, the House of Representatives passed a bill that broadens the transferee judge's authority to include trial and provides for the removal of related state claims to federal court for assignment to the transferee judge. But this bill applies only to mass personal injury claims arising out of a catastrophic event. H.R. 2112, 106th Congress, 1st Sess. (1999). Similar bills were introduced in previous Congresses.

[19] However, the House bill passed in September is not limited to such multistate actions.

actions, defendants have argued and judges have agreed that when multiple states' laws are implicated, a lawsuit cannot meet the damage class action requirement that common issues predominate. If the proposed legislation were to be enacted into law, this might be the fate of some of the lawsuits that were removed to federal court.[20] Some past proposals for consolidating multistate claims include provisions for resolving choice-of-law problems,[21] but the proposed class action jurisdiction legislation does not address this issue.

Second, if many state class actions were removed to federal court, some federal judges could be faced with significant numbers of new and complex lawsuits. In a later section, we suggest that under the current jurisdictional rules additional resources may have to be provided to judges to ensure that they exercise their responsibilities under law to assess and approve the quality of class action settlements and determine appropriate attorney fees. The proposed legislation does not address the resource issue.[22]

Proposals to expand federal jurisdiction over damage class actions have evoked controversy because many believe that federal judges are now disposed against such suits. Hence the proposed legislation attracts support from business representatives and opposition from consumer advocates and class action attorneys. Perhaps the ingredients for a consensus approach to the problems of multistate class actions could be found by incorporating a solution to the choice of law problem in a proposal that expands federal jurisdiction over multistate class actions and provides additional resources for federal judges who preside over such lawsuits.

Prohibiting Mass Tort Class Actions Would Not Solve the Mass Tort Problem

Arguments over the costs and benefits of mass tort class actions have been hampered by the apparent belief of many legal scholars that, absent class certification, mass product defect and mass environmental exposure claims would proceed as individual lawsuits. Empirical research suggests, to the contrary, that when claims of mass injury exist, litigation usually either proceeds in aggregate form or dies on the vine. The important public policy questions relating to mass torts are not *whether* to aggregate litigation, but *how* and *when*.

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[20] In other instances, judges have allowed class counsel to try class actions under multiple state laws; the jury was asked whether the claims of different class members are valid under the particular legal standards that apply to those claims.

[21] For example, H.R. 2112, 106th Congress, 1st. Sess. (1999).

[22] In July 1999, the Executive Committee of the Judicial Conference of the United States voted to express its opposition to H.R. 1875 (and its companion Senate bill) in part because of concern about its probable impact on federal judicial workload.

Class action certification often puts class action attorneys in control of mass tort litigation, and these attorneys often adopt a strategy of settling the largest possible number of claims early in the litigation process according to a formula that only roughly distinguishes among claimants with injuries of differing severity. But mass tort litigation often involves significant numbers of claimants who would be better served by lengthier litigation (to develop a stronger factual basis for negotiation) and more individualized damage assessment. Plaintiff attorneys who aggregate mass tort cases informally argue that they are better able than the class action attorneys to achieve these ends. Class action certification also gives judges control over attorney fees, and may put class action attorneys in a position to obtain the lion's share of these fees. Plaintiff attorneys who aggregate mass tort cases informally enter into contingent fee agreements with each of their clients, who may pay the attorney the same share of any settlement that they would in individual litigation, notwithstanding any savings that may accrue to such attorneys because of the scale of the litigation. Conducted in the lofty terminology of due process, the public debate over mass tort class actions masks the power struggle between these two groups of attorneys: class action specialists and the tort practitioners who bring many individual cases at a time outside the class action structure. To date, insufficient empirical evidence exists to indicate whether mass tort claimants are better served by formal aggregation, through class certification, by informal aggregation, or by the somewhat ambiguous middle ground that MDL currently provides.

Increasing Judicial Regulation of Damage Class Actions Is the Key to a Better Balance Between Public Goals and Private Gain

Judges hold the key to improving the balance of good and ill consequences of damage class actions. If judges approve settlements that are not in class members' best interest and then reward class counsel for obtaining such settlements, they sow the seeds of frivolous litigation—settlements that waste society's resources—and ultimately of disrespect for the legal system. If more judges in more circumstances dismiss cases that have no legal merits, refuse to approve settlements whose benefits are illusory, and award fees to class counsel proportionate to what they actually accomplish, over the long run the balance between public good and private gain will improve.

Judicial regulation of damage class actions has two key components: settlement approval and fee awards. Judges need to take more responsibility for the quality of settlements, and they need to reward class counsel only for achieving outcomes that are worthwhile to class members and society. For assistance in these tasks they can sometimes turn to objectors and intervenors. But because intervenors and objectors often are also a

part of the triangle of interests that impedes regulation of damage class actions, judges should also turn for help to neutral experts and to class members themselves.

1. Judges Need to Scrutinize Proposed Settlements More Closely

Rule 23 requires judges to approve settlements of class actions, but does not itself specify the criteria that judges should use to decide whether or not to grant such approval. Case law requires that class action settlements be fair, adequate, and reasonable, but these elastic concepts do not offer much guidance as to which settlements judges should approve and which they should reject, and current case law and judicial reference manuals do not speak to key aspects of settlements. Based on our analysis, we think judges should:

- ask what the estimated losses were and how these losses were calculated
- exercise heightened scrutiny when settlements fall far short of reasonably estimated losses, even after properly adjusting for the likely outcome if the case were tried
- require settling parties to lay out their plans for disbursement, including proposed notices to class members, information dissemination plans, whether payments will be automatic (e.g., credited against consumers' accounts) or class members will be required to apply for payment—and, in the latter instance, what class members will be required to do and to show in their applications. Generally, in consumer class actions involving small individual losses, automatic payments to class members should be favored when lists of eligible claimants are available from defendants and when a formula can be devised for calculating payments.
- exercise heightened scrutiny when coupons comprise a substantial portion of the settlement value, and require estimates of the rate of coupon redemption
- require information on the estimated *actual* payout by defendants, taking into account all of the above
- exercise heightened scrutiny when claims regarding regulatory enforcement are put forward in support of a settlement, particularly when large dollar values are assigned to alleged injunctive effects. When inquiring about changes in practice, ask whether the instant class action is the first such suit against the defendant or one in a long chain of such suits, as later suits are less valuable as regulatory enforcement tools.

- exercise heightened scrutiny when the amount of fees has been negotiated separately by class counsel and defendants prior to settlement.[23]

Judges' responsibility for the fairness, adequacy, and reasonableness of class action settlements should not end with their formal approval of those settlements. Judges should:

- require that settlement administrators report, in a timely fashion, both the total amounts of disbursements to class members and the total costs of administration, and review these reports to determine whether rates of claiming and coupon redemption are in line with parties' projections at the time the settlement was proposed
- require, at least, annual reports of disbursements and costs when settlements are structured to provide payments over lengthy periods, as well as reports on the process of claims administration including the numbers of claims accepted and denied, reasons for denial, use and outcome of appellate procedures (where provided), and time to disposition. When settlements provide for so-called cy pres remedies (payments to parties other than class members), the beneficiaries of those remedies and the amount of disbursement to them should also be reported. When alternative dispute resolution procedures such as arbitration or mediation are utilized in the claims administration process, judges should require reports on the selection and training of the arbitrators or mediators, payment provisions, and quality control procedures. These regular reports on claims administration should be available to the public for review.
- refrain from making cy pres awards to organizations with which they have a personal connection, to avoid the appearance of conflict of interest.

2. Judges Should Reward Attorneys Only for Actual Accomplishments

The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.

To avoid rewarding class action attorneys for dubious accomplishments, judges should:

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[23] In *Evans v. Jeff D.*, 475 U.S. 717 (1986), the U.S. Supreme Court held that class counsel and defendant could negotiate fees as a component of a settlement. In our book, we review alternative approaches to fee-setting that we believe would reduce opportunities for self dealing.

- award fees in the form of a percentage of the fund *actually disbursed* to class members or other beneficiaries of the litigation[24]
- award fees based on the monetary value of settlement coupons *redeemed,* not coupons offered
- reject fee awards for illusory changes in regulatory practices, such as changes made in response to independent enforcement actions by public attorneys general or other public officials, individual litigation, or previous class actions
- award less, proportionally, when the total actual value of the settlement is very large
- award less, proportionally, when settlements are disbursed to nonclass members—cy pres remedies—except in instances where direct compensation to class members is clearly impracticable
- use phased awards when projected payouts are uncertain and disbursements will be made over time
- require detailed expense reports.

3. Judges Should Seek Assistance from Others

To assure that key aspects of settlements are brought to light, judges should seek assistance from knowledgeable but disinterested parties.

Judges should:

- provide sufficient information and adequate time for objectors and intervenors to come forward and participate in fairness hearings
- be wary of "false helpers" e.g., lawyers who claim to represent a particular set of parties, but whose real motivation is to negotiate a fee with defendants and plaintiff class action attorneys in exchange for disappearing from the scene. To help guard against collusion, payments made by one set of lawyers to another or by defendants to intervening or objecting lawyers ought to be disclosed to the judge.
- award fees to intervenors representing nonprofit organizations who significantly improve the quality of a settlement
- seek assistance from neutral experts in assessing claims of regulatory enforcement and valuing other nonmonetary settlement benefits
- appoint neutral accountants to audit attorney expense reports before making a final award of expenses.

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[24] In *Boeing Co. v. Van Gemert,* 442 U.S. 472 (1980), the U.S. Supreme Court held that class action attorney fees may be awarded on the basis of the negotiated size of a settlement fund, without regard to how many class members come forward to claim shares of the fund. We think this rule has perverse effects in damage class actions.

The additional costs of intervenors and neutral experts should be split evenly between the defendant and class counsel (from the latter's already-decided share of the settlement). All such costs should also be a matter of public record.

In order to improve class members' participation, judges also should:

- provide mechanisms for class members to receive timely information about the progress and outcomes of the litigation, and encourage class members' questions and comments
- require plain-English notices. Notices of the pendency of class actions should indicate what defendants are alleged to have done, to whom, and with what effects. Notices of settlement should describe, in detail, what eligible claimants will receive on average; what they will have to do to receive payments; what defendants are projected to pay, in the aggregate; what other activities defendants have agreed to undertake, if any; what plaintiff attorneys will receive, if fees have been negotiated during the settlement process; and whether any plans have been made for residual or supplementary payments to other organizations.
- consider appointing a committee of unrepresented class members in mass tort class actions, where class members frequently include represented and unrepresented parties, to serve as spokespeople for the latter.

THE ROAD TO REFORM

If judges already have the power to regulate damage class actions but not all of them use it fully, what stands in the way of stricter regulation? We see three obstacles: a discourse about judging that emphasizes calendar-clearing above all other values, a belief that court efficiency is measured in terms of dollars spent rather than dollars spent well, and a failure to systematically expose what occurs in damage class actions to public light.

Change Judicial Discourse

To promote stricter regulation of damage class actions, we need to change the discourse about the role of judges in collective litigation. Judges need to be educated that damage class actions are not just about problem solving, that the rights of plaintiffs and defendants are at stake, that responsibility for case outcomes lies not just with the class counsel and defendant but with the judge as well, and that what is deemed acceptable in one case sends important signals about what will be deemed acceptable in another.

Judges presiding over their first damage class action need mentors to guide them, not just about the process, but also about the incentives for self-dealing inherent in representative litigation and the strategies available to judges for countering them. Judges should be reminded of their authority to dismiss cases and grant summary judgment, when appropriate. At conferences of state and federal judges, participants should share with their colleagues techniques for ensuring that settlements they approve are appropriate and that fee awards are proportionate to real outcomes. Questions about how certification criteria apply to various types of lawsuits, at what stage of the process it is appropriate to certify cases, and whether to certify cases conditionally for settlement should be debated. *Most important, judges should be celebrated for how they carry out their responsibilities in damage class actions, not just for how fast or how cheaply they resolve these lawsuits.*

Increase Judicial Resources

Our recommendations for judicial management of damage class actions might well require an increase in public expenditures for the courts. Judges presiding over class actions may need more administrative support and legal assistance, as well as a reduced load of other cases, so that they can devote sufficient time to class action management. They may need assistance in identifying neutral experts and experienced settlement masters to assist them. Saving money on damage class actions by limiting judicial scrutiny is a foolish economy that has the long term consequence of wasting society's resources.

In the short run, our recommendations also might increase the private costs of individual damage class actions. The price to settle the individual class actions that survive a more rigorous judicial approval process might be higher than the current average cost of settling damage class actions. But if the current costs of damage class actions reflect significant amounts of frivolous litigation and worthless settlements, as critics allege, these costs would diminish over the long run as such litigation is driven from the system, benefiting both defendants and consumers.

Open Class Action Practice and Outcomes to Public View

As with many other public controversies, the debate over damage class actions has created a lot of heat without shedding much light on the range of practices and outcomes in these lawsuits. Shining more light on damage class action outcomes would enhance judges' incentives to regulate class actions. Comprehensive reporting of class action litigation would provide a rich resource for policymakers concerned about class action reform as well as an unbiased information source for print and broadcast reporters.

To increase public information about class action outcomes:

- Judges should require public reporting of the number of class members who claimed and received compensation, the total funds disbursed to class members, the names of other beneficiaries and amounts disbursed to them, and the amounts paid to class counsel in fees and expenses.
- Courts and legislatures should find ways of facilitating broad public access to such data, for example, by making electronically readable case files available through the internet.

* * *

History suggests damage class actions will survive for some purposes. Improving practice is a goal that protagonists can agree on and holds out the hope of achieving a better balance between public goals and private gain.

Notwithstanding the controversy they arouse, history suggests that damage class actions for some purposes will remain a feature of the American civil litigation landscape. Whether and when to permit specific types of damage class actions will be decided by Congress and the fifty state legislatures. But judges will decide the kinds of cases that will be brought within whatever substantive legal framework evolves by their willingness or unwillingness to certify cases, to approve settlements, and to award fees. Educating judges to take responsibility for class action outcomes and providing them with more detailed guidance as to how to evaluate settlements and assess attorney fee requests, ensuring that courts have the resources to manage the process and scrutinize outcomes, and opening up the class action process to public scrutiny will not resolve the political disagreement that lies at the heart of the class action controversy. But they could go a long way toward ensuring that the public goals of damage class actions are not overwhelmed by the private interests of lawyers.

PREPARED STATEMENT OF THOMAS J. HENDERSON

I, Thomas J. Henderson, Chief Counsel of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") submit this testimony on behalf of the Lawyers' Committee. The Lawyers' Committee for Civil Rights Under Law is a 40-year-old nonpartisan, nonprofit civil rights legal organization. It was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination.

I would like to thank Chairman Sensenbrenner and the members of the Committee for holding hearings on the Class Action Fairness Act of 2003 and, in particular, for providing the Lawyers' Committee with the ability offer members of the Committee on the Judiciary with evidence of the significant negative impact this legislation will have on critical civil rights litigation. We appreciate the opportunity to present the Committee with our analysis of the implications that this legislation will have on the Lawyers' Committee, our independent local affiliates, and our clients across the country.

The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. As such, through both litigation and public policy the Lawyers' Committee has been actively engaged in efforts to combat racial discrimination and segregation throughout out nation. However, the primary work of the Lawyers' Committee has always centered on using the rule of law through the state and federal judicial systems to secure redress for clients who have faced racial discrimination. Our major objective is to use the skills and resources of the private bar to obtain equal opportunity for minorities by addressing factors that contribute to racial justice and economic opportunity. The Lawyers' Committee pursues this goal by bringing class action and impact litigation in five major civil rights areas: voting, employment, education, housing and environmental justice. It is through our role as civil rights litigators that we express our concerns about the Class Action Fairness Act of 2003 and the devastating impact it will have on the civil rights litigation that the Lawyers' Committee has pursued for four decades.

I. INTRODUCTION

Class actions have proven to be an essential tool for civil rights enforcement efforts in the experience of the Lawyers' Committee. Historically, Lawyers' Committee cases have been class actions brought in federal court seeking injunctive and, in some cases, equitable monetary relief under Federal Rule of Civil Procedure 23 (b)(2) to vindicate rights under the United States Constitution or federal civil rights statutes. In recent years, however, with Congress' recognition that effective enforcement of the nation's civil rights laws required more complete remedies, including compensatory and, in appropriate cases, punitive damages, Lawyers' Committee class actions have increasingly included actions that seek compensatory and punitive damages under Rule 23 (b)(3), as well as equitable relief under Rule 23 (b)(2).

Class actions are essential to the enforcement of the nation's civil rights laws. They are a vitally important and are often the *only* means by which persons can challenge and obtain relief from systemic discrimination. Indeed, Rule 23 (b)(2) was designed, in part, to accommodate, and has served as a primary vehicle for, civil rights litigation seeking broad equitable relief.

Our concern over this legislation and other efforts to profoundly impact federal class action rules has been ongoing. Beginning with the introduction of the Class Action Fairness Act in the 106th Congress, the Lawyers' Committee has been actively engaged in educating the Congress about the harmful effects this legislation will have on critical class action lawsuits, especially its impact on our civil rights litigation efforts. During the 106th Congress, we sent letters to both this Committee and the Senate Judiciary Committee, each of which were considering similar legislation, offering substantial analysis of the legislation's impact from a civil rights perspective and opposing the legislation. Further, in February of last year, we submitted extensive comments to the Advisory Committee on the Civil Rules, on behalf of 18 civil rights, public interest, and bar organizations regarding proposed amendments to Rule 23, the Rule of Federal Civil Procedure governing class actions. Additionally, in its efforts to ensure continued access to the judicial process on behalf of classes of persons who suffer discrimination and inequality, the Lawyers' Committee has commented on proposed amendments to rules of procedure that will enhance or diminish access to the courts for clients bringing meritorious civil rights claims.[1] Last Summer, I testified on behalf of the Lawyers' Committee before the

[1] *See* February 1, 1999, Comments of the Lawyers' Committee for Civil Rights Under Law on Proposed Amendments to Rules 5, 26, 30, and 34; Supplement to the February 1, 1999 Com-

Senate Judiciary Committee on class action litigation and the Class Action Fairness Act of 2001.

The mission of the Lawyers' Committee does not involve state tort, contract or consumer law and, as a general rule, we do not bring state law tort, contract or consumer cases. It would have been easy for us to view this legislation as concerning only litigation in those areas and, thus, irrelevant to our work. We could have simply remained a bystander in what might appear to be another monumental dispute about tort reform. But this legislation is not about state tort, contract or consumer law. Rather, it concerns the role and availability of the courts and of class actions, and of access to justice for those who have no alternative but to rely on the courts for the protection of their rights and freedoms.

It is our belief that the proposals referred to as the Class Action Fairness Act of 2003, H.R. 1115 and S.274, are unjustified and unjustifiable attempts by Congress to impose federal judicial regulation on matters of law committed to the States under our Constitution. The determination of state law tort, contract and consumer cases is not the responsibility of the federal judiciary under the Constitution. The imposition of such substantial new responsibilities on the federal courts will further impair the ability of those courts to carry out the essential functions they are to serve under the Constitution—the determination of matters involving federal interests, rights and responsibilities. Similarly, compressing virtually all class actions into the federal courts, imposing federal standards on nearly all class actions and other forms of aggregating claims, and adding new procedural requirements, as this legislation would allow, will further erode the availability of class actions and increase the burdens and delays in their use. Accordingly, this legislation will serve to deny to those who are without substantial financial means or political power the access to justice that class actions have so critically provided.

The epic reallocation of judicial responsibility proposed in this legislation is opposed by both the federal and state judiciary, and its constitutionality is doubtful. More critically, the legislation would tear cases from state judicial systems, equipped with thousands and thousands of judges, who administer the laws involved on a daily basis, and thrust them on a relatively small federal judiciary that is not equipped to handle them and is ill-equipped even to handle the volume and complexity of cases now on its docket. In the end, access to the federal courts and to the class action device to secure justice in matters where truly federal issues are at stake will be casualties of this legislation.

II. HOW THE CLASS ACTION FAIRNESS ACT CHANGES THE LAW

It is important to be clear on what the legislation would change in class action practice. For example, it has been a subject of debate whether the legislation would "federalize" class actions and what that means. It is clear that the legislation would make very substantial changes, first with respect to state law class actions that are now litigated in state, rather than federal, courts and, second, in the procedures to be applied in federal court class actions.

More specifically, as to the first of these categories, the legislation would largely eliminate from the state courts class actions brought only under state law and under state law procedures, that is, cases in which no federal question is raised. It would do so in several ways. First, the legislation would impose federal court jurisdiction in such cases and provide for the removal of these cases from state to federal courts. This aspect of the legislation not only creates an entirely new and substantial class of cases subject to federal jurisdiction, but also provides to defendants, or a single disaffected class member or class member willing to collaborate with defendants, the ability to determine the choice of forum in which a case will be heard.

Second, the legislation would effectively eliminate state law class action and claim aggregation vehicles and impose federal class action standards—now and whatever they may be in the future—on cases involving only state law claims. Simply stated, state class action rules and mechanisms would no longer apply; instead, cases dealing exclusively with state law claims would be subject to federal class action rules. The Class Action Fairness Act does this by providing for removal into federal court and requiring the dismissal of any actions that do not satisfy the prerequisites of Rule 23 of the Federal Rules of Civil Procedure (1332 (d) (6)), despite the fact that they raise only state law issues. The ability to remove and dismiss cases that do not conform to Rule 23 effectively eliminates state law class action, claim aggregation and public interest litigation devices, at least at the choice of defendants. This is a breathtaking intrusion of federal regulation into the province of the States and

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ments of the Lawyers' Committee for Civil Rights Under Law; December 1990 Comments of the Lawyers' Committee for Civil Rights Under Law on Proposed Revisions to Rule 11.

on the litigation of state law claims. State class action, claim aggregation and public interest litigation devices must, of course, comply with constitutional requirements. However, displacing these methods and eliminating the ability of the States to develop means for resolving state law claims other than as provided in Federal Rule 23 goes far beyond ensuring the due process that is already constitutionally required.

The impact of this legislation on federal class actions is profound. It would impose new, burdensome and unnecessary requirements on litigants and the federal courts. For example, the prohibition on approving settlements that involve named plaintiffs receiving amounts different from other members of the class is not a reasonable or practical limitation in all instances. In many employment discrimination cases there are fewer employment opportunities denied because of discrimination than there are qualified potential claimants. In those situations, a person who sues as an individual can receive a full award of back pay and in a proper case can obtain an order placing him or her in the job denied because of discrimination. A class member in such a situation must share in the total back pay award, and has only an opportunity to be one of the persons selected for hire or promotion because not all can be selected. If the price of trying to protect others is that he or she must also lose the full measure of individual relief and take only the same percentage share as those who never took any action to challenge the employer, individuals would be deterred from becoming a class representative. Thus, rather than a reform, this provision would discourage and hinder civil rights class actions.

The current legislation pending in this House goes even further than that in the Senate by imposing new procedures and requirements in all federal class actions that are not justified. It would, effectively, foreclose certain cases—including many civil rights cases, and would build-in further needless delay and expense in the disposition of federal class actions. The bill pending in this House would provide appellate review of interlocutory class certification orders (Sec. 1292(a)(4)), and would require stays of proceedings in connection with both motions to dismiss and certification appeals.

The imposition of mandatory appeals of class certification orders, rather than the discretionary appeals now available under Rule 23 (f), is both unnecessary and will build-in to class litigation literally years of delay in the disposition of cases. There is no legitimate interest in requiring appellate review of all interlocutory class certification orders and imposing a stay on all proceedings while they are determined, particularly where all agree that the disposition of class action litigation often already takes too long.

To the extent that the legislation seeks to add protections for plaintiff class members, they are minimal and unnecessary. It does not alter the process of, or standards for, the settlement of class actions, other than indicated above, and the matters with which it is concerned have been more than sufficiently addressed in proposed amendments to Rule 23 adopted by the United States Judicial Conference that will be effective in December. Specifically, the proposed amendments will require a number of burdensome new notices, hearings, procedures and judicial determinations, that will themselves add new and substantial burdens, delay and expense in federal class action practice. In short, the provisions of the legislation that purport to benefit plaintiff class members are too small and transparent a fig leaf to mask the great disservice this legislation would work for those who need resort to the class action—in federal or state court—to vindicate their rights and interests.

III. THE LACK OF JUSTIFICATION FOR THE CLASS ACTION FAIRNESS ACT

In entertaining a suggestion that Congress so fundamentally restructure the allocation of responsibility between the state and federal judiciary in our dual system of courts, it is important to understand and examine the basis offered for such a change. The literature of proponents and supporters of the legislation suggest that it is to rid corporations of frivolous lawsuits, eliminate state court bias against corporations incorporated in a different state, and to place these cases of "national importance" in federal courts where they belong.

The suggestion that state courts are biased against corporations from other states such that they will entertain and sustain frivolous cases, is used as a justification for a drastic alteration in the meaning of diversity jurisdiction. This, in turn, depends upon a perception of corporations by state courts as "foreign" in states where they do business, simply because they are incorporated in another state. But we all know that the state of incorporation often has little or nothing to do with the actual location of a corporation's offices, plants and business operations, and of its contacts with a state as a business entity, contractor, employer, licensee and corporate cit-

izen. The state of incorporation is an artificial factor that does not give rise to bias of the type to be addressed through diversity jurisdiction.

More importantly, the suggestions of state court bias against corporations offered in support of this legislation involve an unparalleled deprecation of state judicial systems that lack any empirical basis. In the area of civil rights, a concern that state courts might not fairly apply the law is premised on historical fact, more than a century of national experience after the Reconstruction Amendments, and countless state laws and procedures designed to preclude African Americans and others from the courts and other functions of government. Yet there is a presumption that state courts are competent to determine even federal civil rights claims. No such historical or factual basis supports the extreme and careless allegations of state court bias against corporations made in support of this bill. Frankly, as an attorney who has argued, in some circumstances, that state courts cannot be trusted to fairly determine federal rights, I have been shocked by the empty and self-serving rhetoric and anecdotes put forward as though they represent a substantial factual basis for this legislation. Those allegations trivialize and demean our state courts, our federal system and the crucial role that federal courts must be available to serve in protecting the interests secured by the Constitution and federal law.

The testimony of Walter Dellinger, on behalf of the Chamber of Commerce before the Senate Judiciary Committee, acknowledges that there is no empirical evidence of widespread problems with state court class action litigation to support the assertions of proponents of the Class Action Fairness Act. Indeed, Mr. Dellinger acknowledges—even emphasizes—that the problems with class action litigation which purportedly motivate the bill are not characteristic of all, or even most of the States' courts but, instead, are confined to no more than a few counties.[2] is not the appropriate response to claimed problems in only several of the hundreds of county courts across the nation.

Thus, the bill cannot be justified on the basis of protection from local bias against out-of-state residents that is the basis for diversity jurisdiction.

Nor can the bill be justified as dealing with matters of national importance. As an alternative to a diversity jurisdiction rationale, proponents would elevate state tort, contract and consumer cases to matters of "national importance" simply because large corporations that do business in a number of states are involved. But this attempt to define "national importance" as corresponding to the interests of large corporations cannot substitute for a proper basis for federal jurisdiction. The interest of large corporations in exempting themselves from the jurisdiction of State courts in class actions does not correspond to the Constitution's allocation of judicial power between the state and federal courts. "National importance" is not synonymous with "federal question." For example, these cases do not involve matters on which Congress has chosen to exercise its powers under the Commerce Clause and which, therefore, involve interests subject to federal regulation. Rather, the legal issues involve purely questions of state law among purely private parties.

The Lawyers' Committee is an ardent defender and proponent of the power of Congress and the exercise of that power in furtherance of national interests. We have urged Congress to act to protect constitutional and federal interests through legislation, and have raised our voice in the courts to defend the exercise of that power in challenges to legislation. However, there is nothing about a state law class action against a corporate defendant that makes it an appropriate case in which to confer federal jurisdiction, and Congress should confine the jurisdiction of the federal courts to matters in which there is a proper federal interest.

IV. THE EFFECTS OF THE CLASS ACTION FAIRNESS ACT.

The consequences of this legislation for class action practice in the federal courts would be astounding and, in our view, disastrous. Redirecting state law class actions to the federal courts will choke federal court dockets and delay or foreclose the timely and effective determination of cases already properly before the federal courts, in addition to the newly redirected cases. In addition, this legislation is one of a number of measures that would make federal class action litigation more difficult, burdensome and expensive, the result of which will make class actions less available to, and effective for, those whose rights cannot otherwise be protected.

First, this legislation would substantially expand the caseload of the federal courts to include hundreds, if not thousands, of complex cases that do not involve questions of federal law. It is well established that the dockets of federal courts are

[2] *See* Prepared Statement of Professor Walter Dellinger for Hearing on "Class Action Litigation" Before the Committee on the Judiciary, U.S. Senate, July 31, 2002, at 4, Hearing Transcript at 27.

already significantly overburdened. It is important to point out that the federal courts have less than 1,500 judges, bankruptcy judges and magistrate judges, compared to more than 30,000 judges currently serving on state courts. Imposing substantial numbers of new cases on the overburdened dockets of the relatively modest number of federal court and federal judges will clog those dockets with the consequence that it will be more difficult to have any and all cases decided.

Currently, there are approximately 4,500 class actions in the federal courts. Although there is not uniform recordkeeping that would tell us the exact number of state court class actions. A reasonable estimate would be 6,750.[3] Even a relatively modest increase in the number of class actions in the federal courts—and there is no reason to suppose that the increase would be modest—would substantially increase the volume of work required by judges to dispose of cases. Assuming that the bill would affect one-half of pending state court class actions, the bill would increase the number of class actions in the federal courts by 3,375 cases, or an increase of 75% in the number of federal class action cases. Assuming that the bill would affect only one-third of pending state court class actions, the bill would increase the number of class actions in the federal courts by 2,250 cases, or an increase of 50% in the number of federal class action cases. If the bill affected two-thirds of state court class actions it would produce an increase of 4,500 class actions—effectively doubling the number of federal court class actions.

The increased caseload is not the only burden; this legislation would also increase the number of complex and time-consuming cases that the federal courts will have to decide. Class actions take a greater share of the time of district judges than do other forms of litigation. In fact, empirical studies have shown that class actions on average consume almost five times more judicial time than the typical civil case.[4] Thus, the stress on the federal courts and the demands on the time of judges would far exceed the simply the significant increase in the number of cases on the docket.

The effect would be to make judges less able to devote time to both existing cases before the federal courts and those that would be redirected by this legislation. All commentators on the subject agree that the most effective means of addressing the particular demands of, and problems that arise in, class action litigation is more careful judicial supervision of such cases. By unrealistically increasing the demands on federal judges, this legislation would have precisely the opposite effect. Judges will have less time and opportunity to give careful supervision to critical class action litigation.

Indeed, faced with overburdened dockets, it can be expected that judges will engage in a form of triage to clear the docket by closing cases. This would lead to an exacerbation in the pressure improperly to dispose of cases by dismissal. This is a problem that particularly effects civil rights cases, and in many districts it is already difficult for civil rights plaintiffs with meritorious cases to survive pre-trial motions in order to have the opportunity to go forward to trial on the facts of the case. The unjustified dismissal of cases is a trend in the federal courts that the Supreme Court has consistently sought to correct. *See Swierkiewicz* v. *Sorema*, 534 U.S. 506 (2002), and *Reeves* v *Sanderson Plumbing Products*, 530 U.S. 133 (2000). An increase in the number of cases federal courts are to handle will only rachet up the pressure on district judges to dispose of as many cases as possible at the earliest stage of the litigation.

Moreover increased numbers of cases on federal court dockets and further procedural hurdles will exacerbate the difficulty in securing certification of class actions in proper civil rights cases. In the late 1980's and early 1990's, Congress determined that effective enforcement of the nation's civil rights laws required that the victims

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[3] The Administrative Office of the Federal Courts reports that there were 4,563 class actions pending in the federal courts as of September 30, 2001 (*See Judicial Business of the United States Courts 2001,* Supplemental Table X–5, Class Action Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit) and that 3,092 class actions were filed in federal courts in FY 2001 (*See Judicial Business of the United States Courts 2001*, Supplemental Table X–4, Class Action Civil Cases Pending by Nature of Suit and District), although it should be noted that, according to the *Empirical Study*, this figure probably understates the actual number of class actions in the federal courts. *See Empirical Study*, at Appendix D, Footnote 364. Statistical data on the number of class actions in the state courts is generally unavailable. In light of this fact, the 2000 study *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, the Rand Institute for Civil Justice attempted to quantify the number of class actions in the state and federal courts through a variety of data sources, and concluded that 60% of class actions were in the state courts. If the approximately 4,500 class actions in federal courts represent 40% of all class actions, then the total number of class actions in state and federal courts can be estimated at approximately 11,250. The number of class actions pending in state courts could, therefore, be estimated at 6,750.

[4] Wilging et al., "Empirical Study of Class Actions in Four Federal District Courts". Federal Judicial Center, 1996.

of discrimination have available more expansive remedies, including compensatory and, in appropriate cases, punitive damages.[5] In order to ensure the effective enforcement of these civil rights laws and fulfill the intent of Congress, it is essential that class actions accommodate civil rights class actions that request compensatory and punitive damages. The only real opportunity for most victims of pattern and practice discrimination to prove and recover damages, or secure other relief, is through class actions. Yet, decisions of some courts of appeals have interpreted Rule 23 (b) in a manner that would make class certification rare, if not impossible, in cases seeking these congressionally mandated damage remedies.[6]

Such misguided interpretations of Rule 23 turn expanded civil rights remedies against the victims of discrimination: civil rights plaintiffs would be forced to elect between class-wide remedies for systemic discrimination, or the rights of individual class members to recover damages. These misapplications of Rule 23 (b) confound the intent of Congress, frustrate federal civil rights enforcement, and deny the benefit of the law to victims of discrimination. In considering legislation on the issue of class actions, Congress should not add to the difficulty in securing the opportunity to prove and obtain relief for patterns and practices of unlawful discrimination. Yet by compressing virtually all substantial class actions into federal courts and imposing additional burdens on their prosecution, this legislation would increase pressure on courts to dispose of class actions by denying certification altogether.

This legislation is one of a number of measures that is making class action litigation more difficult and costly and less accessible and effective. For example, the proposed amendments to Rule 23 recently approved by the Committee on Practice and Procedure impose a number of new procedural requirements and judicial determinations, as well as a number of new notice requirements to federal class action practice, that will further complicate and delay disposition of class actions and make them more expensive and less available to the victims of discrimination and others with federal interests that need to be protected. Further, amendments to the Civil Rules in 1993 and 2000 have made federal courts less well equipped to handle large and complex class actions by imposing limits on the opportunity for discovery. In combination, all of these changes are rendering federal courts inhospitable and ill-equipped forums in which to litigate complex class actions. Forcing virtually all substantial class action suits into these forums, as the Class Action Fairness Act would have us do, will further compound the difficulty of filing and litigating a class action, including important civil rights cases.

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[5] Thus, in the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 et seq., as amended, Congress eliminated a $1,000.00 limit on punitive damage awards and provided for civil penalties in federal enforcement actions in housing discrimination cases. In the Civil Rights Act of 1991, 42 U.S.C. § 2000e, et seq., as amended; and, 42 U.S.C. § 1981a, Congress provided for compensatory and punitive damages for discrimination in employment. As well, the Supreme Court determined that damages were available under other federal civil rights statutes. *See e.g., Franklin* v. *Gwinnett County Public Schools,* 503 U.S. 60 (1992) (damages available for intentional violations of Title IX of the Education Amendments Act and Title VI of the Civil Rights Act of 1964).

[6] Specifically, the decisions of some courts of appeals have interpreted the Advisory Committee Notes to the 1966 Amendment to the effect that Rule 23 (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages," and interpreted the requirement of Rule 23 (b)(3) that common questions "predominate" over questions affecting individuals, in a manner that would preclude certification of almost any civil rights action that sought a damages remedy. *See Smith* v. *Texaco,* 263 F.3d 394 (5th Cir. 2001), *withdrawn*, No. 00–40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Rutstein* v. *Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), *modified, suggestion for reh'g denied* (Oct. 2, 1998); and, *Jackson* v. *Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). In addition, some courts of appeals have interpreted the requirement of Rule 23 (b)(3) that class treatment be "superior," in a manner that would prevent certification of civil rights class actions (as well as preclude individual actions) seeking to establish a pattern or practice of discrimination. *See Lowery* v. *Circuit City Stores, Inc.*, 158 F.3d 742, 758–762 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); *see also, Allison* v. *Citgo Petroleum Corp.*, 151 F.3d at 420–426. But *see Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)(certification of civil rights class action seeking damages available, alternatively, through 23 (b)(2), 23 (b)(2) modified to provide opt-out notice, or bifurcated certification under 23 (b)(2) and (b)(3)); *Lemon* v. *Int'l. Union of Operating Engineers, Local 190, AFL-CIO*, 216 F.3d 577 (7th Cir. 2000)(certification of civil rights class action seeking damages available, alternatively, through 23 (b)(3), divided certification under 23 (b)(2) and (b)(3), or 23 (b)(2) modified to provide opt-out notice); *Jefferson* v. *Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999)(same).

V. CONCLUSION

On behalf of the Lawyers' Committee, our Board of Directors and Trustees and our independent local affiliates, I would like to thank you again for the opportunity to share the concerns we and others in the civil rights community have about this pending legislation. We believe the effect of this legislation on the availability of federal civil rights class actions will be devastating and urge you to reject it. The Lawyers' Committee joins with a host of other organizations in opposing this legislation. We believe the impact that it will have on the ability of our clients to seek legal redress through class actions will be profound, and will result in new and substantial limitations on access to the courts for victims of discrimination.