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THE CLASS ACTION FAIRNESS ACT OF 1999

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 353

A BILL TO PROVIDE FOR CLASS ACTION REFORM, AND FOR OTHER PURPOSES

MAY 4, 1999

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THE CLASS ACTION FAIRNESS ACT OF 1999

TUESDAY, MAY 4, 1999

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Also present: Senators Thurmond, Sessions, and Kyl [ex officio].

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I want to say good afternoon to everybody, and I would like to thank everybody for coming to this hearing about class action abuse and S. 353, the Class Action Fairness Act of 1999.

We have party caucuses that go on usually until 2:15 p.m. or a little bit past that on Tuesdays. So since we have such a full schedule of people to hear this afternoon, I want to start on time and I will stop wherever we are for people, particularly Mr. Torricelli or Mr. Kohl, who will represent and speak for the Democrats. I will let them speak when they get here, regardless of where we are in the process because it is only fair for them to have an opening statement as well.

Although we had a joint hearing with the House earlier this year on bankruptcy reform, this is the first Senate only subcommittee hearing with Senator Torricelli as the ranking member. So I welcome his participation and hope to work closely with him during this Congress and beyond what is on the agenda of this subcommittee. Although the subcommittee did not take up the bankruptcy reform bill, I have had a very close working relationship with Senator Torricelli on that major piece of legislation.

The topic of our hearing today is an important subject that lately has received considerable attention. More and more people recognize that the class action system is being abused and that the people who are supposed to be helped by this process are instead getting used. Ultimately, the current system is benefiting lawyers and not your average class member.

This subcommittee held a hearing about a year ago to examine the problems occurring with class actions and how the process is being abused at the expense of the plaintiff class and defendants. We heard about scenarios where plaintiffs are misled into accept-

ing settlements which either offer them little of value or even cost them money, while the class lawyers get rich. We heard about settlements where plaintiffs receive coupons of little value or with redemption restrictions making them practically useless. Yet, their lawyers receive millions of dollars in attorneys' fees.

We heard about attorneys searching the newspapers and the Federal Register for possible cases, determining which ones they can reap the most from, then recruiting potential plaintiffs so that they can bring their lawsuits. Those things are already on the record. We also heard about the increased concentration of class actions in State courts, particularly in courts which are more susceptible to approving class certifications without adequately considering whether a class action would be fair to all class members.

We heard about plaintiff lawyers gaming the system to avoid removal to Federal court by manipulating the pleadings and by finding a token plaintiff or defendant to defeat procedural requirements. We heard about lawyers using the State court system to get the lowest settlement amount possible for defendants and the highest amount in attorneys' fees for the plaintiff class lawyers. The abuse list goes on, and I am sure that we are going to hear more about this today.

That is why Senator Kohl and I introduced the Class Action Fairness Act. Our bill takes the first step at curbing class action lawsuit abuses. It requires that settlement notices be written in plain English and include the amount and sources of attorneys' fees. It requires notification of State attorneys general of any proposed class settlement that affects their residents so that they can object if the settlement terms are unfair. It penalizes frivolous class action filings by requiring to impose rule 11 sanctions, although the nature and extent of such actions remain discretionary.

Our bill discourages settlements that give attorneys exorbitant fees based upon hypothetical over-valuation of coupon settlements by providing that class action attorneys' fees be based on a reasonable percentage of damages actually paid to class members. It allows attorneys' fees to be based on an hourly rate so that reasonable fees are available in all kinds of cases, including those involving injunctive relief.

Our bill also allows more class action lawsuits to be removed from State court to Federal court either by a defendant or an unnamed class member. Currently, class lawyers can avoid removal if the individual claims are for just less than $75,000 or if just one class member is from the same State as a defendant. Consequently, plaintiff class lawyers gravitate toward those State courts which permit class actions to proceed with little or no scrutiny, and lawyers play games with the procedural requirements to stay in those State courts.

On the other hand, Federal courts consistently give closer scrutiny to class settlements and to whether it is fair for a case to proceed as a class action. They are better equipped to deal with multi–State issues. With their ability to consolidate related cases, the Federal courts can bring about more efficiencies and prevent a race to settlement between competing cases.

Not only do I believe that the changes in our bill better protect the due process rights of unnamed plaintiffs and defendants, I be-

lieve that the fact that we are dealing with multi–State plaintiffs makes the Federal courts an appropriate forum for these kinds of cases. This is especially true because I don't believe State courts should be dictating national policy or imposing their State's laws on other State citizens in these multi–State cases. In fact, I believe that to the extent there is some federalization of class standards, it is reasonable to do with uniformity rather than having individual State courts setting different standards, which only breeds gaming of the judicial system and forum-shopping.

Today, we will hear from witnesses that there is a clear constitutional basis to having these multi–State class actions proceed in Federal court. But our bill also takes into account federalism concerns by making sure that the purely State cases remain in State court, thus allowing State courts to retain their ability to adjudicate class actions that involve their citizens. I want to make it clear, our bill does not prevent any claim from being heard, nor does it close the courthouse door to any plaintiff.

Now, I have heard from lawyers who say that the plaintiff class is obtaining the best value for their case by winning in settlement a bunch of coupons. How can that be? How can a lawyer tell me that the plaintiff class got a great deal where the attorneys negotiated a settlement valued by the court at millions of dollars, of which the class got only coupons, the terms of which are so restrictive they are basically useless, and the lawyers got all the cash?

Witnesses have testified to Congress that these coupons allow the class lawyers to claim that a settlement is worth much more than it really is worth, and therefore they can claim more in attorneys' fees. Again I ask, if coupons are better for the clients, why aren't the lawyers paid in coupons?

These coupon deals are so pervasive that even one of my staffers got a notice telling him that as a member of a plaintiff class in a lawsuit against a mortgage company, he had won in settlement a coupon for $100 off the next financing or refinancing of his mortgage with this company. But he doesn't want to refinance his mortgage at this time, and certainly not with the company that ripped him off in the first place. So you tell me what use to this staff person is this coupon worth $100. And I am sure that those attorneys are not going to be paid with coupons to refinance their mortgages.

What I see happening is lawyers negotiating for something of little to no value for their clients, but keeping what does have value—in other words, cash—for themselves. The way I see it, the class plaintiffs receive no benefit whatsoever and, in fact, plaintiffs forfeit their right to sue. And the reason the plaintiffs' bar is so opposed to any regulation is because we are talking about taking away their gravy train.

Moreover, I find it remarkable that some still maintain that the class action problems we are seeing—State court abuse, attorney misconduct, and consumer exploitation—just happen to be anecdotal. That is not the case. The RAND study, a study by Stateside Associates, and statistics recently compiled by the Federalist Society confirm that more and more class action lawsuits are being filed, that they are increasingly concentrated in State courts, and that abuses are occurring with class actions.

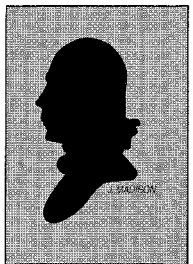
For example the RAND study found that the problems are intrinsically inherent in the class action system, stating that, "It is generally agreed that fees drive plaintiffs' attorneys' filing behavior, that defendants' risk aversion in the face of large aggregate exposures drives their settlement behavior * * * In other words, the problems with class actions flow from incentives that are embedded in the process itself."

The House and Senate committee hearing records are replete with examples of class action abuses. The Judicial Conference has recognized that the process is being misemployed. They have been studying how to fix the class action system for quite some time now. Something has to be done, and our bill is one good first step.

Today, the subcommittee will continue in its examination of class action abuse. We will look at how the Grassley–Kohl bill can address some of these problems, and listen to suggestions on how to make our bill better and how to further address the class action phenomenon. I am looking forward to hearing from all of our distinguished witnesses.

Without objection, I would like to place in the record the Federalist Society's study on class actions already referred to.

[The study referred to follows:]



Class Action Watch

A Publication of the Federalist Society's Litigation Practice Group and Its Class Actions Subcommittee

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Volume 1 Number 1

Analysis: Class Action Litigation—A Federalist Society Survey

When the *Class Action Watch* bulletin was first being planned, we were struck by the absence of any generally available data respecting business exposure to class action litigation. We frequently heard the argument that the business community had been facing more class action litigation with each passing year. Indeed, the preliminary findings of a Rand Institute study published in 1997 say as much, with lawyers and corporate counsel who were interviewed reporting that they have witnessed a doubling or tripling of class action suits in the past few years. But we knew of no effort to actually survey companies in considerable depth regarding their own specific experiences. We therefore undertook that task in December 1998, and some of the findings from that effort are set forth and discussed here.

The first task, of course, was to devise a reasonably thorough survey that companies could readily and easily answer. We chose to ask about putative class action cases that were pending in 1988, 1993, and 1998. The hope was that these three chronological "snapshots" would provide some sense of the development of class action activity over the most recent ten-year period. The respondents were asked to provide information about federal actions, cases in all state courts, and cases just in Texas state courts. We asked for a breakout of Texas actions because it was our understanding that Texas is shaping up to be the next major battleground for legislative consideration of class action reform. And, indeed, the following analysis devotes considerable attention to the Texas survey results for that very reason.

For each of the three years, the survey asked companies to consider a wide variety of issues, including, but not limited to:

- The number of putative class actions pending in federal, state, and Texas state courts.
- The predominant issue in each case (e.g., securites, toxic tort, consumer fraud, etc.).
- The size of the putative class in each case, and whether the class was local, statewide, or nationwide in its composition.

State Spotlight:

Texas Class Action Litigation Survey

See Analysis Section

- The number of state, federal, and Texas state cases in which classes were certified.
- The incidence and magnitude of both initial and post-certification settlement demands.
- The number of federal, state, and Texas state court cases that were resolved by settlement, dispositive motion, and verdict.

continued on page 3

From The Editors

A newsletter of the Federalist Society for Law and Public Policy Studies.

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Website: www.fed-soc.org
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Dear Reader:

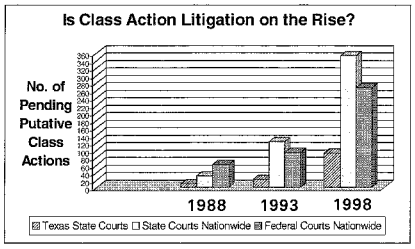
I am most pleased to present the Federalist Society's inaugural issue of *Class Action Watch*. This bulletin, which we hope to publish and distribute two or three times each year, is aimed at providing facts and information relating to class action litigation activity. We have given this area special attention because of the unprecedented amount of debate that is taking place about both the impact of class action activity and ideas for reform. Our goal is not to take sides in these debates, but rather to provide facts and data that may prove helpful in focusing discussion.

We intend each issue of this bulletin to contain three sections. The "Analysis" section will present data about class action activity. In this first issue, we unveil the results of a survey of businesses we recently concluded. Considerable space is devoted to Texas state court litigation because Texas is shaping up to be the next major battleground for consideration of class action legislative reform. The "Commentary" section will provide news about other studies, our programs, articles of interest, and various proposals for class action reform. The purpose will be to provide some useful facts about varying perspectives as well as some general context for thinking about the data we present in the "Analysis" section. Finally, our "Recent Developments" section provides particular news items about class action trends and activity from the last six months.

In organizing this bulletin, we have tried to provide a wide variety of materials in the hope that class action litigators and judges as well as policy leaders, the press, and the general public would find items that are both interesting and easy to digest. The editors also were assiduous in trying to be as thorough and objective as possible. Of course, we encourage any comments or suggestions you may have to improve the publication in these or other respects.

Paul Clement
Chairman, Class Actions
Subcommittee

Figure 1



♦ Respondents reported that between 1988 and 1998, the number of pending class actions in state courts increased by 1042%, and the number in all federal courts increased by 338%.
♦ The number of class actions in Texas state courts increased dramatically from 1988 to 1998, rising by 820%.

♦ The length of time between class certification and settlement.

♦ The size of the plaintiff class.

With respect to these and other issues that we raised, bear in mind that the survey asked about cases that were *pending* in a given year. Therefore, when the 1993 portion of the survey asked about class certification and settlement, for example, the respondents were instructed to "count" cases that were certified or settled before, during, or after 1993. The same can be said for the 1988 and 1998 portions of the survey. This approach was most consistent with what we know about how companies keep track of their cases.

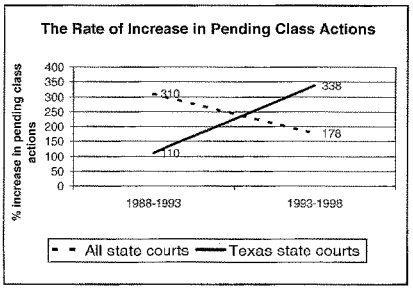
After having completed the survey, we set out to obtain some data. We mailed the survey to 100 companies consisting of: (1) most large employers in Texas, including both Texas-based companies and non-Texas-based companies with a signifiant number of employees and with annual revenues at or about $1 billion or more; and (2) Fortune 500 companies that have a demonstrated a general interest in the litigation process as expressed by corporate or general counsel membership in more than one trade organization that monitors litigation reform, including the American Corporate Counsel Committee, the Civil Justice Reform Group, and the American Tort Reform Association. The companies represented every conceivable industry—transportation, energy and utilities, pharmaceuticals, food service, banking, insurance, heavy and light manufacturing, telecommunications, and a wide range of durable and non-durable consumer goods production. We had no idea whether or not class action litigation was perceived as a "problem" by the companies we surveyed, and the fact that a company has an interest in litigation reform does not necessarily mean that it has concerns about class action activity (indeed, a number of the respondent companies had no class actions to report). Moreover, the surveys were submitted anonymously, and we therefore do not know which companies responded.

The survey effort began on December 4, 1998 with a mailing to the general counsels of the 100 companies we identified. As of January 12, 30 companies responded by returning surveys (a 30 percent response rate). Given the size of these companies and the logistical difficulties associated with responding to such a survey (it was 15 pages), we were quite satisfied to have secured such business participation in this kind of a project. Indeed, we know of no similarly successful survey effort (though Rand and others have been quite successful in collecting data using other very valuable sources).

For a number of reasons, we believe the pool of respondents reflects a rather diverse collection of experiences respecting class action litigation. It is clear, for example, that the companies responding are not simply those especially concerned with or affected by class

Analysis

Figure 2



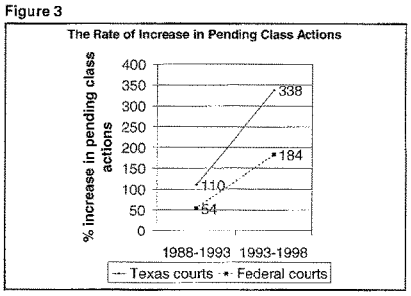
♦ Respondents reported that between 1988 and 1998, the rate of increase in pending class actions rose sharply in Texas courts (from 110%–338%), but the rate of increase dropped sharply when accounting for state courts nationwide (from 310%–178%).

action litigation. A number of the respondents had no pending litigation at all during the years in questions (or very little), while others posted more significant numbers. The median and mean numbers of pending putative class actions reflect this distribution. At the very least, therefore, one can see the nature and extent of class action activity among nearly several dozen major American companies with a diverse array of business interests.

Putting aside our satisfaction with the response, it is crucial to note that this survey effort is not intended to be a complete scientific sample or analysis of class action activity. The data was intended to increase our understanding in this area, but it by no means completes our understanding. Moreover, as we continue to receive responses, we will adjust our analysis. And, in the coming months, we hope to release the results of two other class action survey efforts involving the business community that currently are underway.

What follows is a summary of some of the information we were able to compile from the surveys that were submitted. The data included in this article reflects the best meaningful information available from the survey effort. We did not believe it was appropriate to report on issues or questions unless all or virtually all of the respondents provided data. Thus, for example, we are not comfortable at this time discussing any of the data respecting plaintiff fee awards or the predominant issues presented by class action litigation—too many of the answers to these questions were left incomplete by the respondents. It is our hope that some of these other issues can be tackled in future survey efforts. Moreover, we purposely have avoided reaching any conclusions respecting the data. Readers can decide for themselves what the trends reflect, what has caused them, and whether a problem has been revealed here that should be addressed.

Figure 3



♦ Between 1988 and 1998, the rate of increase in pending class actions rose in Texas courts from 110% to 338%, and the rate of increase for respondents rose 54% to 184% for Federal courts.

The Incidence of Class Action Activity: Is Class Action Litigation Increasing?

We began our survey by asking: "How many putative class actions were pending in 1988 [and 1993 and 1998]? In answering this question, please include all suits in which the plaintiff purported to sue on behalf of a class, without regard to whether class certification was ultimately granted or denied." Respondents were asked to identify the number of such cases in state and federal courts, and then to break down the state cases by jurisdiction (Alabama, California, Florida, Louisiana, Ohio, Texas, and "Other"). Figure One (on page three) sets forth the data from this question.

Among the respondents, the number of pending putative class actions in Texas state courts increased by 820 percent between 1988 and 1998. The number of such actions rose by 1042 percent in all state courts and by 338 percent in all federal courts during that same period.

To ensure that the increases in class action litigation we are seeing were

Figure 4

Texas Appellate Courts Class Certification Rulings

	Affirm Certification	Affirm Denial	Reverse Certification	Reverse Denial	Total
1998 (first 8 mos.)	9	1	3	0	13
1997	4	1	2	0	7
1996	5	1	1	0	7
1995	0	1	0	1	2
1994	3	2	1	0	6
1993	1	0	0	0	1
1992	1	0	0	0	1
1991	1	2	0	0	3
1990	2	2	0	0	4
1989	3	0	0	0	3
1988	0	0	0	0	0
1987	1	2	0	0	3
1986	2	2	0	0	4
1985	1	0	0	0	1
1984	0	0	1	0	1
1983	0	0	0	0	0
1982	0	0	1	0	1
1981	0	1	1	0	2
1980	0	2	1	0	3

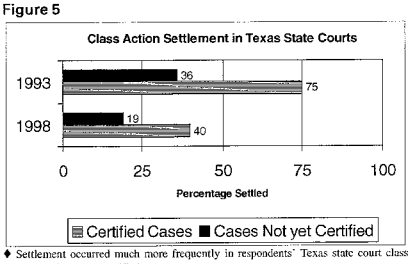
♦ The class action growth trends noted in the survey are confirmed by a recent canvass of reported class certification-related decisions rendered by Texas state appellate courts. That canvass (performed on LEXIS) indicates that throughout the 1980s, Texas appellate courts heard and issued reported class certification-related decisions in only two or three cases per year. In some years, no class action appeals were heard. Appeals from class certification rulings have become much more commonplace in the 1990s. For example, LEXIS indicates that during the first eight months of 1998, Texas appellate courts issued at least 13 class certification appeal decisions.

♦ In the months of September, October, and November, the number rose to 18.

not simply the result of a small number of outliers who experienced very significant spikes, we performed the following analysis:

- We counted the number of respondents who showed increases in class action litigation between 1988 and 1998, 1988 and 1993, and 1993 and 1998. In the 1988–1998 time period, 84 percent reported increases and none reported declines. In the 1988–1993 period, 48 percent reported increases and 16 percent reported declines. In the 1993–1998 time period, 82 percent reported increases and 4 percent reported declines. Therefore, most companies—not simply a small cluster of especially hard-hit companies—saw increases.
- We also looked at the figures for individual respondents who reported increases. For each relevant time period (1988 vs. 1998, 1988 vs. 1993, and 1993 vs. 1998) and court system (federal, state, Texas state), we calculated the median and mean increases in the number of cases for our respondents. The median figure and the mean figure for a given court system and time period were consistently about the same, with very little deviation. Moreover, we noticed that, for each year in each court, it was virtually always the case that respondent increases were quite similar. For example, in comparing 1993 and 1998 data for cases in state courts—a period during which we recorded an increase of 227 cases—two-thirds of the respondents witnessed an increase of seven cases or less and one-third witnessed an increase of 14–28 cases. Similarly, for Texas data during those same years—a period reflecting an increase of 71 cases—88 percent of the respondents showed an increase of six cases or less and 12 percent of the respondents showed an increase of 7–11 cases. In other words, no one company, or small group of companies was responsible for increases witnessed.
- We also sought to control for company growth in an effort to account for the fact that increases in class actions sometimes can result from increases in company growth and productivity or merger and acquisition activity. We found that revenues for the companies surveyed doubled on average between 1988 and January 1, 1998. This is considerably lower than the percentage increases in class action litigation.

Figure 5

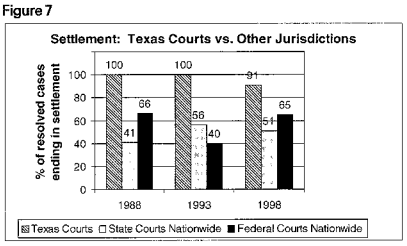


♦ Settlement occurred much more frequently in respondents' Texas state court class actions that were certified.

Figure 6

Period of Time between Certification & Settlement			
	Less than 1 Year	1–3 Years	Greater than 3 Years
1988	0%	0%	100%
1993	0%	33%	66%
1998	60%	40%	0%

Figure 7



♦ Settlement occurs more frequently in Texas state courts than in either state courts nationwide or in federal courts.

In an effort to compare jurisdictions, we analyzed the *rates* of increase in putative class actions between state, federal, and Texas state courts for respondents. The results of that analysis are set forth in Figure Two and Figure Three on page four. In Texas state courts, the rate of increase rose from 110 percent in the 1988/1993 time period to 338 percent in the 1993/1998 time period. For state courts nationwide, the rate of increase dropped somewhat, from 310 percent in the 1988/1993 time period down to 178 percent in the 1993/1998 time period. In federal courts, the rate of increase climbed from 54 percent in the 1988/1993 time period to 184 percent in the 1993/1998 time period. As Figure Four (on page five) suggests, the Texas increases are reflected in the rise of certification rulings handed down by Texas appellate courts over the past few years.

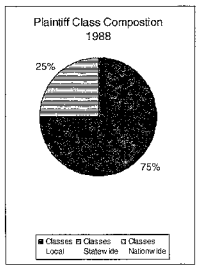
Is There A Relationship between Class Certification and Settlement?

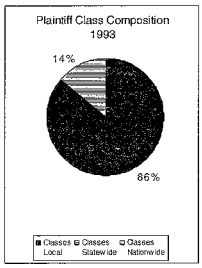
Our survey asked for data respecting both the incidence of class certification and the incidence of settlement. We also asked for information regarding the length of time between class certification and settlement. We requested this information to help people assess the oft-stated opinion that certification greatly increases settlement pressures.

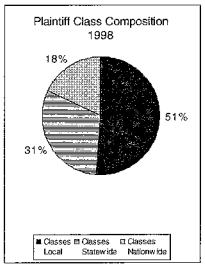
Figure Five compares the settlement rates for putative class actions pending in 1993 and 1998 (there were too many incomplete responses to develop any findings for 1988). Among the respondents, certified class actions seem to settle more than non-certified actions. For example, 75 percent of the certified class actions pending in 1993 resulted in settlement, as compared with

Analysis

Figure 8







36 percent of the cases that were not certified. We see a similar disparity with cases pending in 1998; 40 percent of the certified cases settled,but only 19 percent of the non-certified cases settled.

Figure Six (on page six) tracks the length of time between class certification and settlement. It appears that, among respondents, settlement is now following class certification more quickly than in the past. In 1988, 100 percent of the cases were settled more than three years after certification. In 1993, a third of the cases were settled 1–3 years after certification, and the remaining two-thirds were settled more than three years after certification. Finally, in 1998, we see a complete reversal in the trend, with 60 percent of the cases being settled less than one year after certification and the remaining 40 percent being settled within 1–4 years.

Frequency of Settlement: Texas State Courts vs. Other Jurisdictions

The survey asked how many of a respondent's putative class actions were settled, dismissed on a dispositive motion, or resolved by way of a verdict in favor of either the plaintiff class or the defendant. We compared figures for Texas state courts, all state courts, and all federal courts. Figure Seven distills the results.

The respondents reported a higher settlement rate in Texas state courts than in either state courts nationwide or in federal courts. For each of the three years in question, 90-100 percent of the pending cases that had been resolved were settled before a verdict. The settlement rate was between 40 and 66 percent in federal courts and between 41 and 65 percent in all other state courts nationwide.

Composition of Plaintiff Classes in Texas Litigation: Is Texas Becoming a Forum-Shopping Venue?

Respondents overwhelmingly reported increases in Texas class action litigation between 1988 and 1998. Amidst this growth in activity, to what extent did the composition of the plaintiff classes change or remain the same? We sought to shed light on this issue by asking respondents whether plaintiff classes in pending cases were local, statewide, or nationwide in their orientation. Figure Eight on page seven sets forth the data.

The data obtained from respondents reveals that the composition of plaintiff classes has been changing. In 1988, for example, 75 percent of the plaintiff classes in pending cases were local, and 25 percent were statewide. We saw much the same in 1993, at least insofar as there were no nationwide classes. That pattern changed in 1998—18 percent of the classes were nationwide in their composition, with 51 percent local and 31 percent statewide.

* * *

As we mentioned at the outset, the responses we have received provide a glimpse of the scope and nature of their class action activity. While it may not be representative of all or even most businesses in America, we believe the data helps to increase understanding of the area. Whenever possible, the Federalist Society's Litigation Practice Group will continue to generate data in order to shed further light on trends relating to class action litigation.

The Rand Institute's Class Action Study

In May 1997, the Rand Institute for Civil Justice released a preliminary report on its study of class action litigation. The Study makes a significant contribution to the scholarship on class actions and to the ongoing effort to understand the scope of class action litigation and its impact on society and our judicial system.

The Institute's Study had its genesis in an effort to assist the Federal Advisory Committee on the Rules of Civil Procedure and other policymakers with their work in trying both to understand class action litigation and to recommend possible reforms. The project goals were to (1) build upon the Federal Judicial Center's 1996 study ("FJC Study") of class actions; (2) provide "a more detailed picture of the current class action landscape and to suggest some implications of this landscape for rule changes;" (3) "systematically and objectively describe current litigation practices and to suggest some implications of the practices for rule changes;" and (4) describe the consequences of class actions on "individuals (as claimants, consumers and citizens), businesses, the economy, and society."

Using a multi-pronged search strategy, the Study turned to electronic databases to uncover information on the range of class action litigation pending during the period of July 1, 1995 to June 30, 1996. First, Rand "identified databases that report class actions in some form and that were electronically searchable." Second, it "developed algorithms for identifying records within these databases that refer to class actions, and screened these for references to specific cases." And, finally, the Institute eliminated duplicative references to the same case and tabulated information about case characteristics.

To supplement the Study's statistical findings and "to learn about class action litigation practices," the Institute interviewed key participants in the litigation process from a broad array of interests, including plaintiff lawyers, defense counsel, public interest lawyers, and representatives from state attorneys general offices. In total, the researchers spoke with more than fifty people at thirty-four firms and organizations. The typical interview lasted for about two hours, although some lasted the better part of a day.

Rand reports on a number of findings with respect to the types of class action lawsuits that are typically filed. For example, it found that "mass torts, which have featured prominently in the policy debate about class actions, account for a relatively small proportion of the opinions reported" in the databases that were employed. In addition, Rand found that consumer cases account for a larger percentage of class action litigation than was previously observed in the FJC Study. Although the Institute qualified these findings by pointing out that it did not conduct a "scientific sample" of class action litigation, it states that "virtually everyone . . . on both plaintiff and defense sides" corroborated the finding that consumer cases are a big part of the activity in the class action context.

Given the prominence of consumer cases in class action litigation, Rand goes on to describe this category of cases in greater detail. Its preliminary report examines how the consumer cases are divided among four categories: fees, antitrust, fraud, and other consumer claims. The fees cases—"which involve a variety of claims dealing with charges by service providers"—are graphically depicted to be occurring with great frequency, and Rand states that this is consistent with the testimony that was collected.

The Rand Study also makes a number of findings that are similar to the results of the Federalist Society's survey effort. Specifically, Rand's Report describes an increase in the number of class action cases and identifies a possible trend towards more state court filings. Unlike the Federalist Society Study which took "snapshots" of class action litigation pending in three distinct years, the Institute's empirical data is limited to a one-year period, and,

Commentary

therefore, does not reveal any information about changes in class action activity. However, information gathered by Rand in the interview process corroborates the Federalist Society's data: class action litigation is growing dramatically. As the Institute reports, "With few exceptions, all those we interviewed, on both the plaintiff and defense sides, told us that class action activity has grown dramatically over the past 2–3 years." Many respondents observed "a doubling or tripling over the past several years." Moreover, everyone agreed that recent growth has been concentrated in state courts. This, too, is consistent with the Federalist Society's data.

The Rand Study notes that although there are a number of possible interpretations of the data they present, the Institute's own conclusion is that "the landscape of class action litigation is shifting in some very significant ways, in response to social, economic, and legal forces." The Study goes on to note that a broader exposition of these forces as well as an assessment of the direct and indirect consequences of class actions are reserved for its final report, which is scheduled to be published later this year. *Class Action Watch* will report on its release and summarize its findings in a future issue.

Some Thoughts on Class Action Litigation

During the Federalist Society's November 1998 National Lawyers Convention in Washington, D.C., the Litigation Practice Group hosted a panel on class action litigation and reform. The panel featured Jonathan Beisner of O'Melveny & Myers, Duke Law Professor Francis McGovern, Marsha Rabiteau of Dow Chemical Company, Joseph Rice of Ness Motley, and Brian Wolfman of Public Citizen. U.S. Court of Appeals Judge Patrick Higginbotham served as the moderator. The following is a collection of some observations offered by the panelists.

- "In our judgment, class actions are an enormously important tool for justice, and they can and have served the roles of compensation, deterrence, and reform. . . . And before getting into detail, I would just remind the audience that it is very difficult to rely on media presentations of class actions, which tend to focus on abuses and anecdotes rather than empirical evidence. And there are some important empirical works going on. . . . [Y]ou'll see that by and large compensation and deterrence were achieved . . . and there were relatively few abuses."

  Brian Wolfman
  Public Citizen

- "The public is hurt with respect to how the class action device is being utilized. I don't think the public believes that the class action device is anything more useful than a means of transferring wealth. . . . In addition, the public is aware that products are not being offered in the marketplace because companies are unwilling to bear the risks of introducing products that may be the subject of an aggressive class action lawsuit."

  Marsha Rabiteau
  Dow Chemical Company

- "[W]hat's happening is that when federal courts are using a restrictive view of the use of class actions, they are opening up the state courts. And, I think, the state courts are using an expansive view of class actions."

  Joseph Rice
  Ness Motley

- "[W]e sort of whistle past the graveyard frequently when we talk about the procedural dimension only of class actions. There is a very powerful dance between substance and procedure. You cannot really play with the rules very much without affecting substance in large ways."

  Patrick Higginbotham
  U.S. Court of Appeals

Class Action Reform Proposals

♦ Broader Federal Jurisdiction

Last summer, the House Judiciary Committee advanced to the House floor the Class Action Jurisdiction Act, H.R. 3789, a bill that would expand federal diversity jurisdiction over interstate class actions. The bill would expand the ability of defendants to remove to federal court a broader array of interstate class actions (class actions in which the class includes residents of multiple states or in which the class members reside in a state different from the primary defendants). The stated goal of the bill is to halt class action forum shopping—the increasingly prevalent practice of filing nationwide (or at least interstate) class actions in state courts that tend to certify classes or otherwise favor plaintiffs. The bill was never voted on by the full House, but is likely to be reintroduced this session.

♦ Adoption of Federal Rule 23

Some state courts are viewed as "anything goes" tribunals on class actions because they have never adopted anything like the federal class action rule (Fed. R. Civ. P. 23). As a result, most such courts lack clear principles about what constitutes a valid class action. The proposed reform for such states has been adoption of the federal rule. Two years ago, the Louisiana legislature enacted a new class action statute that closely resembles federal Rule 23. And just last year, the West Virginia Supreme Court adopted federal Rule 23, abandoning an old rule that was far more liberal than the federal rule.

♦ Plaintiff's Burden

In recent years, some state appellate courts have suggested that plaintiffs bear relatively little burden in seeking class certification and that any doubt should be resolved in favor of certifying a proposed class (a practice contrary to current federal court practice). In response, some have suggested adding to state court class action rules an amendment stressing that a movant for class certification bears the burden of showing *with clear and convincing evidence* that the applicable class certification prerequisites are satisfied.

♦ Classwide Proof Requirement

Some federal and state courts have determined that a legal or factual question should be deemed "common to the class" for purposes of meeting the "common question" and "predominance of common question" requirements for class certification only if answering the question as to one person answers the question as to all other members of the purported class. For example, the question "is the defendant liable?" could be deemed a "common question" only if the record clearly indicates that the question must be answered the same way as to all members of the purported class. Some propose making this concept more explicit in class action rules. In a similar vein, others have argued for adding a "classwide proof" requirement to federal and state class action rules. Under such an amendment, a movant for class certification would have to demonstrate that the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought is substanially the same as to all class members. Some federal caselaw already embraces this concept.

♦ Administrative Remedies

Class Actions are at times efforts by plaintiffs' counsel

to "piggy back" on investigations that have already been initiated by state or federal regulators. In these cases, plaintiff counsel typically use agency work product to prosecute the class action (if the agency decides not to pursue the issue). In other cases, if the defendent ultimately resolves the issue with the agency, those counsel claim fees based on a supposed "catalyst" role (even though they may have done little work and played a small role). One proposal has been to include in class action rules a more explicit indication that by definition, a class action is not the superior means for resolving a claim or issue if it is subject to the jurisdiction of an administrative agency (or if the agency has actually exercised jurisdiction over the claim or issue).

♦ Limiting Classes To In-State Residents

Some state courts have concluded that their limited resources should not be expended on adjudicating the claims of out-of-state residents (in some cases, potentially thousands of non-residents), especially where the courts would be called upon to interpret the laws of other jurisdictions. Some state courts have adopted this principle as a matter of precedent. It has been urged that other states should amend their class action rules to permit purported class actions only to the extent that the proposed class encompasses in-state residents.

♦ Attorney's Fees

Another proposed reform is to amend relevant rules and statutes to establish clearer criteria for the awarding of attorneys' fees in class actions. One proposal is a requirement that any such awards must be based exclusively on the amount of time and expenses counsel have expended on the litigation. Multipliers would be permitted, but the rule would eliminate the practice of some courts to almost automatically award a 30–40% piece of what the class obtains through trial or settlement, regardless of the effort actually expended by class counsel.

Some proposals that are being discussed in Texas include:

- ♦ Allowing settlement classes that do not meet the criteria for certification if the case were to be litigated, and establishing criteria to provide for inadmissibility of settlement class certification with respect to any of subsequent trial class proceeding.
- ♦ Direct interlocutory appeal to Texas Supreme Court of certification decisions, and stay of all litigation activity until a decision is rendered.
- ♦ Requiring administrative remedies to be exhausted before class action is filed.
- ♦ Creation of procedural rules by state Supreme Court that further clarify the standards for class certification.

Recent Developments

- On January 4, 1999, the California Supreme Court made it easier for out-of-state residents to file securities class actions. According to the Court, the California Corporate Securities Code creates a civil remedy for out-of-state purchasers who bought stock that was subsequently affected by market manipulation, even though the purchase or sale took place outside of California. The case has been widely discussed because of its potential impact on the level of class action activity in California state courts. *See Diamond Multimedia Sys., Inc. v. Superior Ct. of Santa Clara County*, S058723 (January 4, 1999).

- The Stanford Securities Class Action Clearinghouse reports in its most recent Federal Litigation Box Score that between December 22, 1995 and January 18, 1999, 522 companies have been sued in federal court. The most frequent target of class action litigation is the high-tech industry, and the Northern District of California is the most active district court. Fifty-nine percent of the cases filed allege accounting fraud; fifty-five percent allege insider sales. Source: http://securities.stanford.edu.

- Los Angeles trial lawyer has filed three class action lawsuits asserting that sport card companies are inducing children to gamble. Sport card companies print limited quantities of certain cards-usually with pictures of the most popular sports stars-and randomly insert them into packs. Plaintiffs' attorney, Henry Rossbacher, believes that card companies encourage speculation by printing the odds of getting one of these valuable cards in a pack. The lawsuit claims that card companies have created a lottery and should be forced to pay damages to children who have been lured into buying the cards. Source: Valley Morning Star, August 11, 1998.

- On December 17, 1998, the law firms of Bernstein, Litowitz, Berger & Grossman and Sherman, Silverstein, Kohl, Rose & Podolsky entered into an agreement to settle a Y2K class action lawsuit they filed against Medical Manager Corporation, manufacturer of an integrated physicians' practice management system. The lawsuit alleged that Medical Manager violated various state consumer protection and unfair trade practice laws and breached implied and express warranties by selling software that was not Y2K compatible, failing to disclose this fact to purchasers, and then requiring users to expend significant sums of money to upgrade to a Y2K compatible version. This case represents only the second Y2K class action to reach a settlement. Source: http://biz.yahoo.com/bw/981217/bernstein_1.html.

- A class action suit has been filed in Michigan state court against Budget Rent-A-Car for discriminating against minority customers. The suit alleges that Budget sets rates based on residential zip codes, in order to help to gauge a renter's ethnicity. The Plaintiffs, who are all Black, were allegedly charged more for their vehicle rentals than whites. The Plaintiffs' attorney has said that "even though Budget claims this practice did not target minorities, about eighty-four percent of the consumers who were overcharged were African-American." Source: http://news.stocksmart.com

- On December 15, 1998, shareholders and employees of Crown Central Petroleum Corp. filed a lawsuit against CEO Henry Rosenberg and various corporate officers and board of directors. The lawsuit seeks damages from Rosenberg and the other defendants on the ground that their gross mismanagement of and self-dealing in the company caused its stock price to drop eighty percent in the past ten years and forced the sale or closure of many of its four hundred gas stations and convenience stores. Source: http://www.milberg.com.

- United State District Court Judge Barefoot Sanders of the Northern District of Texas has denied class certification in a product liability lawsuit seeking injunctive relief and damages from the manufacturer of Aleve, the over-the-counter version of the pain-killer Naprosyn. In the complaint, the lead plaintiff alleged that she suffered gastrointestinal injuries after taking the defendant's product for more than ten days. Judge Sanders held

Recent Developments

that certification of an injunctive class is inappropriate where monetary relief predominates, noting that an award of damages would require individualized proof of harm which is not incidental to injunctive relief the plaintiff was seeking. *See Woodell v. Proctor & Gamble Manufacturing Co.*, No. 3:96-CV-2723-H (N.D. Tex. Sept. 30, 1998).

- Defendants achieved a Pyrrhic victory of sorts in the first class certification ruling to be handed down in a state diet drug case. A New Jersey Superior Court has denied class certification in the consolidated lawsuit because under New Jersey's "entire controversy" rule, a class action would preclude absent members from pursuing personal injury claims in the future. The Superior Court did find, however, that the plaintiffs satisfied the four standard elements for class certification under federal and most state laws—numerosity, commonality, typicality, and adequacy of representation—which is likely to encourage plaintiffs to refile their claim in another state. *See In re Diet Drug Litigation*, No. 240 (N.J. Superior Ct., Middlesex County, Oct. 7, 1998).

- In a multi-district lawsuit against a diet drug manufacturer, Judge Louis C. Bechtle has preliminarily approved a settlement proposal by defendant Interneuron Pharmaceuticals Inc. with all plaintiffs nationwide who have alleged injuries from using its product, dexfenfluramine (Redux). The settlement fund is expected to total over one hundred million dollars. Source: Pharmaceutical Lit. Rep. (November 1998).

- In West Virginia, a plaintiff who filed a product liability action against various tobacco companies has asked the County Circuit Court to certify a class of West Virginians who have suffered personal injury from cigarette smoking. *See Ingle v. Philip Morris Inc.*, No. 97-C-21-5 (W. Va. Cir. Ct., McDowell County, Sept. 3, 1998).

- The United States Court of Appeals for the Third Circuit has upheld a district court order decertifying a class of Pennsylvania smokers who sought medical monitoring expenses and entering summary judgment against the six individual class representatives. The court held that the treatment was inappropriate because the three significant issues—nicotine addiction, the need for medical monitoring, and the application of the statute of limitations—must be resolved for each member of the class. *See Barnes v. Tobacco Co.*, No. 97-1844 (3d Cir. Nov. 12, 1998).

- The California Supreme Court has granted a petition for review to DuPont Merck Pharmaceuticals Co. on the issue of whether a consumer fraud class action brought by users of its Warfarin blood thinner was a "SLAPP" suit that violated the company's First Amendment rights. The issue in question is whether the defendant was exercising its constitutionally protected right to free speech when it attempted to persuade California legislators, health insurance companies, and medical providers that a competitor's new generic version of the defendant's top-selling Coumadin oral blood thinner was dangerous and should be kept off the market. *See DuPont Merck Pharmaceuticals Co. v. Orange County Superior Ct.*, No. S073419 (Cal. Sup. Ct. Nov. 6, 1998).

- On December 14, 1998, Plaintiffs Marcia Speilholz, Debra Petrove, and the Wireless Consumer's Alliance, Inc., filed a class action lawsuit in Los Angeles Superior Court, alleging that Los Angeles Cellular Telephone Company falsely and deceptively advertises its cellular coverage area to current and prospective subscribers. The San Francisco law firm of Lieff, Cabraser, Heimann & Bernstein avers that Spielholz was the unfortunate victim of an attempted carjacking incident who was unable to obtain emergency assistance because when the attack occurred she was located in an area where L.A. Cellular allegedly had an undisclosed gap in its coverage. Source: http://lchb.com/lacellular.htm.

- A class action suit was brought on behalf of Bank of Boston account holders against the Bank alleging the Bank was keeping too much of its customers' money by placing their funds in escrow accounts without paying them interest. The case concluded with the Bank agreeing to settle the plaintiffs' claim. The lawyers representing the plaintiff class received $8.5 million in fees to be split among themselves; each customer received $10.

Moreover, additional legal fees owed by the bank under the settlement amounted to $100 per customer and the bank deducted the extra fees from each customer's account, resulting in a $90 net loss to each bank customer. "In short, having been included in a lawsuit they never envisioned, [the plaintiffs] had their own money from their own escrow accounts taken to pay class counsel . . . ." Source: Testimony of Ralph G. Wellington Before the House Judiciary Committee (March 5, 1998) at http://www.house.gov/judiciary/41160.htm.

- In January of this year, a class action lawsuit was filed in California and Saipan against eighteen U.S. clothing manufacturers and retailers, including The Gap, Tommy Hilfiger, May Company, Sears, and Wal-Mart, for the alleged mistreatment of workers in foreign-owned factories operating on U.S. soil. The lawsuit accuses these companies of violating federal racketeering laws for using indentured labor to produce clothing on the island of Saipan (part of the Mariana islands which is a U.S. Commonwealth in the South Pacific), and for failing to pay overtime, or maintain appropriate working conditions. Source: http://www.milberg.com.

- Judge Martin L.C. Feldman, of the U.S. District Court for the Eastern District of Louisiana, recently dismissed on preliminary motions large class actions involving claims that the air bags used in every vehicle in the United States, through the 1997 model year, were defective because they might cause some future injury. None of the representative plaintiffs had suffered any present harm or injuries, or had any problems with the air bags, and the proposed class specifically excluded anyone who alleged injury as a result of air bag use. *See In re Air Bag Products Liability Litigation*, 1998 WL 279237 (E.D. La. 1998).

- The Phoenix district office of the EEOC recently announced that it had settled a class action lawsuit against Southwest Supermarkets, Inc., for one million dollars. The class action had alleged that the supermarket chain permitted sexual harassment to take place in its stores. Southwest, which did not admit to any wrongdoing, agreed to pay $800,000 in compensation to forty-four current and former female employees and to set aside an additional $200,000 for other people who may come forward in the future. The law firm of Lewis & Roca, which reported on this story in its *Arizona Employment Letter*, offered this view of the settlement: "Employers take note—if we were to report to you that an employer settled a sexual harassment case for $18,000, this would not be very earth-shattering news, would it? But look what happens when the facts turn into a 'class action'—multiply $18,000 by forty-four employees or more, and your looking at a settlement of this magnitude. Be forewarned—the class and 'mass' action is the wave of the future and is very costly to defend and settle."

- In testimony before the House Judiciary Committee on March 5, 1998, attorney Sheila Birnbaum of Skadden, Arps, Slate, Meagher & Flom, reported on a study by Stateside Associates, which examined class action litigation by collecting data from the court files of six Alabama counties over a two-year period. The study, which yielded the "Stateside Report," found, inter alia, that (1) ninety-one class actions were filed in the six rural counties during the two years studied; (2) forty-three class actions were certified in these six counties in the period covered; and (3) at least twenty-eight of the certified class action were nationwide class actions and the primary target defendants were large multinational corporations. Source: http://house.gov/judiciary/42030.htm.

- In its November 1998 issue the *Mass Tort Litigation Reporter* wrote that on September 28, "[a]ttorneys from approximately thirty law firms representing asbestos plaintiffs met in Washington, D.C. . . . to discuss and compare recent offers by Owen Corning to settle large groups of asbestos cases." The article reports that Owens Corning has been "making a concerted effort to settle thousands of cases nationwide" by offering different settlement packages to selected firms in the hopes of settling large inventories of claims.

Upcoming Events
(Class Action Related)

February 16 —
Panel on Y2K Liability
New York City

February 26 —
"Tobacco Litigation"
Jacob Sullum of
REASON MAGAZINE
Raleigh, NC

June 22 —
Conference: "Rise of
State Attorney General
Litigation"
Washington, DC

For more information
about these events,
contact the national
office at (202) 822-8138

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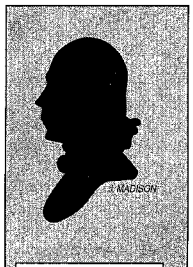

Class Action Watch

A Publication of the Federalist Society's Litigation Practice Group and Its Class Actions Subcommittee

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Volume 1 Number 2
Spring 1999

Analysis: Class Action Litigation—A Federalist Society Survey, Part II

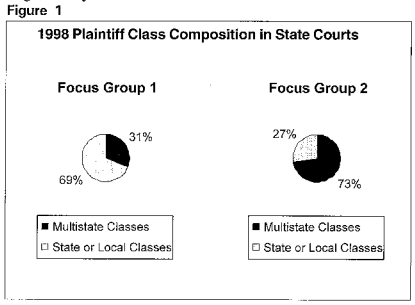
In our inaugural issue of *Class Action Watch*, we unveiled the results of a business survey we conducted on class action litigation. Our first report compiled and analyzed a substantial amount of general data on the nature of federal and state court class action litigation, with a particular emphasis on the Texas state courts. At the time, Texas was about to convene its biennial legislative session and class action reform proposals were scheduled for consideration. This issue of *Class Action Watch* reports on other aspects of the Federalist Society's survey effort. In this latest issue, we specifically highlight data that may prove useful as Congress prepares to assess proposals for class action reform that would, among other things, expand parties' rights to remove litigation from state to federal courts.

A Review of the Project

When the *Class Action Watch* bulletin was first being planned, we were struck by the absence of any generally available data on business exposure to class action litigation. We frequently heard the argument that the business community had been facing more class action litigation with each passing year. Indeed, the preliminary findings of a Rand Institute study published in 1997 say as much, with lawyers and corporate counsel who were interviewed reporting that they have witnessed a doubling or tripling of class action suits in the past few years. But we knew of no effort to survey companies in considerable depth regarding their own specific experiences. We decided, therefore, to undertake that task in December 1998.

The first portion of this endeavor, of course, was to devise a reasonably thorough survey that companies could readily and easily answer. We chose to ask about putative class action cases that were pending in 1988, 1993, and 1998. The hope was that these

Figure 1



♦ Taking account of both focus groups, the vast majority of survey respondents reported that between a third and three quarters of their state class actions involved nationwide or multistate classes.

continued on page 3

From The Editors

A newsletter of the Federalist Society for Law & Public Policy Studies.

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Website: www.fed-soc.org
Email: fedsoc@radix.net

Dear Reader:

I am pleased to present the second issue of Class Action Watch. A number of proposals for reassessing and reforming the nature of class action reform are currently pending before Congress. In early May, Senator Grassley plans to hold hearings on the Class Action Fairness Act of 1999. A similar bill is expected to be introduced in the House of Representatives. Meanwhile, both Houses of Congress are considering Year-2000 liability legislation that includes provisions targeted at class actions. With all this legislative activity directed at class action litigation, this seems like an appropriate time to publish our latest issue of Class Action Watch.

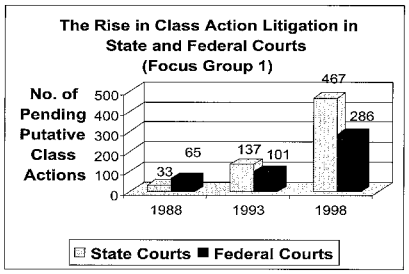
The response to the inaugural issue of the Watch has been overwhelmingly positive. The publication appears to have found a niche by providing objective information about the changing nature of class action litigation and reporting recent developments in the field. Our goal remains facilitating and informing the debates about the future of class actions, rather than taking sides in them.

This issue follows the organization of the first issue. The "Analysis" section reports some of the results of our surveys of corporations' experiences of class action litigation. In addition, we have focused on issues of particular relevance to the ongoing debates in Congress, such as the growth in nationwide class actions filed in state court. The "Commentary" section reports on the positions of various business, consumer, and legal groups on the proposed congressional legislation. Finally, the "Recent Developments" section reports on a number of recent judicial decisions concerning class actions.

We hope this material will prove helpful to litigators, judges, and those involved in legislative debates over the future of class actions. We also hope that this issue will prompt others to try to collect and disseminate additional data concerning the changing nature of class actions. We encourage any comments or suggestions you may have to improve the publication so that future issues can provide even more useful information.

Paul Clement
Chairman, Class Actions
Subcommittee

Figure 2



♦ Respondents reported that between 1988 and 1998, the number of pending class actions in state courts increased by 1315%, and the number in all federal courts increased by 340 percent.

♦ Among respondents, class action litigation rose at a faster rate in state courts than in federal courts. Class action activity more than doubled in federal courts between 1993 and 1998, and more than tripled in state courts for the same years.

three chronological "snapshots" would provide some sense of the development of class action activity over the most recent ten-year period. The respondents were asked to provide information about federal actions, cases in all state courts, and cases just in Texas state courts. We asked for a breakout of Texas class actions because it was our understanding that Texas is shaping up to be the next major battleground for legislative consideration of class action reform and we had already planned to devote a major portion of our inaugural issue to reporting on the activity in this state.

For each of the three years, the survey asked companies to consider a wide variety of issues, including, but not limited to:

- The number of putative class actions pending in federal, state, and Texas state courts.
- The predominant issue in each case (e.g., securities, toxic tort, consumer fraud, etc.).
- The size of the putative class in each case, and whether the class was local, statewide, or nationwide in its composition.
- The number of state and federal cases in which classes were certified.
- The incidence and magnitude of both initial and post-certification settlement demands.
- The number of federal, state, and Texas state court cases that were resolved by settlement, dispositive motion, and verdict.
- The length of time between class certification and settlement.
- The size of the plaintiff counsel fee award.

With respect to these and other issues that we raised, bear in mind that the survey asked about cases that were *pending* in a given year. In other words, when the 1993 portion of the survey asked about class certification and settlement, for example, the respondents were instructed to "count" cases that were certified or settled before, during, or after 1993. The same can be said for the 1988 and 1998 portions of the survey. We chose this approach because it was most consistent with what we know about the manner in which company databases track litigation.

After having completed the survey, we set out to obtain some data. We mailed the survey to 100 companies consisting of: (1) most of the principal large employers in Texas, including both Texas-based companies and non-Texas-based companies with a significant number of employees and with annual

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revenues at or about $1 billion; and (2) Fortune 500 companies that have a demonstrated interest in the litigation process generally as expressed by corporate or general counsel membership in more than one trade organization that monitors litigation reform, including the American Corporate Counsel Association, the American Bar Association's Corporate General Counsel Committee, the Civil Justice Reform Group, and the American Tort Reform Association. The companies represented every conceivable industry—transportation, energy and utilities, pharmaceuticals, food service, banking, insurance, heavy and light manufacturing, telecommunications, and a wide range of durable and nondurable consumer goods production. We had no idea whether or not class action litigation was perceived as a "problem" by the companies we surveyed, and the fact that a company has an interest in litigation reform does not necessarily mean that it has concerns about class action activity (indeed, a number of the respondent companies had no class actions to report). Moreover, the responses were submitted anonymously, and we therefore do not know which companies ultimately responded.

The survey effort began on December 4, 1998 with a mailing to the general counsels of the 100 companies we identified. As of April 20, 32 companies from this survey pool had responded by returning surveys (a 32 percent response rate). We call this respondent pool "Focus Group 1." Given the size of these companies and the logistical difficulties associated with responding to such a survey (it was 15 pages), we were quite satisfied to have secured such business participation in this kind of a project. Indeed, we know of no similarly successful survey effort (though Rand and others have been quite successful in collecting data through other very valuable means).

Another mailing was conducted just a few weeks later in order to create a second focus group ("Focus Group 2"). The purpose of the second focus group was to collect additional data and to see whether results from the first focus group would be corroborated. On December 23, we mailed a virtually identical set of surveys to any company that had representation either on the board of American Corporate Counsel Association or on the Association's Litigation Committee. Any company which participated in the first focus group and which would have also qualified for the second was eliminated from the second mailing list. In total, 215 were included in the second focus group, and, as of April 20, over 31 companies have returned the survey (a 14 percent response rate).

For a number of reasons, we believe the two pools of respondents reflect a rather diverse collection of experiences respecting class action litigation. It is clear, for example, that the companies that responded are not simply those that are especially concerned with or affected by class action litigation. A number of the respondents had no pending litigation at all during the years in question (or very little), and others posted more significant numbers. The median and mean numbers of pending putative class actions reflect this distribution. At the very least, therefore, one can see the nature and extent of class action activity among a few dozen major American companies with a diverse array of business interests.

It is crucial to note that this survey effort is not intended to be a complete scientific sample or analysis of class action activity. The data were intended to increase our understanding in this area, but by no means completes our understanding. Moreover, as we continue to receive responses, we will adjust our analysis.

What follows is a summary of some of the information we were able to compile from the surveys that were submitted. Our choices on

what data to include in this article are simply a reflection of what is readily available. We did not believe it was appropriate to report on issues or questions unless all or virtually all of the respondents provided data. Thus, for example, we are not able at this time to discuss data respecting plaintiff fee awards—too many of the respondents left answers to this question incomplete. It is our hope that some of these other issues can be tackled in future survey efforts.

In addition, given that the response rate to the second focus group is not yet as high as our first survey effort, we are not able at this time to report on all issues. We hope to provide our readers in a future issue with a complete report of our findings as more responses are received. Where a large number of respondents reported data on a particular question, we have reported on the findings in this issue. And, at times, we discovered that data from the second focus group corroborates findings from the first focus group.

It should be noted that *Class Action Watch* does not seek to render any subjective judgments on our findings, and, therefore, we purposely have avoided reaching any normative conclusions respecting the data. We leave it to the readers to decide for themselves what the trends reflect, what has caused them, and whether a problem has been revealed here that should be addressed.

Class Composition: Are Nationwide Plaintiff Classes Litigating in State Courts?

The centerpiece of federal class action reform currently under consideration on Capitol Hill is the proposal to allow class actions that are filed in state court to be removed to federal court even in the absence of complete diversity. One aspect of our survey provides some information that may be useful in examining this issue.

Our survey asked respondents to indicate the number of cases in which the plaintiff class was either local, statewide, regional/multistate, or nationwide for all of the putative class actions pending in each of the three time periods surveyed. As depicted in Figure 1, multistate plaintiff classes were present in 73 percent of the state court class actions pending in 1998 among respondents for Focus Group 2. For Focus Group 1, multistate plaintiff classes were present in 27 percent of the pending state court class actions for the same period.

It is impossible to know with certainty what accounts for the difference in the statistics for these two focus groups (i.e., why nationwide class composition is less pronounced in Focus Group 1 than in Focus Group 2). However, respondents for Focus Group 1 reported considerably more toxic tort and property damage cases than Focus Group 2, while those in Focus Group 2 reported considerably more consumer fee and fraud cases than Focus Group 1. Toxic tort and property damage cases often do involve localized injury, while consumer class actions involving large companies often involve nationwide commercial activity. Thus, it is conceivable that, because of the localized nature of the numerous toxic tort and property damage cases reported by Focus Group 1, the plaintiff class composition data for that focus group is less multistate in orientation than Focus Group 2. Regardless, one thing is certain—among our respondents, nearly a third (and possibly a greater percentage) of state cases could well be removed to federal court if complete diversity requirements were relaxed.

The Incidence of Class Action Activity: Is Class Action Litigation Increasing?

We began our survey by asking: "How many putative class actions were pending in 1988 [and 1993 and 1998]? In answering this question,

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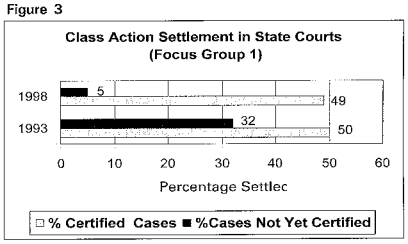
please include all suits in which the plaintiff purported to sue on behalf of a class, without regard to whether class certification was ultimately granted or denied." Respondents were asked to identify the number of such cases in state and federal courts, and then to break down the state cases by jurisdiction (Alabama, California, Florida, Louisiana, Ohio, Texas, and "Other"). Figure Two sets forth the data from this question.

Among the respondents for Focus Group 1, the number of pending putative class actions in state courts increased by 1,315 percent between 1988 and 1998, and by 340 percent in federal courts for the same two years. Our preliminary findings for Focus Group 2 also show a rising trend for state court class actions. Among respondents for Focus Group 2, the number of state court class actions increased by 550 percent between 1988 to 1998.

Figure 3



♦ Settlement occurred more often with certified cases than with cases that were not yet certified.

In order to ensure that the increases in class action litigation we are seeing were not simply the result of a small number of outliers who experienced very significant spikes, we performed the following analysis:

- We counted the number of respondents who showed increases in class action litigation between 1988 and 1998, 1988 and 1993, and 1993 and 1998. In the 1988-1998 time period, about 84 percent reported increases and none reported declines. In the 1988-1993 period, about 48 percent reported increases and about 16 percent reported declines. In the 1993-1998 time period, about 82 percent reported increases and about 4 percent reported declines. Therefore, most companies—not merely a small cluster of especially hard-hit companies—saw increases.

- We also looked at the figures for individual respondents which reported increases. For each relevant time period (1988 vs. 1998, 1988 vs. 1993, and 1993 vs. 1998) and court system (federal, state, Texas state), we calculated the median and mean increases in the number of cases for our respondents. The median figure and the mean figure for a given court system and time period were consistently about the same, with very little deviation. Moreover, we noticed that, for each year in each court, it was virtually always the case that respondent increases were quite similar. For example, in comparing 1993 and 1998 data for cases in state courts—a period during which we recorded an increase of 230 cases—about two-thirds of the respondents witnessed an increase of

Figure 4

Period of Time between Certification & Settlement			
	Less than 1 Year	1–3 Years	Greater than 3 Years
1988	0%	50%	50%
1993	57%	14%	29%
1998	36%	64%	0%

seven cases or less and about one-third witnessed an increase of 14-28 cases. In other words, no one company or small group of companies was responsible for the increases we observed.

- We also sought to control for company growth in an effort to account for the fact that increases in class actions sometimes can be the result of increases in company growth and productivity or merger and acquisition activity. We found that revenues for the companies doubled on the average between 1988 and January 1, 1998. This is considerably lower than the percentage increases in class action litigation.

Is There A Relationship between Class Certification and Settlement?

When we began this project one observation we frequently heard from practicing attorneys was that certification increases the pressure for defendants to settle. In order to provide some information to spark further debate about this observation, our survey asked for data respecting both the incidence of class certification and the incidence of settlement. In addition, we asked for information regarding the length of time between class certification and settlement.

Figure Three compares the settlement rates for putative state class actions pending in 1993 and 1998 for Focus Group 1 (there were too many incomplete responses to develop any findings for 1988). Among the respondents, certified state class actions seem to settle more than non-certified state class actions. For example, 50 percent of the certified class actions pending in 1993 resulted in settlement, as compared with 32 percent of the cases that had not yet been certified. We see a wider disparity with state cases pending in 1998. Already, 49 percent of the certified cases pending in 1998 have settled, but only 5 percent of the cases that have not yet been certified have been settled.

Figure Four tracks the length of time between state court class certification and settlement for Focus Group 1. It appears that, among respondents, settlement is now following class certification more quickly than in the past. In 1988, for example, 50 percent of the state cases were settled more than three years after certification; no cases settled in less than one year after certification. In 1993, only 29 percent of the cases were settled after more than three years after certification, 14 percent of the case settled between one and three years of certification, and 57 percent settled within one year of certification. Finally, in 1998, all of the certified state cases that were reported by our respondents settled within three years of certification, and of those, 36 percent settled with one year of certification.

* * *

As we mentioned at the outset, the responses we have received provide a glimpse of the scope and nature of their class action activity. While it may not be representative of all or even most businesses in America, we believe the data helps to increase understanding of the area. Whenever possible, the Federalist Society's Litigation Practice Group will continue to generate data in order to shed further light on trends relating to class action litigation.

Commentary

FEDERAL CLASS ACTION REFORM:
A BOXSCORE OF SUPPORT AND OPPOSITION

On February 3, Senators Charles Grassley (R-IA), Herbert Kohl (D-WI), and Strom Thurmond (R-SC) introduced the "Class Action Fairness Act of 1999" (S. 353), which contains, in pertinent part, three major reform provisions that would (1) allow a state court class action to be removed to a federal court in the absence of complete diversity; (2) limit attorneys fees to a reasonable percentage of the damage award; and (3) require that all proposed state class action settlements be filed with the U.S. Attorney General and the offices of the state attorneys general in states in which any class member resides. A reform bill was introduced in the House last year, and a bill substantially similar to the Senate initiative is expected to be introduced in the House very soon. The following is a summary of opposition and support with respect to these provisions.

	Business Community	American Bar Association	Association of Trial Lawyers of America ("ATLA")	Other Advocacy Groups
Relaxing Diversity Requirements	There is unanimous support amongst the business community for this provision, including coalitions such as the U.S. Chamber of Commerce, the National Federation of Independent Businesses, the National Association of Manufacturers, the Chemical Manufacturers Association, the American Council of Life Insurance, the American Tort Reform Association, and the Civil Justice Reform Group.	The ABA has supported certain amendments to Rule 23, including authorization of settlement classes, but has not endorsed achieving class action reform through congressional legislation.	ATLA has voiced general opposition to the "Class Action Fairness Act of 1999" as well as the previous House version, but has not provided details as to the specific provisions. Source: http://www.citizen.org/congress/civjus/classaction/opponents.htm	Public Citizen opposes this provision and has stated that, to the extent class action reform is necessary, it should be achieved through amendment of Rule 23. About 30 other groups have expressed general opposition to this legislation, including AFSCME, Consumer Federation of America, and Handgun Control Inc., Source: http://www.citizen.org/congress/civjus/classaction/opponents.htm.
Capping Attorneys Fees	The business community unanimously supports the concept of capping attorney fees, but is not pushing hard for this particular reform through the current legislative vehicle.	See above. It also bears noting that the ABA has consistently opposed all attorney fee reform initiatives, including caps on contingency fees.	Same as above.	Same as above.
Settlement Notification to Attorneys General	Some segments of the business community have expressed concern that this provision could slow productive settlements. However, no formal opposition has been mounted or is expected.	No apparent position.	Same as above.	Public Citizen has not spoken specifically as to this provision. With respect to other Groups, see above.

RECENT DEVELOPMENTS

- On March 24, a Florida appellate court upheld a $300 million settlement between a nationwide class of nonsmoking flight attendants and four cigarette manufacturers for alleged health damage due to occupational exposure to secondhand tobacco smoke. *Ramos v. Philip Morris Cos.*, No. 98-389 (Fla. Cir.Ct. App. 3d Dist. March 24, 1999). The unanimous opinion also approved the agreement's provisions for $46 million in attorneys' fees and $3 million in costs for counsel representing the member class of 60,000. The settlement does not provide money to settling class members, but provides money for research on smoking-related diseases. In the opinion, Judge Robert Shevin noted the trial court's observation that the class would have had "less than a 50-50" chance of success at trial.

- On January 22, a Louisiana trial court approved a nationwide class action settlement in a suit alleging defects in "side-saddle" gas tanks in General Motors Corp. trucks. The agreement gives truck owners $1,000 vouchers toward purchase of new GM vehicles. *White v. General Motors Corp.*, No. 42,865 (La. Dist. Ct., Iberville Parish January 22, 1999).

- On January 29, a class action was filed by black homeowners in Toledo, Ohio, alleging that Farmers Insurance and two of its agents engaged in redlining and discrimination against the class when it refused to write replacement cost policies to homeowners in predominately black neighborhoods and discouraged applications on the basis of race. *Toledo Fair Housing Center v. Farmers Insurance Group of Cos.*, No. CI0199901339 (Ohio Comm. Pls., Lucas County January 29, 1999).

- On February 26, the Louisiana Supreme Court denied a tobacco industry appeal of a trial court's certification of a class of state smokers, leaving it to the trial court to determine if medical monitoring is a viable claim under Louisiana law. *Scott v. The American Tobacco Co.*, No. 98-C-3016 (La. February 26, 1999).

- The law firms of Bernstein, Litowitz, Berger & Grossman and Sherman, Silverstein, Kohl, Rose & Podolsky entered into an agreement to settle a Y2K class action lawsuit they filed against Medical Manager Corporation, manufacturer of an integrated physicians' practice management system. The lawsuit alleged that Medical Manager violated various state consumer protection and unfair trade practice laws and breached implied and express warranties by selling software that was not Y2K compatible, failing to disclose this fact to purchasers, and then requiring users to expend significant sums of money to upgrade to a Y2K compatible version. This case represents only the second Y2K class action to reach a settlement. Source: http://biz.yahoo.com/bw/981217/bernstein_1.html.

- On July 12, a trial is scheduled to begin in New Jersey in a medical monitoring class action by New Jersey residents who used two popular diet drugs, Redux and Pondimin, but have yet to develop primary pulmonary hypertension or valvular heart disease, two conditions associated with use of the diet pills. The court, for the first time, certified a medical monitoring class under New Jersey's Consumer Fraud Act. *Vadino v. American Home Products Corp.*, No. MLD-L-425-98 (N.J. Super. Ct.). On March 12, a Pennsylvania court certified a nearly identical medical monitoring class, finding it satisfied the criteria for such a claim under *Redland Soccer v. Dep't of Army*, 696 A.2d 137 (N.J. 1997). *In re: Pennsylvania Diet Drugs Litigation*, No. 9709-3162 (Ct. Comm. Pls., Philadelphia County March 12, 1999). On February 11, a West Virginia court reversed its earlier dismissal of a medical monitoring class of diet pill users. *Burch v. American Home Products Corp.*, No. 97-C-204 (W. Va. Cir., Brooke Cty. February 11, 1999). Acting on a motion for reconsideration, Judge Fred Risovich found that a medical monitoring remedy would be a "far better remedy than the 'in retrospect' damages award urged by defendants in the name of judicial economy and 'reasonable certainty.'"

Recent Developments

♦ On February 5, a federal judge dismissed a shareholders' class action lawsuit alleging American Home Products Corp. and its officers made false and fraudulently misleading statements regarding Redux and Pondimin. The court said the company did not materially mislead the investing public by failing to come forward with reports of heart valve problems prior to July 8, 1997, when the problems were first publicized, or by failing to disclose all medical data behind that announcement. *Oran v. Stafford*, No. 97-4513 (D. N.J. February 5, 1999).

♦ Judge Martin L.C. Feldman, of the U.S. District Court for the Eastern District of Louisiana, recently dismissed on preliminary motions large class actions involving claims that the air bags used in every vehicle in the United States, through the 1997 model year, were defective because they might cause some future injury. None of the representative plaintiffs had suffered any present harm or injuries, or had any problems with the air bags, and the proposed class specifically excluded anyone who alleged injury as a result of air bag use. *See In re Air Bag Products Liability Litigation*, 1998 WL 279237 (E.D. La. 1998).

♦ On March 11, a participant in the Section 8 federal housing program filed a class action suit against the St. Louis Housing Authority in U.S. District court claiming the housing authority failed to comply with federal housing quality standards related to lead paint inspection regulations. The proposed class includes all current and former Section 8 tenants who have children who are or were under seven years old at the time of residency, a class estimated to have over 1,000 members. *Smith v. City of St. Louis Housing Authority* (E.D. Mo. March 11, 1999).

♦ In January of this year, a class action lawsuit was filed in California and Saipan against eighteen U.S. clothing manufacturers and retailers, including The Gap, Tommy Hilfiger, May Company, Sears, and Wal-Mart, for the alleged mistreatment of workers in foreign-owned factories operating on U.S. soil. The lawsuit accuses these companies of violating federal racketeering laws for using indentured labor to produce clothing on the island of Saipan (part of the Mariana islands which is a U.S. Commonwealth in the South Pacific), and for failing to pay overtime, or maintain appropriate working conditions. Source: http://www.milberg.com.

♦ The United States Court of Appeals for the Third Circuit has upheld a district court order decertifying a class of Pennsylvania smokers who sought medical monitoring expenses and entering summary judgment against the six individual class representatives. The court held that class treatment was inappropriate because the three significant issues—nicotine addiction, the need for medical monitoring, and the application of the statute of limitations—must be resolved for each member of the class. *See Barnes v. Tobacco Co.*, No. 97-1844 (3d Cir. Nov. 12, 1998).

♦ On March 16, the Judicial Conference of the United States voted to oppose bills pending in Congress that seek to discourage lawsuits related to "Y2K" millennium date conversion problems. The Conference, headed by Chief Justice William Rehnquist, opposed Senate Bills S. 96 and S. 461 and House Bill H.R. 755, because they would shift most such suits to already overburdened federal courts.

♦ Los Angeles trial lawyer has filed three class action lawsuits asserting that sport card companies are inducing children to gamble. Sport card companies print limited quantities of certain cards—usually with pictures of the most popular sports stars—and randomly insert them into packs. Plaintiffs' attorney, Henry Rossbacher, believes that card companies encourage speculation by printing the odds of getting one of these valuable cards in a pack. The lawsuit claims that card companies have been lured into buying the cards.
Source: Valley Morning Star, August 11,1998.

♦ The law firm of Milberg, Weiss, Bershad, Hynes & Lerach LLP reports that it is representing plaintiffs in

a series of cases demanding that companies that allegedly profited from the use of forced and slave labor during World War II be held accountable. Ford Motor Company, Volkswagen, Krupp, Siemens, and Heinkel have already been named in lawsuits, and similar suits against Daimler-Chrysler, AEG, Telefunken, General Motors, Continental, and BMW are likely to be filed shortly. Source: www.milberg.com.

♦ The Stanford Securities Class Action Clearinghouse reports that "at least 235 companies were named as defendants in federal class action securities fraud lawsuits filed in 1998. That volume breaks the prior record of 227 companies sued in 1994. It also indicates a litigation rate close to 'one-a-day' from every trading day that the stock market is open." Source: http://securities.stanford.edu.

♦ On March 18, a federal jury found for the tobacco industry in a class action suit brought by 114 Ohio union health care trust funds seeking reimbursement for the costs associated with treating smoking-related diseases. *IABSOIW Insurance Fund v. Philip Morris*, No. 1L97CV1422 (N.D. Ohio March 18, 1999). It was the first action of its kind to go to trial. Along with finding that cigarette manufacturers did not conceal the hazards of smoking, the jury found they did not commit mail and wire fraud by allegedly targeting blue collar workers in cigarette advertisements and promotional materials

♦ On March 16, a federal court in Illinois dismissed a software developer's suit over a Microsoft Corp. FoxPro database program with alleged millennium date conversion defects. *Kaczmarek v. Microsoft Corp.*, No. 98-C-7921 (N.D. Ill. March 16, 1999). The judge concluded that plaintiff could not prove the program contained an inherent defect because users could reconfigure the program themselves to eliminate it. The putative class action was the first "Y2K"-related suit brought against Microsoft Corp.

♦ "The Chicago Tribune reported a couple of weeks ago on a class-action suit just filed in Cook County Circuit Court against Colgate-Palmolive, drugstore chain Walgreen Co., the American Dental Association, and assorted other defendants. The charge: failure to warn consumers of the risk that vigorous brushing might cause 'toothpaste related injury' to gums. The plaintiffs are seeking warning labels on toothpaste boxes. . . ." Source: The Weekly Standard, May 3, 1999.

♦ In a recent editorial on prominent class action plaintiff lawyer William Lerach of Milberg Weiss, the Wall Street Journal reported that Mr. Lerach once told a meeting of corporate directors: "I have the greatest practice of law in the world. I have no clients." Wall Street Journal, April 20, 1999, at A22.

♦ In the area of guns litigation, during an early April hearing in the Accu-Tek litigation before Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York, plaintiffs' counsel reported that a nationwide class action against various firearms manufacturers would be filed within three weeks. We will continue to monitor developments in this area.

Upcoming Events
(Class Action Related)

May 20 —
Civil Justice Leture:
Gerald Walpin,
Rosenman & Colin
Hartford

June 2 —
Guns Litigation Program:
Congressman Robert Barr
Atlanta

June 22 —
The New Business of
Government-Sponsored
Litigation: State AGs
& Big City Lawsuits
Washington, D.C.

November 11-13 —
Class Actions Panel
National Lawyers
Convention
Washington, D.C.

For more information
about these events,
contact the national
office at (202) 822-8138

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Senator GRASSLEY. Because he has to go very quickly, I want to call on the Senator from Arizona for purposes of an introduction.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Well, thank you very much, Mr. Chairman, and thank you for the legislation you have sponsored and for holding this hearing. I appreciate my colleagues allowing me to proceed out of turn. As a member of the full committee but not this subcommittee, I appreciate your courtesy.

I simply wanted to preliminarily introduce a member of your third panel, John P. Frank, from my State of Arizona, a distinguished member of the bar, a partner in the firm of Lewis and Roca there, and a member of the firm's special litigation group. In fact, Mr. Chairman, he has been involved in more than 500 appeals in the Arizona Supreme Court, the Ninth Circuit and the U.S. Supreme Court. That is about as many appeals as I have made to the chairman of our full committee here, so I know that is a lot of appeals.

John Frank was a law clerk to Justice Hugo Black. He was an Assistant Professor of Law at Indiana University, and then a Professor of Law at Yale University. He has been named to the National Law Journal's list of the 100 Most Influential Lawyers in the country, not once, not twice, but three times.

In all of the good things I can say about him, of course, there is one thing that is a black mark on his record, but I will not fail to mention it. He has for many years, and currently serves as General Counsel to the Arizona Democratic Party. With that one exception, his record, however, is outstanding. [Laughter].

In fact, I had the opportunity for a time to serve as General Counsel to the Republican State Party at the same time that John served for the Democrats, and we worked together on a number of matters.

But to conclude, Mr. Chairman, John Frank is Chairman of the Senior Advisory Board to the Ninth Circuit Court of Appeals. And in addition to writing 11 books on legal history and constitutional law, he served on the Civil Procedure Committee of the Judicial Conference from 1960 to 1970, which, of course, meant that he was a member of that committee in 1966 when it promulgated the present rule 23 on class actions.

He is eminently qualified to speak to the subject of your bill. His conclusions and his testimony here are eminently balanced and sensible. I commend them to you, and again preliminarily introduce to you John P. Frank, of Phoenix. Thank you for the opportunity to do that at this point.

Senator GRASSLEY. We thank Mr. Frank for coming, and thank you, Senator Kyl.

Senator Thurmond.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman. I am pleased that the subcommittee is holding this hearing today on S. 353, the Class Action Fairness Act. I think this is important legislation that

is needed to help reform our class action system. I appreciate your work, Mr. Chairman, on this issue.

Class action lawsuits are an extremely important aspect of our court system. We generally think of lawsuits as involving a few named persons. However, in class actions, hundreds or thousands of people are often involved. A major reason for class actions is to allow aggrieved people to combine together to bring a lawsuit that would not be worth bringing on their own. By combining together, the case can generate enough money to compensate attorneys, and the results sometimes can be quite beneficial for plaintiffs.

Unfortunately, however, there are sometimes abuses, and the abuses appear to be increasing. There is a great incentive on the part of lawyers representing the defendants to settle because of the huge potential liability of their company from all of the combined claims. These settlements are often quite good for the attorneys for the plaintiffs, but not necessarily for the plaintiffs themselves. Indeed, the plaintiffs are often secondary to the attorneys.

In a hearing here by Senator Grassley in this subcommittee in the last Congress on this issue, we heard from witnesses who received essentially worthless coupons, while their attorneys made millions. A key reform of this bill would combat this problem by linking attorneys' fees to the plaintiffs' actual recovery. This issue is especially important because a number of class action lawsuits arise in State courts, especially courts that have proven to be very receptive to class action lawsuits.

Class action lawsuits are important for many litigants, but they should not be used as social tools to effect social change. This hearing is important to discuss the bill's efforts for reform in this area, and I am pleased to have the witnesses with us here today.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Senator Thurmond.

The Senator from Alabama.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I want to say that I believe that class actions can be extraordinarily effective tools in helping us deal with legal problems confronting America. Sometimes, the error, or negligence, committed by the defendant is applicable to thousands, or even hundreds of thousands of different individuals. Therefore, 100,000 lawsuits would not be appropriate, when one case could settle for all the parties involved in those issues.

The concept of class action has been around a long time, and I think it is a good concept. What has happened, however is that over the years good advocates have figured out ways to file those actions in circuits and in methods that maximize the benefit to their client. And I respect them for that, but it is up to us in Congress to make sure that we create laws that guarantee fairness across the board.

I would like to note one case, for example, from my State of Alabama, *Hoffman* v. *Bank of Boston Mortgage Corporation,* a class action filed by a Chicago attorney in the circuit court of Mobile, AL. The case alleged that the bank did not promptly post interest to

real estate escrow accounts. A settlement was agreed to that limited the maximum recovery for class members to $9 each.

After the State approved the settlement, the bank disbursed more than $8 million to the class action attorneys in legal fees and credited most of the accounts of the victims with paltry sums. The legal fees, equal to 5.3 percent of the balance in each account, were debited to the accounts. So they debited everybody's account, these class action victims, with the legal fees.

For many accounts, the debit to the account exceeded the credit they obtained. For example, Dexter J. Kamowitz, of Maine, did not initiate the class action against Bank of Boston. However, he received a credit of $2.19 under the class action settlement. At the same time, the class action attorneys debited his account for $91.33 for legal fees, producing a net loss of $89.14. Such results often produced outrage from class members in other States affected by the action.

Judge Frank Easterbrook, of the Seventh Circuit, has asked, "What right does Alabama have to instruct financial institutions in Florida to debit the accounts of citizens in Maine and other States?" So this bill would eliminate some of those abuses and help us deal with them. I know there are six rural counties in Alabama which are seen as good counties to file lawsuits in. There have been 91 class actions filed in these six counties in the last number of years, I believe, from 1995 to 1997. And you ask why would a New York attorney or someone from Chicago do that.

Well, a good attorney is out to find the best forum, if he can, to file his case in, and many of them have found these forums to be most advantageous. But you are setting a legal principle and establishing penalties nationwide, and I think in interstate matters that the class action really would be better done in Federal court, where you have less possibility of home cooking, a fairer system, a uniform system of law.

And although I certainly think we need to be careful about expanding Federal jurisdiction—we have Federal jurisdiction in cases with de minimis interstate commerce nexus, but when a national corporation is dealing with clients in every State in America, that is quintessentially an interstate operation and it is the kind of thing that I think is appropriate in Federal court.

Thank you for your leadership, Mr. Chairman. I am pleased to join with you in support of this and I look forward to the testimony, and if we can improve this piece of legislation, I look forward to that. Thank you, sir.

Senator GRASSLEY. We have a statement from Senator Torricelli which we will insert into the record at this point.

[The prepared statement of Senator Torricelli follows:]

PREPARED STATEMENT OF SENATOR ROBERT TORRICELLI

Thank you Senator Grassley.

I want to say first that I have great respect for my colleagues Senator Grassley and Senator Kohl, and I don't doubt their commitment to finding a solution to the problem of collusive class action settlements where the attorneys receive more than the plaintiffs.

However, I'm not sure how the bill before us addresses that problem. In fact, there are a few provisions in this bill that could greatly hinder the ability of plaintiffs to obtain class action relief at all.

Class actions are an essential part of our legal system.

- They are necessary for administering many of the complex cases that move through our courts.
- And they are often the most economical and efficient method for managing the claims of a group of similarly injured people.
- Many times they are the only hope for the injured because they allow people to pool resources against big defendants.

Class actions have been an important tool to accomplish policy changes in a variety of areas including civil rights, antitrust, consumer fraud and tort law.

- The 1997 Texaco employment discrimination case was one of the more notable cases in which this was true in recent years.
- As you may recall, Texaco was found liable for discriminating against its African–American employees. Indeed, we all heard the tapes documenting the racial epithets used by Texaco's management.
- The Texaco plaintiffs could never have afforded to pursue this case as individuals, but were able to use a class action to obtain just compensation for the discrimination against them.
- And perhaps more importantly, they were successful in altering Texaco's systemic discriminatory practices.

This is a perfect example of why we need to tread carefully in reforming the class action system.

I am concerned that this bill sweeps too broadly and, in so doing, would result in more harm than good.

My concerns center on two areas.

First, the bill drastically lowers the threshold for removing a case to federal court.

- The proponents claim there are problems with the current requirement of complete diversity, but I disagree that the solution is to change the law to the complete opposite end of the spectrum, which is minimal diversity.
- Minimal diversity would allow for removal of cases to federal court if any class member is a citizen of a different from any defendant.
- Let me give you an example of the kind of cases that will be affected by this bill.

TOBACCO CASES

Class action lawsuits have been an indispensable tool in recent efforts to hold the tobacco industry accountable.

Most tobacco class action litigation occurs in state courts. This arrangement makes sense because the cases typically involve purely state law claims.

But this bill will allow tobacco companies to routinely remove or at least attempt to remove cases to federal court where it is more difficult for class certification to occur.

In general, the tobacco industry prefers to litigate in federal court and this bill corresponds perfectly with their strategy.

GUN VIOLENCE

Another example of class actions that will be affected is in the area of gun violence.

Litigation is the primary way to ensure that the gun industry takes responsibility for the safety of its products.

It would be a disservice to the more than 100 thousand individuals injured by firearms each year to hinder the progress of these suits by giving gun manufacturers the option of removing the case to federal court where the result will be increases in costs and significant delay.

My second concern is that in transferring so many class actions—among the most resource-intensive of all litigation—to federal court, we will place a tremendous burden on federal courts.

- Federal judges have already seen their caseloads rise substantially over the last five years.
- The number of civil and criminal filings per district judgeship climbed 16 percent to 484.
- The number of appeals filed grew 11 percent.
- Despite these increases, no new judgeships have been created in 8 years and there are currently 65 vacancies in the Federal Judiciary.
- These discouraging statistics prompted Chief Justice Rehnquist to call the federal judiciary "a victim of its own success." In short, people like federal courts so much that they want to pursue their cases there.

- In the past few years, Congress has continued to expand federal jurisdiction to areas that were typically the exclusive province of state courts. Yet, Congress has failed to provide the courts with the resources they need to handle them.

I will conclude my remarks by quoting again from Justice Rehnquist. He made these remarks in response to legislative proposals to increase the jurisdiction of the federal court:

> If the ill effects from these bills were confined to the increase of the workload of the federal judiciary, they would still be of concern to judges and to the legal profession. But there is a much broader question involved. How much of the complex system of legal relationships in this country should be decided in Washington, and how much by state and local governments?

That is a fundamental question of which we must not lose sight. Thank you.

Senator GRASSLEY. It is my privilege now to call on our first witness, and that is Senator Kohl. Senator Kohl has worked very closely and hard with me on this subject and I appreciate his cooperation, and I would like to hear your testimony at this point.

STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman. Mr. Chairman and members of this subcommittee, let me thank you for convening this hearing today on class action abuses. Mr. Chairman, it has been a pleasure working with you on legislation to help ensure that victims stop being shortchanged, while their lawyers line their pockets with exorbitant fees.

Let me just give you one disturbing example offered by one of my constituents, Martha Preston, of Baraboo, WI, who testified before this subcommittee less than 2 years ago and whose case I believe Senator Sessions referred to just a few minutes ago. Ms. Preston was an unnamed member of a class action lawsuit against her mortgage company. While she did not initiate the suit, the class action lawyers were supposed to represent her. Instead, they negotiated a settlement that was, at best, a bad joke.

Initially, she "won" 4 dollars and change. A few months later, however, her lawyers went into her escrow account and secretly took $80—20 times the compensation that she has received. In total, her lawyers managed to pocket over $8 million in fees, but never explained to the court or to their own clients that the class, not the defendant, were paid the attorneys' fees.

Naturally outraged, she and others sued the class lawyers, but her suit was turned away on a technicality by a divided Federal court, even though Judge Easterbrook and other dissenting judges blamed the class action lawyers for, "pulling the wool over the State judge's eyes," and complained that unfair class action settlements are too easily, "crammed down the throats" of overmatched victims.

Adding insult to injury, the lawyers turned around and sued her in Alabama, a State she had never visited, and demanded an unbelievable $25 million. So not only did she lose $75, she was forced to defend herself from a $25 million lawsuit. Mr. Chairman, in the words of Woody Allen, "this is a travesty of a mockery of a sham of justice."

Even class action lawyers admit there is a problem. The National Association of Consumer Advocates complains that, "some * * * newcomers have brought with them a relatively new brand of con-

sumer advocacy, one in which the lawyers stand first, if not alone, in the benefits line at the time of settlement. Simply put, many consumer class actions are now being settled on the basis of what the lawyers get and not what the consumers in the class get." And Public Citizen agrees that, "all too often, class action settlements are approved with little or no judicial scrutiny," citing a study finding that 90 percent of all class settlements are approved without amendment.

Fortunately, there are a few steps that we can take to weed out the worst abuses, while still protecting what is basically an effective process for vindicating rights. We don't want to close the courthouse doors to important class action claims, and we don't have to.

Mr. Chairman, that is why you and I have introduced the Class Action Fairness Act of 1999. This measure, which you described so eloquently, protects victims from being dragged into lawsuits, unaware of their rights and unarmed on the legal battle field. By promoting more disclosure and closer scrutiny, it gives regular people back their rights and their representation.

Mr. Chairman, I hope my own balanced record on these types of issues adds credibility to our measure. Just today, I reintroduced the "Sunshine in Litigation Act," which addresses the growing use of secrecy orders by Federal courts that too often allow vital public health and safety information that is discovered in litigation to be covered up, to be shielded from mothers, fathers and children whose lives potentially are at stake. Unlike our class action reform, this is a proposal that trial lawyers support and some business groups resist.

Whether it be secrecy in courts or class action reform, doing what is right is what counts. And regardless of where the special interests line up, our Class Action Fairness Act is a terrific place to start. Of course, this is not a final product; we continue to remain open to further negotiations. But, Mr. Chairman, this is a balanced approach that corrects the worst abuses while still preserving the benefits of class actions. So I look forward to working together with you and others to move this forward.

Thank you, Mr. Chairman.

Senator GRASSLEY. And I accept your offer, obviously, as we do continue our partnership on this bill.

Senator Thurmond or Senator Sessions, any questions from either one of you?

Senator SESSIONS. No, Mr. Chairman. Thank you, Senator Kohl, for your comments.

Senator GRASSLEY. Thank you very much, Senator Kohl.

[The prepared statement of Senator Kohl follows:]

PREPARED STATEMENT SENATOR HERBERT KOHL

Mr. Chairman and members of the Subcommittee, let me thank you for convening this hearing today on class action abuses. Mr. Chairman, it has been a pleasure working with you on legislation to help ensure that victims stop being shortchanged, while *their* lawyers line their pockets with exorbitant fees.

Let me give you just one truly disturbing example, offered by one of my constituents—Martha Preston of Baraboo, WI—who testified before this Subcommittee less than two years ago. She was an unnamed member of a class action lawsuit against her mortgage company. While she did not initiate the suit, the class action lawyers were *supposed* to represent her. Instead, they negotiated a settlement that was, at best, a bad joke.

Initially, she "won" four dollars and change. A few months later, however, her lawyers went into her escrow account and secretly took $80—20 times the compensation she received. In total, her lawyers managed to pocket over $8 million in fees, but never explained to the court or *to their own clients* that the class—not the defendant—would pay the attorneys' fees.

Naturally outraged, she and others sued the class lawyers. But her suit was turned away on a technicality by a divided Federal court, even though Judge Easterbrook and other dissenting judges blamed the class lawyers for "pulling the wool over the state judge's eyes" and complained that unfair class action settlements are too easily "crammed down the throats" of overmatched victims.

Adding insult to injury, the lawyers turned around and sued her in Alabama—a state she had never visited—and demanded an unbelievable $25 million. So not only did she lose $75, she was forced to defend herself from a $25 million lawsuit. Mr. Chairman, in the words of Woody Allen, "this is a travesty of a mockery of a sham of justice."

In too many cases, victims are dragged into lawsuits unaware of their rights and unarmed on the legal battlefield. In the end, they get little or nothing, while their lawyers cash in. Some of these suits may be frivolous. Even when the claims are real, defendants often collude with class lawyers—leaving defendants with protection from future lawsuits under unreasonably favorable terms, class lawyers with padded wallets, and class members out of luck. And courts, who never hear from anyone looking out for the victims' best interests, often don't give class actions the close scrutiny they deserve.

Even class action lawyers admit there's a problem. The National Association of Consumer Advocates complains that "some * * * newcomers have brought with them a relatively—new brand of consumer advocacy—one in which the lawyers stand first, if not alone, in the benefits line at the time of settlement. Simply put, many consumer class actions are now being settled on the basis of what the lawyers get and *not* what the consumers in the class get." And Public Citizen agrees that "all too often class action settlements are approved with little or no judicial scrutiny," citing a study finding that 90 percent of all class settlements are approved without amendment.

Fortunately, there are a few steps we can take to weed out the worst abuses, while still protecting what is basically an effective process for vindicating rights. We don't want to close the courthouse doors to important class action claims. And we don't have to.

Mr. Chairman, that's why you and I have introduced the Class Action Fairness Act of 1999. This measure promotes more disclosure and closer scrutiny. And it gives regular people back their rights and their representation.

First, it invites third parties—namely, state Attorneys General—to look out for consumers by requiring they be notified about proposed class settlements that would affect residents of their states. This provision has been endorsed by Wisconsin's Attorney General Jim Doyle, who also is President of the National Association of Attorneys General. Second, it promotes better disclosure to class members, by requiring notice in *plain English*—not *legal jargon*—of the terms of a proposed settlement, including the source of attorneys' fees. Third, it makes class lawyers think twice about "scam" settlements by limiting attorneys' fees to a reasonable percentage of the *actual* damages received by class members, rather than letting them reap big fees based on inflated "estimates" of the value of unlikely-to-be-used $5 coupons.

Finally, it permits unnamed plaintiffs or defendants to remove multi-state class actions to Federal court, where judges are likely to give closer scrutiny and have the ability to consolidate related cases, in order to prevent a "race to settlement" between competing cases and competing class lawyers.

Let me emphasize the limited scope of this legislation. Unlike some proposals out there to move from "opt-out" to "opt-in" procedures, we do not close the courthouse door to any class action. And we do not require that state attorneys general do anything with the notice they receive. We do not deny reasonable fees for class lawyers. Nor do we mandate that every class action be brought in Federal court.

These proposals have earned a broad range of support. Even Judge Paul Niemeyer, the Chair of the Judicial Conference's Advisory Committee on Civil Rules, who has testified before Congress on this issue, expressed his support, calling this a "modest" measure, noting in particular that increasing federal jurisdiction over class actions will be a positive "meaningful step."

Mr. Chairman, I hope my own balanced record on these types of issues adds credibility to our measure. Just today, I've reintroduced the "Sunshine in Litigation Act," which addresses the growing use of secrecy orders by Federal courts that too often allow vital public health and safety information that is discovered in litigation to be covered up, to be shielded from mothers, fathers and children whose lives are

potentially at stake. Unlike our class action reform, this is a proposal the trial lawyers support and some business groups resist.

Whether it be secrecy in courts or class action reform, doing what is right is what counts. And, regardless of where the "special interests" line up, our Class Action Fairness Act is a terrific place to start. Of course, this is not a final product. We continue to be open to further limitation of the removal provision, and you have indicated that you may be able to live without the mandatory Rule 11 penalties, which inexplicably raise loud concerns.

But Mr. Chairman, this is a balanced approach that corrects the worst abuses, while still preserving the benefits of class actions. I look forward to working together to move it forward. Thank you.

Senator GRASSLEY. Three or four administrative matters before we call the next three panels, and I will obviously call the next three panels separately. Everybody's full written testimony will be put in the record as submitted to us, so your entire statement will become part of the printed record. Therefore, we ask you to summarize your oral testimony in 5 minutes. That is when the red light goes on, and then obviously if you are in the middle of a sentence or in the middle of a paragraph, finish it, but we would like to keep everybody to the limit so we get through because there will be a lot of questions to be asked and we want Members to be able to participate.

One other administrative thing, and that is that for Members who are here or for Members who aren't here, you can expect that we won't be able to ask all of our questions orally, so some will be submitted for answers in writing. We would like to have those answers provided to us in writing within 2 weeks from today. If that is an inconvenience for somebody, tell us what would be a good time for you and we will try to accommodate you, but normally we would like to do that in 2 weeks.

On our second panel now, I introduce Assistant Attorney General Eleanor Acheson, who will be testifying about the Justice Department's views. I welcome you and thank you for your cooperation in providing testimony for your Department and for your participation in the hearing. I would ask you to proceed.

STATEMENT OF ELEANOR D. ACHESON, ASSISTANT ATTORNEY GENERAL, OFFICE OF POLICY DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Ms. ACHESON. Thank you, Senator Grassley. Good afternoon. I appreciate the opportunity to appear before the Subcommittee on Administrative Oversight and the Courts to lay out the Department of Justice's views regarding the proposed Class Action Fairness of 1999, S. 353.

I have submitted a more extensive written statement for the record. That statement describes the Department's concerns with each of the sections of the bill. To keep my oral statement short, I will focus on those provisions of S. 353 that would effectively federalize class actions, and then address whatever questions you have, Senator Grassley, or any of the other Members. By so limiting my opening statement, however, I don't mean to minimize our other concerns that are described in the written statement.

Sections 3 and 4 of S. 353 would effectively federalize most State class actions by providing Federal jurisdictions for class actions in which any plaintiff is diverse from any defendant in the action. S. 353 further provides that if a State class action is removed to Fed-

eral court and then is not certified as a class action under Federal rules, the Federal court is to remand the case to the State court, stripped of its class allegations. In other words, even if the case could have proceeded as a class action under the law of the State, S. 353 would effectively require the State to try each individual claim separately.

The ability to consolidate large numbers of claims in court is tremendously important. When there are large numbers of individuals, each of whom has been significantly harmed, but the potential recovery is insufficient to support an individual lawsuit, a class action is virtually the only way these individuals can seek redress through the legal system. Plaintiffs, defendants, and the system of justice all benefit from the efficiencies resulting from consolidated consideration of multiple claims with common questions of fact and law.

Because the class action mechanism is so important, we should be cautious in curtailing access to it, do so only on indications of clear and undisputed failures or abuse, and make sure that any limitations or changes to this procedure are closely tailored to the specific problems identified.

S. 353 is apparently intended to address a perception that State courts are too ready to certify class actions. Of course, State courts are subject to the constraints of due process, as are Federal courts. We do not believe that a difference between State and Federal class certification standards justifies Federal action. To the extent that there have been concerns about ex parte certifications in State courts, the States themselves appear to be remedying that situation.

S. 353 also apparently is intended to address concerns that certification of nationwide class actions by State courts permits individual States to impose their own law on the Nation as a whole and leads to extorted settlements and other abuses by class action attorneys. If this is indeed an endemic problem, legislation addressing State certification of nationwide classes may be in order, but S. 353 does not take this approach.

Instead of focusing on what the appropriate limits on State authority to bind out-of-state plaintiffs ought to be, S. 353 would permit removal to a Federal court of nearly all State law cases that otherwise would be heard in State court. Implicit in this provision is the belief that class certification is more difficult to obtain in Federal court, since otherwise removal to Federal court would not reduce the possibility of extorted settlements.

Again, we do not believe that Federal policy concerning class actions is sacrosanct. States, within the constraints of due process, should be free to establish their own policies. Moreover, the instances generally cited as evidence of abusive or collusive class action settlements can and have occurred in Federal as well as State courts. If the Congress believes that courts are approving unjustifiable class action settlements, Congress certainly has the authority to address that issue in Federal class actions, and provide models for States to follow, if appropriate.

There are certainly examples of class actions in which settlements appear to provide benefits primarily to lawyers and defendants rather than to the injured plaintiffs. There are class actions

in which the purported nationwide reach of the State court seems problematic. Perhaps there are particular classes of cases—the Judicial Conference has been considering whether mass torts constitute such a class—that appropriately should be tried in Federal court, even absent the traditional grounds for Federal jurisdiction.

We would be pleased to work with the members of this subcommittee and with the Congress to determine whether there are specific, systemic problems with class actions that warrant a Federal response and to help craft such a response.

Thank you.

Senator GRASSLEY. Thank you very much. I will start out with questioning and we will have 5-minute rounds of questioning, and I thank you for your timeliness as well.

Your testimony makes reference to perceived abuses in class actions. Yet, both the House and Senate have received abundant testimony regarding these abuses. Moreover, as I referred to in my opening statement, there have been several studies documenting that class action filings are dramatically on the rise. Many academics and judges acknowledge that the class action rule has gone beyond what was originally intended.

So my question to you—really, two questions and then a question that kind of summarizes—Are you saying that there is no systemic problem with the class action system? Are you saying that there are no real issues of consumer exploitation and attorney misconduct in regard to class actions? And does the Justice Department have any data indicating that the information that we have about the tidal wave of State court actions is just plain wrong?

Ms. ACHESON. I am certainly not saying that the studies that you refer to don't indicate that there are some problems. I think my answer, Senator, is no to your first two questions. And with respect to your third question about there being a tidal wave of class actions in State courts, I think I would say that, first of all, a tidal wave of any kind of litigation in any particular forum doesn't necessarily in and of itself indicate that there are any problems.

Getting back to your first question, it is clear, I believe, that there are certainly excesses, abuses and failures of courts and court systems, it would appear, to in some cases, both respect to procedural aspects—we have talked about the ex parte certification—and some substantive aspects, effectively police class actions. Nobody is disputing that there are those cases.

They occur both in State and Federal courts, however, and one of our points about this bill and the problems that it intends to target, which I think we would all agree should appropriately be addressed, is that this bill doesn't, in federalizing class actions, in taking State class action cases into the Federal court, necessarily address those problems.

And so I think that is what we are saying. We are not saying that there aren't problems. I think we are saying, and I think the RAND study——

Senator GRASSLEY. Maybe you could help us by suggesting, since there are some problems, what you might suggest to fix as to what you consider to be a problem.

Ms. ACHESON. Well, first of all, I don't purport to be an expert in this area, but it looks as if the studies that have been done—

I have not read the Federalist Society study, but we will certainly look at that immediately—indicate a couple of problems that do exist. One of them, which has been the procedural problems that sometimes occur, it appears, at least, in certain State court systems are beginning to be addressed by State courts themselves.

Senator Sessions didn't refer to this, but one of the problems procedurally has been a practice—I don't know whether it was just in some counties in Alabama, but of ex parte certification of class actions. Perhaps that occurs in other State systems, but now the Supreme Court of Alabama has fixed that problem and it is no longer appropriate as a procedural way to go forward.

On the more substantive side, it seems to me that another of the problems that have been identified, and I think people rightly are concerned about, is the extent to which a State court that has jurisdiction of a nationwide class action can effectively apply its State law to out-of-state plaintiffs. And while there are some Supreme Court cases which indicate the limits that due process allows in such circumstances, I would think that Congress could appropriately legislate within those limits and cut back to some extent there.

So it would seem to me that might be one approach to get to the business that is much commented on, which is how appropriate is it for a State court somewhere to be binding an out-of-state plaintiff.

Senator GRASSLEY. Could I ask you one more question while I still have time?

Ms. ACHESON. Absolutely, Senator.

Senator GRASSLEY. You raise concerns about federalizing class actions. Aren't multi-State plaintiff class actions exactly the kind of cases that should be in Federal court? Wouldn't you agree, as Professor Elliott will testify, that the Constitution's only limitation on diversity jurisdiction is Article III's requirement that controversies be between citizens of different States, but rules governing complete diversity, minimum amount in controversy, and removal are really political decisions not mandated by the Constitution? Those latter words are his.

Because we are dealing with interstate class actions involving plaintiffs and defendants from many different States, shouldn't the Federal courts be at the very least an option for these litigants? Don't you think that due process dictates that?

Ms. ACHESON. Well, I guess, Senator, I would say that I don't believe due process dictates that. I would agree with Professor Elliott that I think the Constitution allows it, but I certainly don't think due process dictates it. I think that there are federalism interests that are implicated here that we need to be concerned about because there certainly are both sets of circumstances and absolutely fully competent State court systems and groups of judges who can handle class action cases.

And somewhere between what the Constitution would allow and some of the excesses that I know occur and have been vividly described here today, I think we can craft some lines and some sets of rules that would get at some of the abuses that have been described, but perhaps not have the effect of pushing so many cases into the Federal system.

Senator GRASSLEY. Senator Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman. Mr. Chairman, I have another engagement and have to leave. I understand Mr. Steve Morrison, a distinguished attorney from South Carolina, is one of the witnesses here today, and I wish to welcome him. I would like to ask unanimous consent that I may submit some questions for the record.

Senator GRASSLEY. Yes. Senator Thurmond is an example that I just spoke about that there will be some questions submitted for answer in writing.

[The questions of Senator Thurmond are located in the appendix.]

Senator GRASSLEY. The Senator from Alabama.

Senator SESSIONS. Thank you. Ms. Acheson, I am disappointed, I guess, that your statement is so strongly adverse to this. It strikes me that we have a magnificent legal system in America, but it is appropriate to reform it and change it as we have evidence to suggest that there are problems.

I think this administration is basically resisting all attempts to reform tort law in America, and I think we need to reach an accord where we can communicate on how to make it better. That is just an observation. You probably disagree with that, but I think we are not giving serious thought to it and we need to work together to get some changes.

Let's take a typical class action, maybe a credit card interest error, maybe a product defect, a medical defect that is sent to 50 different States in America. Just as a matter of public policy, wouldn't it be better that that case be settled and handled in a Federal court, where the U.S. Supreme Court may ultimately decide an issue, as opposed to the plaintiffs being able to search 50 States and then finding the most favorable law and then find the county or circuit within that State that would be most favorable to their lawsuit and filing it there? Just conceptually, isn't this the kind of case that would be more appropriate in Federal court?

Ms. ACHESON. Well, I think it is hard, on a relatively bare-bones hypothetical, Senator, to really get into all the competing interests. But the way that you have presented the matter, it would seem to me that probably in a case where you do have victims/plaintiffs in all 50 States, it might well be the type of a case that would be most effectively and appropriately handled in a Federal court. But it sort of depends on what law would be applied because it may well be that that Federal court is applying, unless there is some basis for Federal jurisdiction, simply the law of one of the 50 States where the occurrence, whatever it was, the accident, the fraud, the negligence, the whatever, took place.

So I think that one thing that really needs to be examined is what is really the culprit here. Is the culprit people searching out the best substantive law, or is the culprit people searching out the weakest sort of procedural structures that they can manipulate?

Senator SESSIONS. Well, good lawyers are going to seek the most favorable forum in the whole world, if you allow them to. They are not good lawyers if they don't, and I think it is our job to make sure we have got a system that creates a favorable forum for both parties, not just one party.

We have certainly had complaints and evidence to suggest that plaintiff lawyers and defendants have gotten together in pre-trial negotiations and agreed to settlements that provide little for the victims, but allow large attorneys' fees for the attorneys. And then they find a favorable State court somewhere and go in and present a settlement, and little has been done by the judge to go behind that settlement to make sure it is just. Are you familiar with that problem?

Ms. ACHESON. That is certainly one of the problems that has been written about. I can't say I am personally familiar, but you are absolutely right. It is one of the specific problems that many people identify.

Senator SESSIONS. Well, I believe we have a situation in which we have a class of cases that would be appropriate in Federal court because not only some specific act of interstate commerce is involved, but the entire matter is usually deeply involved in interstate commerce. You have a Federal court system that therefore can provide a universal system of law that private industries and businesses can know what the law is and protect themselves better, and would avoid aberrational results.

I mean, why would you say these lawyers from Chicago want to file a lawsuit like this in a rural county in Alabama? The six counties in Alabama—I don't believe any of them have over 20,000 people in them. Why would they pick those counties to file lawsuits if they didn't think there was some specific advantage?

Ms. ACHESON. I assume you are right in that. I assume you are right, and I would only say this just to underscore the main theme of our comment. One is we are absolutely not opposed to class action reform. Two, we are simply concerned that particularly with regard to the two or three major problems that have been articulated that this legislation does not get at it. And, three, Senator, we are more than ready to sit down and address specifically your concerns of how to get at some of these problems.

What we are concerned about is that federalizing is not the answer because there really isn't any whole system of law that a Federal court or any State court can apply in some of these cases. I think the question is what can we do substantively, but also what can we do to have appropriate cases be in the Federal system and to shore up the State systems with respect to the kind of policing that may need to happen in some of these areas. But we, I want to underscore again, are more than ready to work with you and with the chairman of this subcommittee on this issue.

Thank you very much.

Senator SESSIONS. Well, we have criminal laws and other laws that are very tenuously connected, lawsuits over employment that have tenuous interstate commerce connections. But often the class actions are just intrinsically interstate commerce and I think they are most appropriate for this handling.

Thank you.

Senator GRASSLEY. Right now, there are State courts that, in dealing with large class actions, are dictating the laws of other jurisdictions. Does it make sense to you that a court in Illinois is dictating to a resident of Massachusetts what their law means?

Ms. ACHESON. Well, I am not sure whether or not it makes sense to me. I guess, Senator Grassley, what I believe our concern is is that this bill does not necessarily address that problem. If that case were brought in the Federal court in Illinois and was determined to be appropriate for class handling, the Federal court might well be applying the substantive law of Illinois or Oklahoma or——

Senator GRASSLEY. That gets to my point. Isn't the Federal court in these instances better suited to do this?

Ms. ACHESON. I am not sure why that is intrinsically so.

Senator GRASSLEY. Well, I mean isn't that what Federal courts are supposed to do when they preside over Federal diversity cases?

Ms. ACHESON. Well, there are class actions and other kinds of group actions brought in the Federal court on Federal bases, and then when there is diversity, obviously, they deal with the State law. But State courts have for 200-plus years dealt with the laws of their sister States. I mean, I think that just on that sort of precept alone, there is nothing that is magical about the Federal courts.

Senator GRASSLEY. Well, I am in a situation, not a real situation but a hypothetical situation, of my constituents—explaining to them that their rights were adjudicated in a suit that they never knew about, never consented to participate in. It was heard by a State court judge who is elected by people in another State and has no accountability to the citizens of my State of Iowa, and there is nothing an Iowa citizen or court can do about it if the case is settled. To me, that is a problem. You don't see that as a problem?

Ms. ACHESON. No. I do see that—first of all, I certainly see it as a multi-layered problem that people might well have objections to. What I think I am trying to say, Senator, is that whether it is in Federal court or State court I don't think is the answer to that problem. I think the answer to that problem is some of the notification provisions and the whole idea of clearer notice to parties, the opportunity to opt out.

If somebody does get notice, they know what the benefit of staying in might be and what the consequences of getting out and seeking to bring their action might be. I think there are some other ways to get at that very problem. But simply changing the forum doesn't change—the Federal court may be stuck with exactly some of the same procedural shortcomings that you are talking about. There is no guarantee, because a matter is in Federal court, that the non-in-state plaintiff is going to know any more, is going to be any further informed or better protected just based on which court it is in.

Senator GRASSLEY. Well, thank you very much.

Do you have another question?

Senator SESSIONS. I would just like to say that Texas is also a favorite spot, and they have had a 338-percent increase in these filings. Alabama is not the only one. I didn't want to suggest that, but we do have a problem and I have been made aware of it. I had the Attorney General from New Hampshire come down 3 years ago when I was Attorney General of Alabama and wanted my assistance to help intervene in one of these class actions that involved his constituents in New Hampshire.

What you say about this, in theory, is correct, but our Founding Fathers were practical people. They created separation of powers and they understood home cooking. That is really why we have diversity jurisdiction, so out-of-state defendants can get a less home-flavored court and jury. Isn't that what we have really got here in these class actions, a classic diversity case, but because of its unusual nature can be pled in such a way that it doesn't implicate the diversity rules? Isn't that why we ought to make some reform?

Ms. ACHESON. Well, I certainly think that based on some of the examples that have been given here, it would seem to me to be certainly, if not right over the edge, casting a shadow on abuse of the law, if not the spirit. In those cases, we should come up with some reforms.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Ms. Acheson. We appreciate your cooperation.

Ms. ACHESON. Thank you, Senator.

[The prepared statement of Ms. Acheson follows:]

PREPARED STATEMENT OF ELEANOR D. ACHESON

Good afternoon. I appreciate the opportunity to appear before this Subcommittee on Administrative Oversight and the Courts to express the Justice Department's views regarding the proposed Class Action Fairness Act of 1999 (S. 353).

INTRODUCTION

The Class Action Fairness Act of 1999 (S. 353) proposes to deal with perceived abuses in state class actions by effectively federalizing class actions. Sections 3 and 4 of S. 353 are substantively identical to H.R. 3789, a bill considered by the House in the last Congress. Last October, the Administration issued a Statement of Administration Policy that stated that the Attorney General would recommend that the President veto H.R. 3789 if it were presented to him. *See* Statement of Administrative Policy (issued Oct. 5, 1998). S. 353 raises the same concerns as H.R. 3789. Moreover, it includes a number of additional provisions that raise additional concerns on policy and its constitutional grounds. Accordingly, the Department strongly opposes S. 353.

Before addressing the specific provisions of S. 353, I would like to review the importance of class action procedures and the significance of the provisions of S. 353 that would federalize most class actions. When there are large numbers of individuals, each of whom has been significantly harmed, but the potential recovery is insufficient to support an individual lawsuit, a class action is virtually the only way these individuals can seek redress through the legal system. Even when the harm to some or all of the individual victims might justify individual lawsuits, class actions are by far the most efficient means of resolving large numbers of claims that have common questions of fact and law. Indeed, court systems can be overwhelmed by large numbers of similar claims, delaying and even denying justice to plaintiffs. Class actions provide efficiency benefits to defendants as well, permitting resolution of multiple claims in one proceeding. Plaintiffs, defendants, and the system of justice all also benefit from the reduction in or elimination of inconsistent verdicts. Because the class action mechanism is so important, we should be cautious in curtailing access to it, do so only on indications of clear and undisputed failures or abuse, and make sure that any limitations or changes to this procedure are closely tailored to the specific problems identified.

S. 353 would address perceived abuses in class actions by federalizing them—providing federal jurisdiction and removal authority for almost all non-securities class actions. We do not believe that the case has been made that there are abuses intrinsic to state court class actions that justify the wholesale removal of these cases from state courts. There have been cases raising concerns from state courts, but also from federal courts, and the anecdotes about state cases seem to reflect problems with individual judges or particular locales rather than systemic problems in states' handling of class actions. Unless the claimed abuses of class actions are peculiarly a state court or state law problem, federalization would not address the problems.

A related, and, we believe, crucial aspect of our consideration of S. 353 is that we live in a federal system. states should be able to create the remedies in their courts that the states conclude best serve the interests of their citizens. S. 353 would federalize class actions involving only state law claims—claims based on federal law already can be brought in federal court under federal question jurisdiction. We should await evidence of clear necessity before the federal government interferes with the authority of states to set their own law and procedures in their courts, and that evidence should demonstrate that the states have broadly overreached or are unable to address the problems themselves.

Finally, we are all aware that federal class actions standards have been narrowed considerably by court interpretation in the past decade or so. There is much debate over whether this is a good or bad thing, but the very existence of the debate makes clear that there are public policy choices to be made. There is nothing sacrosanct about federal choices. When assertions are made that states certify class actions that "should not" be certified, or approve settlements that "should not" be approved, we need to be sure that such statements are not simply expressions of policy differences. In a system of federalism, state public policy choices should not be overridden without a showing of compelling national need. There must be evidence of harm to interests of national scope that require a federal response, and even with such evidence, federal preemption should be limited to remedying specific problems with tailored solutions, something that S. 353 does not do.

There are certainly examples of class actions in which settlements appear to provide benefits primarily to lawyers and defendants rather than to the injured plaintiffs. There are class actions in which the purported nationwide reach of a state court seems problematic. Perhaps there are particular classes of cases—the Judicial Conference has been considering whether mass torts are such a class—that appropriately should be tried in federal court even absent the traditional grounds for federal jurisdiction. We would be pleased to work with the Members of this subcommittee and with the Congress to determine whether there are specific systemic problems with class actions that warrant a federal response and to attempt to craft such a response.

I would now like to turn to the specific provisions of S. 353.

SECTION 2—NOTIFICATION REQUIREMENTS

Section 2 of the bill requires notification of the Attorney General and state attorneys general of proposed settlements in class actions, requires that hearings on proposed settlements be delayed for 120 days after notification, imposes plain language requirements on class notices, and limits attorneys' fees in class actions. We have the following concerns about the provisions in this section.

1. Notification of the Attorney General

Requiring notice to the Attorney General of all class certifications and settlements is unnecessary and burdensome, both to the litigants and the Attorney General. Under this provision, the Department is likely to be inundated with notices in cases in which the Federal government has no interest. We note that the statute does not indicate what the Attorney General is supposed to do with the notices or the information contained in them. In addition, despite the provision in the bill that these notice requirements impose no legal obligations on the Attorney General, the Attorney General's silence in response to notices may in some cases be interpreted as acquiescence, if not approval.

2. Instructing State-court judges as to the timing of hearings on proposed class action settlements

Section 2's requirements concerning notice of proposed settlements in state court class actions and hearings on those proposals implicate constitutional principles of federalism. Section 2 would require, for example, that judges in state as well as Federal courts to wait at least 120 days after service of settlement documents on state and Federal attorneys general before convening any hearing to evaluate the fairness of a proposed class-action settlement. Such procedural directions to state judges, although constitutional in our view, could be subject to significant constitutional challenge as an impermissible infringement on the states' sovereign authority to determine the manner in which state courts adjudicate state law claims.[1]

[1] *See Johnson* v. *Frankell,* 117 S. Ct. 1800, 1805 (1997) (recognizing a "general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, * * * that federal law takes the state courts as it finds them") (internal quotations omitted). *But see also Printz* v. *United States,* 117 S. Ct. 2365, 2371 (1997) (noting that at least some types of Federal in-

3. Notice and attorneys fees provisions

The notification provisions of section 2 would create a number of difficulties in class actions. First, it is often difficult to determine the current residence of all members of a plaintiff class. This would necessitate providing notice to the attorneys general of all fifty States in order to ensure that agreements are enforceable against class members who generally could not otherwise opt out. The 120-day advance notice requirement follows general practice in most cases, but would not permit an expedited settlement even if the court and parties agreed in a particular case that it was necessary.

Finally, the proposed limitation on attorneys' fees could create a number of problems. It is not clear why class actions brought under particular substantive rules of law should have different attorneys' fees rules than other cases involving the same rules of law. For example, it is not clear why Title VII class actions involving classes of current and former federal employees, which the Department defends on behalf of the United States, should have different attorneys' fees rules than all other Title VII cases. Title VII, like other employment discrimination statutes, has its own fees provision and there is a well-established body of law concerning what is and is not permitted. One of the principles established by that body of law is rejection of the kind of proportionality set forth in proposed section 1714(a). Courts recognize that civil rights cases often concern equitable rather than monetary relief, and that attorneys may be unwilling to pursue these cases (or Title VII cases subject to caps on recovery) if they will not be paid for their efforts. Proposed subsection 1714(b), which permits courts to base attorneys' fees on a reasonable lodestar calculation, provides some, but not enough, correction. A reasonable lodestar is often the beginning rather than the end of fee calculations in Title VII cases. Multipliers are available for particularly complicated cases or for experienced plaintiffs' counsel. The interests of both plaintiffs, the courts, and even defendants are best served by not discouraging experienced and knowledgeable counsel from taking on these cases.

SECTIONS 3 AND 4—CLASS ACTION JURISDICTION AND REMOVAL FROM STATE TO FEDERAL COURT

Under current law, Federal district courts have jurisdiction in diversity cases only when *all* plaintiffs are diverse from *all* defendants. That is, no plaintiff can be a citizen of any State of which any defendant is a citizen. Section 3 of S. 353 would change that rule for class actions alleging State law claims. Under S. 353, Federal district courts would have jurisdiction in such cases as long as *any* class member was a citizen of a State different from any defendant. Section 4 of S. 353 would permit any defendant (without the concurrence of the other defendants) to remove such a case from State to Federal court. Once removed to Federal court, the case would be governed by Federal law concerning class actions. In the event that the Federal district court did not certify the proposed class, S. 353 provides that the case would be remanded to State court stripped of its class allegations.

S. 353 provides exceptions for corporate governance and securities class litigation. The legislation also *permits* Federal courts to abstain from hearing class actions against State government entities or officials against whom Federal courts may not be able to order relief.[2] S. 353 also *permits* Federal courts to abstain from hearing class actions in which the "primary defendants" and a "substantial majority" of the members of the plaintiff class are from the same State and that State's law governs the action. This exception is not likely to produce a significant reduction in the number of State class actions subject to removal. Defendants in class actions are likely to be corporate entities whose citizenship has no necessary relationship to where claims against them arise, so the exception for cases in which plaintiffs and defendants are predominately citizens of the same State is likely to apply to few cases.

Because the exceptions in S. 353 are likely to be insignificant, the effect of this statute would be to grant defendants the option of State or Federal court in almost all State class actions. In addition, since cases not certified in Federal court would be remanded to State court stripped of their class allegations, the bill would effectively federalize class action standards. This latter result would not be affected by the provision in the legislation that permits plaintiffs to file amended class actions

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structions to state courts are exempt from the general proscription against the commandeering of State governmental institutions).

[2] This latter exception appears to be superfluous in light of *Pennhurst State School & Hospital* v. *Halderman,* 465 U.S. 89 (1984). In that case, the Supreme Court held that the Eleventh Amendment forbids Federal courts from ordering States and State officials to conform to State law.

upon remand, since S. 353 appears to permit defendants to remove the amended action to Federal court once again.

The bill apparently is intended to address a perception that State courts are too ready to certify class actions. Of course, State courts are as subject to the requirements of due process as Federal courts.[3] If there are class action procedures in State courts that protect the due process rights of the parties but are objectionable on policy grounds, these policy issues should be addressed in the State courts and legislatures. We do not believe that a mere difference between Federal and State class certification standards justifies Federal action. We live in a federal system and the States should be free to provide the remedies they consider appropriate in their courts. To the extent that S. 353 is directed at concerns about *ex parte* class certifications in certain states, state legislatures and courts are the appropriate bodies to address these concerns.[4]

S. 353 also apparently is intended to address concerns that certification of nationwide class actions by State courts permits individual States to impose their own law on the nation as a whole and leads to extorted settlements and other abuses by class action attorneys. If this indeed is an endemic problem, legislation addressing State certification of nationwide classes may be in order, but S. 353 does not take this approach. Instead of focusing on what the appropriate limits on state authority to bind out-of-state plaintiffs ought to be, S. 353 simply would permit removal to Federal court of nearly all State law class actions that otherwise would be heard in State court. Implicit in this provision is the belief that class certification is more difficult to obtain in Federal court, since otherwise, removal to Federal court would not reduce the possibility of "extorted" settlements. Again, we do not believe that Federal policy concerning class actions is sacrosanct and that the States, within the constraints of due process, should be precluded from establishing their own policies. Moreover, the instances generally cited as evidenced of abusive or collusive class action settlements have occurred in federal as well as state courts. If the Congress believes that courts are approving unjustifiable class action settlements, Congress certainly has the authority to address the issue in federal class actions and provide models for states to follow if appropriate. Finally, a recent study by the Federal Judicial Center found that "there were not objective indications that settlement was coerced by class certification." *See* Thomas E. Willging, *et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996), at 60, 90 (1996).

We note that S. 353 would permit the removal to Federal court of cases concerned solely with State law that are most appropriately tried in State court. For example, a class action brought under State law concerning a corporation's operations within the State would be removable to Federal court solely because a primary defendant happened not to be a citizen of the State, even if the defendant had substantial operations in the State. This bill would undermine the efforts of State courts to address State and local matters by allowing litigants to circumvent and render irrelevant the State court system. In our view, this provides further demonstration of why federalization of class actions is not an appropriate remedy for perceived class action abuse.

We also are concerned about the potential impact of this legislation on the Federal judiciary at a time when the Chief Justice of the United States has expressed serious concern about the marked expansion of caseloads of Federal courts. *See* Chief Justice Rehnquist, *The 1997 Year-End Report on the Federal Judiciary* at (I)(A). Preliminary data from RAND's ongoing study of class actions suggest that more than half of such litigation is in State courts. Class actions are among the most resource-intensive litigation before the judiciary. A study of class actions in Federal court by the Federal Judicial Center showed that class actions took two to three times the median time of a civil case from filing to disposition and consumed almost five times more judicial time than other civil cases. FJC, *Empirical Study of Class Actions in Four District Courts* at 7. By expanding Federal court jurisdiction for class actions and permitting removal from State courts, this bill could move most

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[3] In *Phillips Petroleum Co.* v. *Shutts* (472 US 797, 821–22 (1985), the court held that for a forum state to apply its law to non-residents in a nationwide class action, the state "must have a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts 'creating state interest,' in order to ensure that the choice of law is not arbitrary and unfair." The court held that if this test was not satisfied, violations of the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV would result.

[4] Indeed, the complaints about *ex parte* class certification have focused on one county in a particular state, and the Alabama Supreme Court has dealt with that problem. *See Ex parte Equity Nat'l Life Ins. Co.,* 715 So.2d 192 (Ala. 1997); *Ex parte Citicorp Acceptance Co.,* 715 So.2d 199 (Ala. 1997); *Ex parte First Nat'l Bank,* 717 So.2d 342 (Ala. 1997).

of this litigation into the Federal judicial system, potentially requiring substantial new Federal resources. Responsibility in this area should continue to be shared among both the Federal and State judicial systems.

In addition to these policy concerns, we believe that the bill's displacement of State-law class certification procedures could be subject to constitutional challenge on federalism grounds. As a general matter, Congress has the power to prescribe the manner in which Federal courts, in the exercise of their diversity jurisdiction, handle issues such as class action certification, "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna* v. *Plumer,* 380 U.S. 460, 472 (1965). However, sections 3 and 4 of S. 353 would expand the Federal courts' diversity jurisdiction in a highly selective fashion. Putative class actions that failed to meet the federal standard for class certification would be returned to state court in disaggregated form for individualized adjudications. The resulting displacement of States' decisions as to the proper role of class action procedures in the adjudication of State-law claims could be attacked as an impermissible form of federal interference in States' decisions as to how to structure the operations of the their own courts. Although we believe that these provisions are constitutional and that such a challenge should not succeed under current doctrine, there is a strong likelihood of constitutional litigation on this point.

SECTION 5—RULE 11

Section 5 of S. 353 would amend Rule 11 of the Federal Rules of Civil Procedure to require judges to impose sanctions upon finding a violation of Rule 11, instead of leaving the issue to the judge's discretion as is the case now. This provision would apply to all civil litigation, not simply class actions. We strongly oppose this provision for a number of reasons.

First, we believe that, barring an emergency requiring prompt legislation, amendment of the rules of procedure should proceed through the processes of the Rules Enabling Act, 28 U.S.C. §§ 2071, *et seq.* That act was created by Congress for the precise purpose of affording fair and thorough consideration, with an opportunity for comment by the public at large, to proposals for rules amendments. The Department strongly supports the Rules Enabling Act process. To the extent that any amendment to Rule 11 is necessary, it would be appropriate for the Advisory Committee on Civil Rules to make a proposal to the Judicial Conference Standing Committee on Rules of Practice and Procedure for consideration. Accordingly, we urge that the change proposed in S. 353 be submitted to the Judicial Conference or an appropriate committee of the Conference for review in the first instance, rather than being pursued directly through legislation.

Our second reason for objecting to the proposed modification of Rule 11 is that the modification is not directed at the problem S. 353 is intended to address. The modification appears intended to deter frivolous class actions, but Rule 11 applies to civil litigation generally. The impact on class actions of the proposed change is likely to be minuscule compared to its impact on other aspects of civil litigation. While we do not necessarily agree that class actions are a greater source of frivolous lawsuits than other kinds of civil actions, if any measures are to be taken to deter frivolous class action claims, the measures should be directed specifically at that issue.

We also object to the proposed modification of Rule 11 on substantive grounds. In 1983, sanctions under Rule 11 were made mandatory, as S. 353 would make them again. In 1993, sanctions once again were made discretionary in response to the "increased disruption" caused by the mandatory sanctions provision enacted in 1983. *See Proposed Amendments to the Federal Rules of Civil Procedure: Hearing Before the Subcomm. On Courts and Admin. Practice of the Senate Comm. on the Judiciary,* 103d Cong. 9–10 (1993) (statement of Sam C. Pointer, Jr., Chief District Judge for the Northern District of Alabama and Chairman, Advisory Committee on Civil Rules). Judge Pointer observed that the empirical studies of the Federal Judicial Center "amply support [the Advisory Committee's] conclusion that there has been an excessive and unproductive amount of Rule 11 activity" under the 1983 version of the rule. Judge Pointer further noted that the Judicial Conference accepted the view that "explicit discretion to decline imposition of sanctions is needed in order to deal with the problem of Rule 11 motions that raise technical, insignificant violations." Judge Pointer also recognized the concerns of the civil rights bar that "the 1983 version of Rule 11 had been used by defense counsel and some courts to 'chill' the development of potentially meritorious, yet untested and novel, claims." Thus, ample deliberation and research supported the change from mandatory to discretionary sanctions in 1993. No such research demonstrates the need for the revi-

sion to Rule 11. S. 353 would accomplish, particularly outside of the Rules Enabling Act process. For these reasons, the proposed revision to Rule 11 is unwarranted.

CONCLUSION

As discussed in my testimony, there may be discrete problems with class actions that need to be addressed. We would be happy to work with Members of this subcommittee and with the Congress to address any such problems. Nevertheless, we do not believe that federalization of class actions and imposition by the federal government of numerous requirements in state court class actions litigation is appropriate for the reasons we have set forth, and accordingly the Department of Justice strongly opposes enactment of S. 353.

Senator GRASSLEY. Our next panel is Mr. John Frank and Professor Don Elliott. Mr. Frank is a partner with the Phoenix law firm of Lewis and Roca. He is the witness that was introduced by Senator Kyl, and he is the last living member of the committee which created the class action rules in the period of time of 1963 to 1966. Mr. Frank will be able to provide us with a unique insight into the class action rules.

Mr. Elliott is a partner at the Washington, DC, office of Paul, Hastings, Janofsky and Walker, and is currently an adjunct professor at Yale Law School. Previously, Mr. Elliott was at the Yale Law School as a professor, 1981 to 1994, specializing in a number of subjects, including complex litigation, class action, and constitutional law.

Welcome to both of you. I think we will start with you, Mr. Frank.

PANEL CONSISTING OF JOHN P. FRANK, LEWIS AND ROCA, PHOENIX, AZ; AND E. DONALD ELLIOTT, PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CT

STATEMENT OF JOHN P. FRANK

Mr. FRANK. Thank you, Mr. Chairman. I appreciate the opportunity to be here very much. This has been a subject of deepest interest to me. You are right; in the 1960's, I was on the committee. I dissented at that time because I thought it would lead to fraud, and I must say the results seem to indicate that.

In more recent years, there has been 7 years of work by subsequent committees, headed by Judge Patrick Higginbotham, Judge Paul Niemeyer and Judge Scirica. All of them have invited me to participate as an emeritus member, so I have participated in all of the meetings and the hearings on this subject in the last several years. I have the report of the Federal Judicial Center, and the RAND report was sent to me for comment before it became final. So it is a matter of deepest interest. I strongly support this bill.

Senator Sessions, you may be perhaps amused to know that you are not the only Alabamian nor the first to have doubts on this subject. I cannot give you orally, because the time is too short, the history of this matter, except to say that originally when we created this rule, we assumed that the largest class would be 100 people. And we were looking at airplane crashes and the Ringling Brothers fire at Hartford, CT.

The growth of this to involve thousands and thousands of people was totally beyond the anticipation of the rule.

But I return to Senator Sessions. Senator, at page 8—if you have my statement, at page 8a, when Justice Black, whose clerk I was

and whose very close friend I was, so that we corresponded for all the years of his life, made his decision in *Snyder* v. *Harris* requiring that each party have the jurisdictional amount, and thus frankly cutting down on class actions, I wrote him an applauding note and sent him a copy of my dissent to the rule. And he responded, "Thanks for sending me your dissent to Rule 23(b)(3) concerning which I wrote in my opinion in *Snyder* v. *Harris.* I certainly agree with you that the rule is a very poor one, and I am glad to know that you agreed with me at the time it was passed."

To add to your collection of oddities, Senator Grassley, I have inserted at page 15 of my statement an illustration of a check that some victorious member of a class who, for his joy in being in a class, got a check, a copy of which I enclose, for $.08, with counsel receiving a very large sum.

Let me use the balance of my time to speak briefly to the bill itself because there simply isn't time to make a comprehensive statement here for you. But let me turn to the bill.

First, I have made some technical suggestions to the staff where I think, Senator Grassley, you can do even more to tighten down on that fee subject. There are some details there that I would not use in this precious time, but they are there. I do think one thing you ought to give real thought to is you have unleashed the injunction thing without putting an effective control on the fees there, and all that is going to do is shift the cases from damage cases to injunction cases, which is already happening. And I submit that a little tightening there would be an improvement and carry out your wish, which I strongly applaud.

On the fee subject, as I say, I have covered it. Coupons ought to be abolished. You are absolutely right. This business of giving people a coupon for what would amount for the discount they would get on the merchandise anyway and then paying a large fee is simply scandalous. Also, I think, Senator, and members of the committee, you ought to take up the subject of fluid recovery.

I would like to make one or two other points. May I do so? I am not sure if the light tells me that I am done.

Senator GRASSLEY. Yes.

Mr. FRANK. Fluid recovery is what is being done—the sort of thing Senator Thurmond objected to, I think, where there is nothing to give the class, so you take the amount of money and give it to some charity and then pay a large fee to the client. That is wrong. That is the kind of social policy that ought to be made by the Congress or by the administrative agencies and should not be the subject of the whimsical jurisdiction of some class action judge.

I have one very gray point to take up, Senator Grassley—two, if I may, briefly. One, the problem with the Department of Justice. Clearly, if the Department is going to veto the bill, it is a waste of time; you probably will have trouble getting two-thirds.

Those problems can be solved. Ms. Acheson was very clear that they are ready to talk. I submit that if you think it wise, you might arrange informally to have Judge Higginbotham of the Fifth Circuit and Judge Pointer of your circuit, who are the two most experienced judges in America on the Federal–State relation problem in class actions, and who have administered a great number of the cases with both Federal and State participating, together with the

Department of Justice and some technical member of your group—let me nominate Senator Kyl—to see if you can't work out a compromise with Justice. I suspect you could, and if I can personally be of any assistance, I would like to.

The only other subject I can take up, with the indulgence of your time, Senator Grassley, goes to you, but it is major. I respectfully submit that it is probably not a good idea to have this rule 11 thing tacked on here because what you are doing—you have got plenty of opposition from the class action bar as it is. I am responsible more than any other bar member in the country for the 1993 revision of rule 11, and it is working rather well and was supported by the Litigation Section of the ABA and countless other groups all over America. You don't need two wars.

What is more important is it is not a good solution to the problem that is troubling you, and I ask leave to state briefly what I submit would be a better solution. In the committees of the last 7 years, we have repeatedly taken up the subject of the small case—I gave you the example of the $.08, the $.38; you gave the $10 case—whatever they may be, the trivial case which ought not be in the Federal courts at all.

The slang expression for these cases in the committee dialogue was the "t'ain't worth it cases." They are just not worth putting in the Federal system. They are not worth putting in any system. They are just fee engenderers and there is nothing else to them. It is the biggest complaint you have and it is a good one.

I submit that this bill should provide, as earlier drafts of the pending rule has provided—and it should have stayed there—that it would be very constructive to put a "t'ain't worth it" provision into your statute and provide that the court, before certifying a class, should ensure that the prospect of financial reward to members of the class is large enough to be worth undertaking it in the first place, so that the $.02, $.08, $15 trivial cases would be barred from being in this category at all.

I submit that that will get to, Senator Grassley, what you wisely want. You will get rid of the frivolous cases that way and still keep it within the orbit of class actions without taking on a side war that I greatly fear would result in defeating the whole bill. And it is a good bill and you ought to do it, and I thank you for letting me say so.

Senator GRASSLEY. We will consider your recommendation as well on that point.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF JOHN P. FRANK

STATEMENT TO COURTS SUBCOMMITTEE ON SEN. S.B. 353

By John P. Frank
Lewis and Roca
Phoenix, Arizona

May 4, 1999

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My name is John P. Frank, and my law firm is Lewis and Roca of Phoenix, Arizona. This subject is of deepest interest to me and I thank the Committee for the opportunity of discussing it.

By way of personal background, I taught Civil Procedure at Indiana University and Yale for some years before taking up my practice in Arizona in 1954. From 1960 to 1970, I served on the Civil Procedure Committee under the Chairmanship of Mr. Dean Acheson and by appointment to Chief Justice Warren. Hence, I was a member of the Committee in 1966 when present Rule 23 was promulgated.

In the several recent years in which the Rule was reconsidered by the Committee, I was recalled as an emeritus member by the successive Chairman, Judge Patrick Higginbotham and Judge Paul Niemeyer. I attended and participated in all hearings and meetings.

I have from time to time appeared before this Committee on various rule changes, and was invited and appeared last year before the House Committee on diversity and class actions.

Incidentally, I am the author or editor of 11 books and numerous articles, many of them relating to civil procedures.

I. HISTORICAL ACCOUNT.

A. The Origin Of The Modern Rule.

Rule 23, on which the basic committee work was done in 1962 and 1963 and which was promulgated in 1966, must be seen as part of both its professional and its social times.

From the professional standpoint, the procedural world had enjoyed a rebirth. The great flush of creative activity which had led to the rules of 1938 had been under the leadership of a distinguished committee headed by Attorney General Mitchell and staffed by Judge Charles E. Clark and J.W. Moore. That committee had done its giant work and exhausted itself; there was no practice of membership rotation in the 1950s, and the Supreme Court simply abolished the committee. For a period of years there was none.

Then in 1960, Chief Justice Warren made the appointments to recreate the procedural structure. For chairman of the civil committee, he chose Mr. Dean Acheson, America's great elder statesman and yet a lawyer perfectly competent to lead discussion in procedural matters. In regular attendance was Judge Albert Maris of the Third Circuit Court of Appeals, chairman of the Standing Committee, and J.W. Moore, then at the height of his powers, and Charles Alan Wright, then very much a young comer in the

procedural world. In the then style, the committee were dominantly members of the bar.

The reporter was Professor Ben Kaplan of Harvard, later a justice of the Massachusetts Supreme Court; it is highly important that in the small circle of truly great reporters of various projects, Kaplan was preeminent and enormously effective. Rule 23 is, in the large sense, his rule. As we moved forward, he began to develop as his successor reporter Albert Sacks of Harvard, who undertook the later leadership role on Rule 23. Professor Kaplan was at the apogee of his academic career and Professor Sacks was on the way up, later to become dean of the Harvard Law School.

The new committee hit the deck running. It began with an emergency rule which has become 54(b) to solve the then very serious problem of when is a final judgment; and another emerging fix was substitution of public offices under Rule 25(d). The first big task was a complete review of the whole concept of party structure, with great expansion of joinder of parties. Rule 23 was one of those rules and was the summit in joinder.

One other vital element of this professional time: This was a committee which in every respect was prepared to think big. Rulemaking was a high policy and significant activity. All meetings of the committee were held in the Supreme Court building and Chief Justice Warren often dropped in for portions of the meetings. The dreary era of the 1980s, when the rule system was unable to respond effectively to Justice Powell's 1980 dissent on

discovery problems and which resulted in Congress' virtually brushing aside the whole rules process by adopting the Civil Justice Reform Act of 1990 was a universe which was not even imagined in the 1960s. Chief Justice Warren's committee was there to do business.

Also important was the social setting, for this had a most direct bearing on this rule. Rule 23 was in work in direct parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room. If there was single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.

The other factor is that 1964 was also the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who must not exploit the whole population, of a fairly simplistic good guy--bad guy outlook on the world, had its consequences.

One other element of the time must be identified: This was a world to which the litigation explosion had not yet come. The problems which became overwhelming in the eighties were not anticipated in the sixties. The Restatement (Second) of Torts and the development of products liability law was still in the offing. The basic idea of a big case with plaintiffs unified as to

liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but, as will be shown, they were expected to be too big for the new rule.

Against that background, let me turn to the creation of the rule. In this brief statement I slide over the pre-1960 concepts of class action, the "true" class action involving joint rights in which a class decision was res judicata; the hybrid category involving several rights relating to specific property; and the third, which is the parent of the major class actions of today, the "spurious" class actions involving several rights affected by common questions, as to which the result was res judicata only as to the parties actually joined.

Put at its simplest, what new Rule 23 did, first, was expand the true class action somewhat, (b)(1); second, make sure that suits against segregation, as well as other civil rights cases, would be within the class action rule and would be binding as to all members of the class liberally conceived, (b)(2); and third, the one time spurious class action which has been restricted to actual parties was turned into a binding res judicata procedure which could cover a universe as large as notice could reach. It is, I believe, true that (b)(3) was the most radical bit of rulemaking since the original rules created one cause of action and abolished key distinctions between law and equity. The committee repeatedly spoke of it as a "crowning accomplishment."

It was perfectly apparent to the rules-makers of the time that they were doing big things. The critical meeting was October 31 and November 2, 1963, and the most sharply disputed question was whether to have Rule (b)(3) at all.

There were two levels of concern over (b)(3), apart from details. Remember, the possibility of group securities actions, of RICO and of products liability were still in the future. The sharp practical concern was that major defendants charged with tort liability could readily rig what I will unkindly call a patsy class, arranged to have it sue, have the class take a dive, and thus let the defendants avoid responsibility. It was perceived from the beginning that the class action had the potential of turning the courts into merchants of res judicata, selling that valuable asset at a manipulated price. That was the practical problem and it was more than hinted at from time to time. Remember that this was the era of the great society and "big business" has a very limited stock of trust.

So much for the underlying policy resistance. The legal form which this resistance took was that it was morally and constitutionally wrong to deprive people of their causes of action without their consent. Mind you, this is not long after such cases as *Sipuel v. Oklahoma* or other of the great civil rights cases which had heavily stressed that individual legal rights were personal, not fungible. There was an intense sensitivity to the fact that people should not be swept into a basket; that their rights were independent and personal to them.

Had this problem of individual rights not been solved in a fashion which satisfied that committee, I think there never would have been a (b)(3). There was great concern that in mass torts perhaps there should be no class actions at all. Professor J.W. Moore gave the illustration of the Ringling Bros. mass tort, the fire in the tent at Hartford. He said that any compulsory class action "goes against my grain of the right of the litigant to run his own lawsuit"; and he repeated a concern I had expressed earlier that "the Pennsylvania Railroad, or some other alleged tort feasor" might take "the initiative to force a concourse of plaintiffs in a particular jurisdiction. I can't think of anything nicer for the general counsel of the Pennsylvania Railroad in the Perth Amboy situation, than your class suit rule."

It was at that moment that committee member Judge Charles Wyzanski had his flash of genius. He responded to Professor Moore, "Would you be satisfied, Professor Moore, if the class could never include anybody who specifically protests within a given period?" Professor Moore responded, "That would be helpful" and the principal opponent of (b)(3) added, "If that were done, my problem would evaporate."

Thus, the opt-out concept was born and quickly adopted. Again, it must be perceived that this was not the conception of the "opt-out" of today because the really large class action had not yet been conceived of. Judge Wyzanski was thinking of relatively small classes, and he said of the individual claimant, "If he cares enough to conduct his own litigation," he should "be allowed to do it. He must affirmatively care." Again, it was here

assumed that opt-out was an actual conscious choice of a person who had a meaningful alternative to bring his own action. It assumed that the interest of the individual was large enough so that the option of bringing one's own action was a meaningful option. The concept of thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future. The committee thought that it was making a major policy decision and not that as a practical matter it was simply going to either subsidize or burden future branches of the United States postal system with superfluous mail.

I make this a little more innocent than it was. Professor Kaplan raised the possibility of very large numbers of claims. A couple of other examples were given. But Judge Wyzanski was firm that all those people, even in a giant case, would have to have notice:

> I think you also have to make a finding that the form of notice to be used would in all probability reach all persons in the proposed class. And I think it quite clear that in [an enormous case involving thousands] you could not make any such finding. I don't think that case is a class action except for those people who can be reached.

It is a great tribute to Judge Wyzanski's foresight that the Supreme Court has since held that notice and an opportunity to opt out is constitutionally required in class money claim cases. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Shareholder derivative actions were pulled out of former Rule 23 and made into Rule 23.1 in the belief that they were so different from class

actions that they should be separated; the number 23.1 was used only to avoid renumbering other rules.

It is with that understanding that the rule was adopted and it was with that understanding that the notes contain the famous restriction that this rule would rarely, if ever, be used in mass tort cases. As a member of the committee, I dissented from the (b)(3) portion of the rule on the grounds that the classes would be too busy to rig and that if a pharmaceutical drug case were filed in state A, a user in state B should not be compelled to hire a lawyer to determine whether or not he should opt out.

A few years later Justice Black, for whom I had been both clerk and biographer, handed down an opinion restricting class actions. I sent him my dissent and I insert his reply here.

II. COMMENT OF JUSTICE BLACK ON THE 1966 RULE 23.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

May 2, 1969

Mr. John P. Frank
114 West Adams Street
Phoenix, Arizona 85003

Dear John,

Thanks for sending me your dissent to Rule 23(b)(3) concerning which I wrote in my opinion in Snyder v. Harris. I certainly agree with you that that rule is a very poor one and I am glad to know that you agreed with me at the time it was passed.

Best regards to you and the family.

Sincerely,

Hugo L. Black

hlb:fl

B. **Expansion And Successes.**

We may safely assume that the number of class actions following immediately upon the adoption of the rule was small. That is no longer the case. The number filed in each of the past eight years has ranged from the low of 647 to a high of 1,340. We haven't a clue as to the number of people or dollars involved. The burden on the courts has been ever larger. The number pending in 1988 was 1,370 and the number pending in 1993 was 2,131. Moreover, the number of cases closed has declined each year. The number closed in 1988 was 805 and the number closed in 1992 was 381.[1] Moreover, the cases get bigger, involving more and more people. We are now in the era of the billion dollar or several billion dollar aggregate actions; some big ones are Agent Orange, Dalkon Shield, and DES. Some of these big cases have been class actions, while others have been pulled together under the multi-district panel system. The common areas, in addition to some torts (for there remains resistance to this device for torts in some areas) are antitrust cases, securities cases, and RICO or consumer fraud cases.

With the expansion of the class actions, there have been successes, failures, and problems, and these will be briefly identified from the historical standpoint in the discussion following. There have clearly been successes in the almost thirty years of operation of Rule 23. A demonstration of this is that many of the commentators who have written to the Advisory

[1]The Administrative Office for U.S. Courts did not keep pending case records for 1994 or 1995. It courteously shared its unpublished figures for 1994 and 1995, showing 991 class action filings in 1994 and 1,340 in 1995.

Committee for substantial groups of the bar or client blocs have indicated either general satisfaction with the rule as it functions or satisfaction with particular portions.

The most dramatic fact of all those letters, however, is that not a one of them names any particular success. For illustration of what is not there, in preparation for this meeting we have a paper from Judge Schwarzer and others on federal-state coordination in big cases which lists a whole series of illustrative successes. We have nothing of that sort on Rule 23 triumphs. To this large segment of the reporting bar, there are no specific cases to which they wish to give an hurrah. In the general literature, Judge Weinstein in the Agent Orange case is the rare sung hero. I have browsed through ten years of the Index to Legal Periodicals, and a fair number of articles cited. The number of noteworthy, successful class actions mentioned there is extremely small.

The point being made here is not that there are no successful class actions; of course there are. In my own region one can point to those one knows about; *see, e.g., Harmsen v. Smith*, 693 F.2d 932 (9th Cir. 1982), a bank security fraud case, or others I may mention. The point is that this is anecdotal knowledge; there is no serious history evaluating the pluses and minuses of this remedy.

Without doubt the vastly numerous claims in some situations, as asbestos or some product liability claims or others, must be aggregated somehow. A splendid general study of the various devices of aggregation is

Professor Judith Resnik's *From "Cases" to "Litigation,"* 54 Law and Contemporary Problems 5 (Summer, 1991). In March, 1988, the Judicial Conference approved consolidation of multiple litigation in state and federal courts; in 1991, it approved consolidated treatment for asbestos cases. The Federal Court Study Commission endorsed increased aggregation for trial as well as discovery. A variant method of aggregation is consolidation under Rule 42. The American Law Institute now has its own proposal. But history does not tell us the best method of aggregation; in 1966 the committee thought MDL preferable to class actions for mass accidents. However, asbestos was before the Supreme Court last year and the solution was rejected; it is back again this year and the Supreme Court has not yet spoken.

There are such successes.

C. Problems.

1. The Fix.[2]

Quite clearly the fear of some, of whom this writer was definitely one, was that the rule would invite trouble by giving prospective defendants an opportunity to rig classes which might be cheaply bought out. The 1963 specter has not, in fact, arisen to haunt the system. This phase of the federal district courts becoming merchants in the sale of res judicata has not occurred.

[2]In this section I am reporting on the commercial and tort cases, not the "good cause" cases, such as the environmental actions.

But its cousin has. Potential defendants have not had to create phony cases. The "take a dive" plaintiff class has instead been empowered by the attorney who purports to represent the class -- the attorney for the fair and adequate representative according to the rule -- who is prepared, in effect, to take a bribe in which he gets a lot and the members of the class get very little. Such arrangements are also called "'sweetheart' settlements with defendants, trading a portion of the compensation due victims for a premium on, or merely the certainty of, the fee recovery." D. Rosenberg, *Class Actions for Mass Torts*, 62 Ind. L.J. 561, 583 (1987).

For want of statistical evidence, one must become anecdotal, and I report from anecdote that this phenomenon exists. As p.30-42 of the Manual for Complex Litigation Second (sometimes called by the judges the Complex Manual for Litigation) recognizes, "counsel for the parties are the main source of information concerning the settlement." Of course the judge should review the settlement and of course there should be opportunity for protest, but with the backlog of over 2,000 class actions pending, with presumably all of them before very busy judges, and with judges bringing uneven levels of ability to the task -- not all of them are a Judge Pointer or Judge Weinstein or Judge Higginbotham -- settlements can be perfunctorily swept through.

A recent illustration of an extraordinarily meticulous fee study is that of Judge William Browning in a $600 million matter, largely though not entirely affirmed after close thought in *Washington Pub. Power v. City of Seattle*, 1994 W.L. 90327 at 9 (9th Cir. Mar. 23, 1994). This was a seven-and-a-half-

year case. It took a law clerk one year, full time, to analyze the fee claims and the judge over three weeks to utilize the data and reach his result. As is observed in a very substantial Stanford Law Review article, judicial review of the records in a big case "seems a positively breathtaking waste of an article III judge's time," and this review usually results in "a few generalities about the uncertainty of recovery" and a contingency multiplier. J. Alexander, *Do the Merits Matter?*, 41 Stan. L. Rev. 497, 578-79 (1991). As has been said in a very constructive analysis, "Ultimately, the most persuasive account of why class actions frequently produce unsatisfactory results is the hypothesis that such actions are uniquely vulnerable to collusive settlements that benefit plaintiffs' attorneys rather than their clients." J. Coffee, *Plaintiffs' Attorneys in Class Actions*, 86 Col. L. Rev. 669, 677 (1986).

This does not, by any means, always happen. A splendid example is of a large securities fraud case pending in the district court in Louisiana. A settlement was negotiated in which the security holders would receive 1.7 cents return on each dollar invested, minus 25 percent for legal fees, essentially a penny on the dollar. The net return to the investors, in short, was slightly over one percent and counsel fees were proposed to be $7 million.

This one was gross enough to raise a howl and a national television program highlighted it. This led to a protest. The judge did take steps to reject the proposal and a later, different and fairer settlement was worked out. But in most settlements, there is no television coverage and the

sense of scandal is not large enough, nor the potential awards great enough, to engender an effective protest.

As this thought has been politely put, "Because the economic interests of the attorney and the class may conflict, the attorney may negotiate settlement terms that do not reflect the interests of the absentee class." Note, *Abuse in Plaintiff Class Action Settlements*, 84 Mich. L. Rev. 308 (1985). Without any venality, but simply as a matter of business judgment, as Judge Friendly has observed, the attorney may have an advantage in taking a smaller settlement bearing a higher ratio to the cost of work than a larger settlement obtained after extensive discovery, trial and appeal. *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972).

The hazard of this conduct was greatly increased by the United States Supreme Court decision in the matter of *Jeff D. v. Evans*, 475 U.S. 717 (1986). It had previously been the rule in some circuits – the lead case was from the Third Circuit, *Pandrini v. National Tea Co.* 557 F.2d 1015, 1021 (3d Cir. 1977) – that the settlement on the merits and the determination of legal fees must be truly separate episodes so that the merits would be determined at one time and the legal fees at another and later time. This reduced the bribery potential. But the Supreme Court in *Jeff D.* held that both of these matters could come on at once, so that the defendant could settle with the class and settle with the lawyer simultaneously.

This has not improved the returns to the classes. As Professor Kane has observed with respect to settlement proposals which "explicitly

provide for large attorney's fees . . . the court cannot rely on opposing counsel to assure a full adversary presentation of the attorneys' fee application because, having reached a settlement, the class opponents have no interest in how the fee issue is resolved." M.K. Kane, *Of Carrots and Sticks*, 66 Tex. L. Rev. 385, 398 (1987). Moreover, as the Ninth Circuit observed in March of this year, "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage." *Washington Pub. Power v. City of Seattle, supra*. For another discussion of "the pressures on class lawyers to settle and obtain fees rather than maximize the benefits to the class," see L. Grosberg, *Class Actions and Client-Centered Decision Making*, 40 Syracuse L. Rev. 709, 776 (1989). Let me be very explicit. Nothing in this aspect of the fee problem makes the defense attorney look any better than the plaintiff's attorney.

I insert as my next two pages illustrations of these problems. In the first, the class members get 8 cents each; counsel has a large fee. The second, by two major critics of Rule 23, Professor John Coffee of Columbia and Professor Susan Koniak of Boston University, illustrate the plain outrages of some state cases.

Mellon Mortgage Company
3100 Travis Street
Houston, Texas 77006

PAYMENT SUMMARY

ID NUMBER:	917-3101393103	PHONE NUMBER:	
VOUCHER NO:	0000257005	VOUCHER DATE:	09/20/96

This check represents your rebate in final settlement of the DeBoer Vs. Mellon Mortgage Company lawsuit of which you were notified by notice dated December 23, 1993. The settlement in the suit has now been finalized. Should you have any questions, please contact the plaintiffs' attorneys, Zimmerman and Reed at (612) 344-0099.

(Detach Here)

Mellon Mortgage Company
3100 Travis Street
Houston, Texas 77006

60-160/433

CHECK DATE 09/20/96 CHECK NUMBER 0000257005

PAY...ZERO DOLLARS 08 CENTS

VALID FOR 180 DAYS

917-3101393103

$*********0.08

TO THE ORDER OF:

MELLON BANK, NA
PITTSBURGH, PA 15259-0001

AUTHORIZED SIGNATURE

The Latest Class Action Scam

Rule of Law

By John C. Coffee Jr. And Susan P. Koniak

An alarming new pattern is developing in class action litigation. More and more frequently, large nationwide class actions, sometimes involving millions of class members, are being settled in state courts—often in tiny towns far off the beaten track and often on terms that give the class members far less relief than they typically would obtain in individual lawsuits.

Two recent examples have received extensive publicity. This newspaper reported last month on the settlement of the largest property-damage class action in U.S. history, covering an estimated six million Americans who owned homes with defective polybutylene (PB) plumbing and an additional unknown number of persons who will someday own these homes. The case was settled in a state court in Union City, Tenn.—not usually the forum for major commercial litigation.

More revealing, however, was the settlement process: Virtually the same settlement had been submitted for approval to a state court in Texas. When the parties could not persuade the state court to approve their proposed deal, they refiled the action in a Texas federal court. After encountering difficulties there, also, they simply moved to Tennessee.

In the meantime, another group of plaintiff's attorneys filed an identical nationwide class action in Alabama. For a time, like dueling banjos, the two teams of plaintiff's attorneys competed for clients, trading accusations of misconduct and running rival newspaper and TV ads. The result was both to confuse eligible homeowners and to create a competition that defendants could exploit.

Eventually, a state court judge in California negotiated a truce between the warring factions. But as the Journal's reporter concluded, the revised settlement on which the two factions agreed did little to improve benefits for the class. Rather, it mainly assured both groups of plaintiff's attorneys that they would receive court-awarded fees.

The day following the Journal's story, the New York Times reported an even more egregious example of class action abuse. Bank of Boston agreed to a settlement under which it would deposit up to $8.76 in each class member's bank account (to compensate them for excessive escrow charges) and then deduct upward of $300 from many of those accounts to pay the plaintiff's attorney fees. Although this left many class members poorer than if the action had not been brought, the settlement was nevertheless approved in an Alabama state court—far from Bank of Boston's home base.

What is happening here? Dubious "scrip" settlements in which class members receive coupons to buy a new and improved version of the defendant's formerly defective product, usually at only a modest discount off the retail value, are a well-known phenomenon. They are essentially a device to inflate the value of the settlement because the plaintiff's attorneys' fees typically are based on that inflated value (usually one-third). Recently, federal courts have shown a greater skepticism of nonpecuniary settlements that give little value to the class but award high fees to their attorneys. If a settlement is of doubtful value, the parties are increasingly apt to present it to a less sophisticated (or as the plaintiff's attorneys might put it, more "cooperative") state court.

The Supreme Court has just heard argument in a case that will test whether state courts can approve class action settlements even in cases that legally can be litigated only in federal court. If it is possible for state courts to settle cases that they cannot hear, the migration of cases to state court—and the number of doubtful settlements—will predictably accelerate.

Other reasons also make state courts a more inviting forum for pre-arranged settlements. First, if the state court refuses to approve a settlement, the settling parties can just take their show on the road to another court in another state, as happened in the PB plumbing settlement. Eventually, they will find a court willing to oblige their desire to trade a small settlement for high attorneys fees.

> *The PB case was settled in a state court in Union City, Tenn.—not usually the forum for major commercial litigation.*

Second, major corporate defendants are often sued in multiple forums. Once rival and overlapping class actions are pending in different courts, defendants can play plaintiff's attorneys off against each other, running what is in effect a reverse auction to gain the cheapest settlement. Paying the class's lawyers to sell out their clients is invariably cheaper for defendants than paying the class.

What, then, should be done? Some will say: Abolish class actions! But this would only cost corporations more because it is much more expensive to defend many individual actions than the class suit. Nor would it benefit victims.

A more sensible starting point is to recognize that the problem of competing class actions cannot arise on the federal level. In the federal system, a single judicial body—the Judicial Panel on Multidistrict Litigation—has the power to consolidate related actions before a single court. This procedure works reasonably well and could be extended to state courts by legislation giving the federal panel power to consolidate class actions brought in state courts that seek to represent a nationwide class of plaintiffs.

But this cannot be the entire answer. Collusive class settlements, in which the class members' interests are subordinated to those of their attorneys, occur in federal court as well. Individual trial judges simply have inadequate incentives to resist parties who want to settle and too little information to recognize when the settlement is collusive.

Thus, another part of the solution may be the traditional American one: Sue the so-and-sos! The bank customers who ended up worse off after their class settlement are now seeking to sue the bank and the attorneys for both sides who concocted this bizarre deal.

Another hope may be special monitors. Sen. William Cohen (R., Maine) has proposed that notice be given to state attorneys general in all consumer class actions settlements that seek to bind a nationwide class in the hope that they could intervene to resist a sellout. He has also proposed that class members receive notice written in plain English. Again, these ideas have promise, but they fall short of a complete remedy.

In truth, there is no panacea. But the courts, the bar and the press must recognize the need for closer oversight of class actions. Many in the bar would like to view abusive settlements as exceptional and rare. They are not. A Gresham's Law is developing under which "bad" class actions—and bad plaintiff's attorneys—are driving out the good ones.

Mr. Coffee teaches law at Columbia University, and Ms. Koniak teaches law at Boston University.

D. **Fees.**

We have no clear cut analysis of the extent to which Rule 23 deserves the title occasionally given to it in casual talk among lawyers as the Lawyers Relief Act. The disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque. In many cases, the individual members of the class are entitled to receive at most a dollar or two, while the attorney who secured this benefaction for them can retire on his share of this victory. This Relief Act aspect of course cuts in both directions because the defense bar must also be paid a sizeable sum for its efforts to keep the recovery down. As is developed elsewhere, "the paramount motivation for such litigation [is] counsel's desire to generate substantial fees." Note, *Attorneys' Fees in Class Action Shareholder Derivative Suits*, 9 Del. J. Corp. L. 671 (1984), citing *Zeffiro v. First Pennsylvania Bank*, 581 F. Supp. 811, 813 (E.D. Pa. 1983).

The result by the 1980s and the present time, by way of historical development, has been oft times to create a giant churn. The plaintiffs' lawyers are busy, the defendants' lawyers are busy, the courts are busy, and the cream that should rise to the top from all of this churning is frequently only a drop or two for those whom Rule 23 was designed to benefit. For a strenuous attack on counsel fees, *see* J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991), giving one illustration of a thousand dollar an hour fee. The article also

illustrates the use of special masters as judges try to take control of the detailed analysis of some of these claims.

The common argument in favor of allowing class actions to proceed with pittance returns to the beneficiaries is that this serves as a social regulatory mechanism and helps to avoid future abuses of the general public. Collateral to this is the argument that at least some of these cases are brought by organizations generally well regarded for good works in behalf of consumers or other beneficiaries and that the fees helped to sustain such organizations. However, there has never been a meditated analysis as to whether this form of social regulation for consumers or the environment is better handled by government agencies or by the courts, nor whether the burden on the court system over-balances the value of this indirect form of social legislation and administration.

A different solution to the minuscule recovery and the large fee is the concept of "fluid recovery." The development of this device, largely in the past ten years, is set out in J. Solovy and others, Class Action Controversies at 140-42 (1994). For example, when members of the class would get only two dollars a piece, the only winners are likely to be the attorney and, oddly enough, the defendant because nobody applies for these small amounts and the defendant gets to keep the money. Under the developing notion of fluid recovery, there are other forms of charge without any effort to get anything to the individual plaintiffs. Illustrations are price rollbacks, escheat, and other

devices; for discussion, *see* G. Hillebrand and D. Torrence, *Claims Procedure in Large Consumer Class Actions*, 28 Santa Clara L. Rev. 747 (1988).

E. The Class Representation.

1. Who is the representative?

The rule assumed that there would be an honest to God plaintiff or plaintiffs as true representatives of the class. That has become a fiction; the class representative "has been reduced a little more than an admission ticket to the courthouse and one anecdotal example of the class claim. Class counsel does all major planning and makes the critical litigation decisions." J. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 Hastings L.J. 165, 166 (1990).

The only close analysis in the literature strongly suggesting that no plaintiff is representing the class is the Alexander study in the Stanford Law Review, *supra*, analyzing nine settlements in securities cases. The stakes in those cases range from $19 million to $95 million. The percentage settlement in seven of those cases range from 20 percent of the stake to 27 percent and four of them are within a two-point spread. The merits of those claims had nothing whatsoever to do with the settlements; the merits could not be so interchangeable. These are cases in which officers and directors are named as defendants and strongly suggest that settlements are made with corporations to get the insiders off the hook.

2. The race for the gold.

The most visibly distasteful aspect of class actions is the race by attorneys to grab the first class claims and thus get to be lead counsel or at least on the steering committee. The ashes from the great fire will not be cold and the corpses barely at the mortuary before someone will have filed a class action; having found one person, dazed but alive, or one widow, the attorney quickly files the action. There is no actual representation of a class at all.

From there on out, the case is churned to warrant more fees. There are cases where the defendant would settle immediately, but is not given the chance.

The development described here is anecdotal and not statistical, but the anecdotes come on high authority. To write this paragraph I have consulted four past presidents of the American Trial Lawyers Association, the number one group of plaintiffs' lawyers. They are unanimous that this practice exists and that it is disgusting; they refer to these speed artists as "The Parachutists." This historical development, they believe, brings shame to the Bar and particularly to their great division of it.

F. **The Managerial Revolution.**

A significant historical development in the 1980s has been the impulse to change major portions of the Rule 23 procedures. This must be seen in relation to the rise of the managerial revolution in the entire court system. As the courts have been inundated by the familiar explosion, the dominant impulse has been to ask judges to take more and more charge of the cases. The development of the pretrial conference rule over the last fifteen years is an illustration.

The dominant motifs in this historical development have been, first, a feeling that the judges are a pretty capable lot, which probably would be stipulated; and second, that Big Brother will take care of you. The bar has a good deal more trouble accepting this second proposition. It has led to two developments of note in recent years. One has been the impulse to get rid of the notice system and, thus, totally abandon the original premise of the rule that every member of the class should have at least an opportunity to decide whether he wishes to be in it or not. As classes grow infinitely larger, there has been a strong impulse to save the money and the time and, hence, the development of proposals to give up notice.

As noted earlier, there is a constitutional limitation to scuttling notice. An alternative device to get to the same end is the abandonment in many instances in recent years of the express provision of the rule that the class, if there is to be one, is to be certified as early as possible. On the theory that Big Brother will take care of the public, and that counsel for the

two sides can be expected to take care of their defendant clients and the class even before there is a class, the practice has arisen of negotiating the settlement first and certifying the class afterwards. This is accompanied by the practice of publicizing what the settlement recovery would be so that the members of the class can look at their share before they decide whether to opt out.

The original filing of the action tolls the statute of limitations. Under the system of settling before there is a lawsuit, a potential class member who peeks before he opts is thus free, if he wishes, to get into another class in some other part of the country in the hopes of doing better. This has led to the phenomenon of rival class recruiters urging opt-out on the grounds that "I can get you more."

III. ILLUSTRATIONS, ANECDOTAL AND OTHERWISE, OF WHAT APPEAR TO BE ABUSES.

1. *Kamilewicz v. Bank of Boston.* Bank of Boston agreed to deposit $8.76 in each class member's bank account and then deduct up to $100 from each account for counsel fees.

2. Someone has brought a class action against New York Life Insurance Company. A settlement has been reached. I happen to be a policyholder and, hence, am in the class. What I get for my "victory" is that I can, if I wish, borrow some money from New York Life to pay my premium, and I can buy some more insurance if I care to at a favorable price. I don't need the money and don't want the insurance, so this doesn't do me a great deal of good. Counsel gets $22 million.

3. *Barros and Naja v. GE Capital Mortgage Services, Inc.* The class each gets $2.20 and counsel gets $200,000.

4. See attached documentation of an eight cents victory.

5. *Rosenfeld and Hart v. Bear Stearns.* Plaintiffs get nothing; counsel gets $500,000.

6. *Strommer v. GE Capital Mortgage Services, Inc.* Plaintiffs receive "less than $1 and no more than $2." Counsel fees "not to exceed $500,000."

7. In a *Prudential* case report in the National Law Journal, December 4, 1995, 350,000 investors average $200. Counsel gets $34 million.

8. Knight Rider Papers, columnist Dave Barry, reports the *Orafix Denture* case. The named plaintiff got $25,000. 650 people got $7 each. 2,800 people got discount coupons for dental supplies. Counsel got $54,934.57.

9. *In Kind Class Action Settlements, Comment on Fluid Recovery*, 109 Harvard Law Review 810 (1996).[3]

a. Airline price-fixing case: $458 million award, of which $50 million is cash, $408 million is in discount certificates, and $14 million in fees. The court found the economic value to the class "substantially less" than $458 million but approved; p. 813.

b. *Nintendo*: $25 million in $5 coupons. Fees and administrative costs $1.75 million; p. 813.

c. Fraudulent insurance case, a proposed $47,215,400 in scrip for class members to buy life insurance and $26 million in fees was rejected by the court; p. 814.

d. In the *General Motors* case in the Third Circuit, the district court approved, but the circuit court rejected, an award of $2 billion (more or less) in coupons for new purchase of General Motors vehicles and $9,500,000 in fees. The court found this to be simply a skilled merchandising mechanism by General Motors; p. 814-15.

e. Attached Wall Street Journal commentary of Professor John Coffee and Susan Koniak.

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[3]A superb essay.

IV. ILLUSTRATION OF CLAIMED SUCCESSES.

Very responsible groups do not share my views on (b)(F). One of those groups is the Alliance for Justice, of which I am a director and for which I have enormous respect. I, therefore, attach as Exhibit A as a balance to my own views – though I am not myself persuaded – the views of the Alliance for Justice on this point.

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I turn now to a consideration of the Bill immediately before the Committee. Let me say emphatically that I generally strongly support it and my suggestions are to be seen within that framework. I think it will go a long way to solving the problem. Moreover, Congressional action is needed. A Committee of the Civil Procedure Committee recently required by the Chief Justice has just finished a gigantic study of mass torts but concludes that further study is needed before action can be taken. However, the proposals of this Bill are sufficiently valuable and are so well addressed to current problems that there is no need to wait upon them. The Special Committee on Mass Torts can take this Bill, and if it becomes law, this statute into consideration as it continues with its labors.

Let me comment on the key provisions of the Bill:

1. The provision that State Attorneys General should be notified. In recent days Attorneys General have been active in pursuing class remedies or at least large scale remedies in tort situations such as the tobacco cases. They have a contribution to make and a certain objectivity which makes them quite different from contingent fee counsel. I, therefore, strongly recommend that they be involved.

2. Notices, fees and injunctions. I do not believe that notices to individuals of their participation in class action should be made in any way but direct communication. Radio and television may not be heard or seen and the notices published in the press are never seen by anybody; they have become a matter of pure form. I believe it is a matter of due process under Supreme

Court decision that notice requires the best possible notice and the best possible notice in substantially every case is some kind of mail communication.

3. I have made suggestions to staff as to the counsel fee aspects of the bill which go into somewhat more detail than the Committee would like to hear orally, but let me make the general points:

(a) To the extent that fees are to be determined by the amount actually paid to the Class – and this is a splendid proposal – there needs to be some terminal date. Counsel will be chafing at the bit to be paid immediately upon the settlement agreement and under this provision, of course, they must wait for a pay out. I suggest that there be a three month or some other similar figure included here as a limit on pay-out time.

(b) The provision as to future benefits based on improper conduct, translated into legalize, means that we are talking about B(2) cases, which is to say the injunction cases. There will be a great deal of argument as to what those benefits are, as I have discussed with the staff. There could be, I have seen assorted fictitious benefits. Something which should suggest that these future benefits must be "highly probably", or something else of that sort would be helpful here. Otherwise, the Bill would simply shift Class Actions from B(3) cases to what would become the injunction B(2) cases because that's where the fast fee money will be.

(c) As drafted the Bill provides that the costs actually incurred by all defendants in complying with the terms would be added to the other cost factors. I suggest that subparagraph (3) be disjunctive and that an "or" would well replace "and".

(d) The most important suggestion I have here is that the Lodestar provision be eliminated entirely. Lodestar is based on time and everybody knows so in the class action cases, time is either squandered or miserably over reported or calculated. This provision could very well nullify all of the good which the Bill seeks to do under the earlier portions of this section.

4. Fluid recovery (*i.e.* nothing to the class and some general bonanza to some public interest) should never be allowed. Nothing in the Constitution, the Code, or the rules makes the courts proxies for the appropriation committees of Congress. Nothing authorizes the courts to be specialized tax collectors for public purposes. Much as I would like to see more money in some of these causes, providing it is not the judges' job.

5. I turn to the Rule 11 addendum to the statute. This is not part of the statute with any particular reference to class actions; it is a proposed revision of Rule 11 as applicable to all civil cases from the federal courts. I think this is regrettable for two reasons, one substantive and the other tactical. I shall then make my own suggestion as to how to deal with the problem of worthless cases.

(a) Rule 11 was amended in 1983 greatly to increase a sanctions system in the federal courts. It proved to be extremely regrettable. Under the Rule, first the lawyer sued the other side and then he sued the other lawyer. It worked extremely badly.

In consequence, in 1993 the Supreme Court issued present Rule 11 which is working very well. I must acknowledge to you that I am probably the lawyer in the United States most responsible, insofar as any one individual can be responsible, for the 1993 revision. I recently deposited the archive on that topic in the University of Texas Law Library.

(b) On the tactical side, the Rule 11 provision, which is basically extraneous to this class action proposal, could well result in the defeat of the entire Bill. The fact of the matter is that it will be very difficult for this Committee, if it approves of this Bill, to get it passed through both Houses because of the very strong resistance of the class action plaintiffs bar who are a very competent lot. You can expect war to the hilt. At least this is a narrow group. If you take on the Rule 11 matter, you will add to that opposition a great share of the bar of the country. For example the Litigation Section of the ABA strongly supported 1993 Rule 11. The Committee will have trouble enough with this worthwhile legislation; I commend to you the wisdom of fighting only one war at a time.

Moreover, there are better ways to handle the problem of worthless class action cases at the beginning, without waiting to see how they come out and then sanction the participants. Cases which are likely to result in a trivial recovery to members of the class, say $10.00 or less, ought to

be dismissed at the beginning. These are the cases which have three qualities: first, they occupy a great deal of court time; second, they can create large fees for worthless litigation; and third, they give substantially nothing to the members of the class who are suppose to be the beneficiaries of the suit.

The slang expression which was much used in the civil procedure committee concerning this problem over the several past years was that these were the "t'aint worth it cases." I strongly recommend that you deal with the problem that concerns you of cases which should not be in the court at all by excluding all together the t'aint worth it litigation. There can be a provision calling on the trial judge to take consider at the beginning what the probable amount of recovery for individuals is in the case, and unless there is some appreciable value to members of the class, the case should not be in court at all.

This is a matter of the theory of government as well as of class actions. These are likely to be the cases in which there was some alleged mis-pricing or some minor problem with securities. These are matters which should be in the hands of the administrative agencies. If the Federal Trade Commission does not wish to take up an unfair pricing problem or if the SEC does not wish to take up an unfair securities problem, and if the matter is a small one, then it should not be taken up at all. Otherwise, we are simply encumbering the court system for the purpose of creating fees without doing any significant good to the individuals who are suppose to be benefited.

It may be said, and it is said, that the trivial cases are not insignificant because the aggregate may be of consequence. If this is so, it is not the proper business of the federal courts to be making

the social policy of the country in this fashion. If Congress wishes to regulate these matters, if the administrative agencies wish to deal with them, they are the competent bodies for this purpose. Apart from any other consideration, Article 3 judges already have too much to do without being burdened with deciding whether, as in the illustration I gave you before, members of the class should get a check for 8 cents. These actions are not cases or controversies; they are usually price controls which more suited agencies have not seen fit to impose.

We need to be reminded of what Justice Stone said in *United States v. Butler*, 297 U.S. 1, 87 (1936): "Courts are not the only agency of government that must be assumed to have the capacity to govern."

6. I realize that good people disagree with me on the preceding argument. If they are persuasive with the Committee, then I warmly recommend that these become "opt in" cases instead of "opt out" cases. As my historical sketch shows, "opt out" is not some wisdom given from God. Notice is a constitutional requirement, but there is an option as to how and when it should be given. There is no excuse at all for the doers of good in these small bore cases to do their good if the assumed beneficiaries don't want it. Let notice be given first – fair notice telling the class members what they can reasonably expect – and then let them decide whether they wish to expend 32 cents for a stamp on their prospects. If Congress and the administrative agencies do not see fit to provide this regulation, and if the assumed beneficiaries don't want it enough to ask for it, then the court is really simply rewarding imaginative counsel. "Opt in" would determine whether this trip is really necessary.

CONCLUSION

I do not propose abolishing class actions at all; these are suggestions to improve them. Congress cannot escape the fact that problems of mass torts or mass wrongs in our society must be dealt with and should be. Asbestos victims should have recovery. There should be relief for persons injured by large-scaled deficiency in manufacture of automobiles. The committee functioning under the direction of the Chief Justice on mass torts, with which to some extent I served, on February 15, 1999 made a 71-page summary report with an appendix of almost three inches thick. It suggest further work on the mass tort problem and should be encouraged to do it. Whether by class actions, whether by MDL (which has been, I think, more successful but needs some improvement as well), by federal/state cooperation in the court systems, or by a variety of other possibilities which are discussed in the mass tort report, these problems have to be met. They are here and they are real.

At the same time, we need not sit in paralysis and fail to correct clear abuses in the existing system. The legislation before us here is an improvement. It deals with obvious abuses. Abuses can be corrected without obstructing future proposals for large scale treatment of mass torts. I warmly commend the sponsors of this legislation for their proposal and hope that the Committee stay the course and give us legislation which is needed.

Again, thank you very much for permitting me to share my thoughts with you.

EXHIBIT A

ALLIANCE FOR JUSTICE STATEMENT

II. THE IMPORTANCE OF RULE 23 CLASS ACTIONS

While used somewhat sparingly, when invoked, Rule 23 class actions have played a critical role in protection of the environment, public health and safety and consumers rights. For example, they have proven especially appropriate where large numbers of citizens have suffered property damage or other environmental insult, requiring redress but often in circumstances where thousands of individual actions would be entirely impracticable. (See, e.g., In re Three Mile Island Litigation, 87 F.R.D. 433 (M.D. Pa. 1980) (class action of individuals harmed by TMI occurrence); In re Asbestos School Litigation, 789 F.2d.2d.2d 996 (3d Cir.), cert. denied, 479 U.S. 852, 479 U.S. 915 (1986) (national class of school districts suing asbestos industry for asbestos cleanup); In re Agent Orange Litigation, 818 F.2d.2d.2d 145 (2d Cir. 1987) (class of veterans exposed to toxins in Agent Orange); Pruitt v. Allied Chemical Corp., 85 F.R.D. 100 (E.D. Va. 1980) (class action by workers in seafood industry); Cook v. Rockwell, 151 F.R.D. 378 (D.Co. 1993) (class action challenging discharge of radioactive substances from Rocky Flats); Cape May County Chapter of Izaak Walton League v. Macchia, 329 F.2d.2d. Supp. 504 (D.N.J. 1971) (class action challenging pollution of tidal areas from dredging from development project); Wehner v. Syntex Corp., 117 F.R.D. 641 (N.D. Cal. 1987) (class action certified to recover response costs for dioxin contamination).

The use of the class action device under Rule 23 has been essential not only in the so-called "mass tort" context, of which the asbestos litigation is the most prominent example, but also, and increasingly, where environmental incidents have caused damage to natural resources or property interests. The most recent and dramatic example, of course, involved the Exxon-Valdez oil spill resulting in enormous damage not only to natural ecosystems but also to real property, fishing rights, tourism and other economic interests. The availability of Rule 23 class certification was essential to obtaining necessary redress for the people of Alaska from this catastrophe. After several months of procedural wrangling by the parties, the defendant Exxon successfully moved for a mandatory punitive damages class which, over plaintiffs objections, was certified by the

District Court.

Had the proposed Rule 23 changes now under consideration been in place, it is doubtful whether any widespread relief would have been obtained for Alaska citizens, and it is likely that multiple individual actions would still be flooding the state and federal courts in Alaska. For example, the proposal that Rule 23 certification must be "necessary" rather than merely "superior", as discussed below, could be viewed as allowing class actions only where individual actions could not be brought. Since many individual suits were indeed filed in Alaska, it is questionable whether the necessity test under the proposed rule would have been satisfied even though a class action was a superior litigation tool. Without this option, many thousands of additional suits by injured Alaska residents would surely have overwhelmed the federal and state courts. Instead, the class action device was instrumental in achieving a $5 billion jury verdict that is soon to be allocated among the numerous injured plaintiffs.

Class actions certified under Rule 23(b)(3) have not been frequently used, nor have they resulted in unreasonable awards. A comprehensive 1991 American Law Institute study of environmental injury litigation from 1983 through 1986 found that total awards were consistently reasonable and significantly less than the few monumental settlements achieved in prominent mass tort cases such as the Agent Orange litigation. (American Law Institute Reporter's Study, Enterprise Liability for Personal Responsibility at 319-21 citing Love Canal Actions, 145 Misc. 2nd 1076, 547 N.Y.S. 2nd 174 (1989) ($20 million award to over 100 plaintiffs claiming Personal injury and property damage): Ayers v. Jackson Township, 106 N.J. 557, 525 A.2d 287 (1987) (compensation for loss of palatable water for twenty months and medical monitoring but no personal injury awards); In re Three Mile Island, supra, (initial settlement of $24 Million for economic and property damage; second settlement of $15 million for medical injuries; $5 million for medical monitoring). In attempting to explain this phenomena, the ALI reporter urged that we "recall that even conservative estimates indicate that there are over 10,000 environmental carcinogen deaths each year, so it is evident that environmental injury victims have enjoyed very little tort success. . . . Why are there so few of these claims? The answer is that environmental injury tort cases are difficult to win." ALI Study at 321.

Since World War II American society has experienced enormous technological change conferring vast and incontrovertible improvements in our quality of life. However, new technologies like nuclear power, petro-chemicals and biotechnology often come with attendant risks and potential economic costs. And the federal courts, usually reluctantly, but ultimately have become the fora where the external costs of these new technologies can best be addressed. From Exxon-Valdez to Three Mile Island to Love Canal, when needed, class action remedies have worked effectively, and there is every likelihood they will be even more necessary in the future. Proposals that would make Rule 23 certification less available at the very time that the courts -- and the public -- are coming to terms with these dramatic changes in our science and economy would seem ill-considered at best.

Similarly, in the context of consumer cases, the claims themselves are often too small to

support individual litigation. Without class certification, there is no redress for vindication of these claims, no matter how widespread. The Supreme Court has said that class certification is an important tool for litigating small claims that would otherwise not be heard. Phillips Petroleum Co. V. Shutts, 472 U.S. 797, 809 (1985) ("Class actions may permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Without the important tool of Rule 23 class certification, consumers would have no weapon against unlawful conduct and the wrongdoer would be able to keep the proceeds of legal violations while having no deterrence from committing similar violations in the future.

Senator GRASSLEY. Professor Elliott.

STATEMENT OF E. DONALD ELLIOTT

Mr. ELLIOTT. Thank you very much, Mr. Chairman. If I could begin with a very brief personal note, in 1989 I was confirmed as general counsel of EPA by the Senate, and I remember, Mr. Chairman, in our courtesy calls you said to me, why would anyone leave a professorship at Yale to go be a general counsel at EPA? And I must say, Senator, I wanted to tell you that in some of the dark hours at EPA I remembered that comment.

But I am here today as a longtime teacher of complex litigation and class actions at Yale Law School, where I have been a successor of John Frank's since 1981. I am a qualified supporter of class actions, although I think there are some abuses under the Federal rules, as well. But I am here primarily because I am very concerned that some recent decisions have restricted the rights of litigants in the large multi-party cases that I agree with Senator Sessions really ought to be in the Federal courts, to remove those kinds of cases into the Federal courts where they belong.

And I do disagree with the Department of Justice's position. I was very disappointed with it. I do not think this legislation effectively federalizes. I think that is a little bit too simplistic. My view as both a litigating lawyer and a professor of civil procedure is that we have struck a really brilliant balance in cases. We give the plaintiff the first choice of where they file the case, but that is not an unlimited choice. It is balanced by the defendant's right to remove. And that is true in all kinds of cases and it is one of the core reasons we have diversity jurisdiction.

Unfortunately, for a variety of reasons that we could get into if you are interested, that right to removal has become more apparent than real in complex class action cases. It is pretty easy for a good lawyer to join some parties that will defeat complete diversity, and thereby make a complex case, including a class action case, one that can't be removed to Federal court.

So I think what we are really talking about in the removal provisions here is not effectively federalizing litigation, but restoring the balance between the plaintiff's right to pick and the defendant's right to remove the case to Federal court if there is too much home cooking or too much of what we sometimes call the home court advantage.

I don't think there is any real serious question about the constitutional authority of the Congress to do something like that. And I think it is important to realize that removal is, I think, a really brilliant part of our jurisprudence. It not only guarantees reality and the appearance of fairness to the litigants directly involved, but I think sometimes it is not fully recognized that it creates a kind of incentive that gently discourages the State courts from going too far through the device of competition.

Senator Grassley, you will be glad to know that we in academia are again rediscovering some of the virtues of the market, and I think increasingly market approaches to a variety of areas are coming back into fashion. And in a sense, that is what removal does. It doesn't override the States' decision to have any kind of class action rule they want. It simply says if there is a little competition

and an alternative to go to Federal court, then States are not able to go too far.

In a sense, it is like the school choice plans. You know, you try to improve the public schools by giving somebody an opportunity to go elsewhere if the State is not using its monopoly in the right way. And I think the removal provisions of this bill are definitely a step in the right direction.

I also disagree with the Justice Department interpretation that if cases are remanded from Federal court that they are necessarily stripped of the class action allegations. It is true that those allegations are stricken, but once the case goes back to State court, if it is appropriate for State certification, I don't see why those class action allegations couldn't come back in. So I think that is a provision that needs to be clarified in terms of its intent.

Since time is short, let me just wind up. You mentioned that there might be some areas for further thought as the process goes forward, and let me mention two or three. First of all, part of the problem we have in terms of removal in class action cases is created by—and these are not in my written statement. I apologize, but just in thinking about it last night, part of the problem is created by the 1996 amendments to 28 U.S.C. 1446(b), the removal statute that provides an absolute 1-year limitation on the right to remove to Federal court in diversity cases. In these complex class action cases, you are not going to get to the question of who the proper parties are within that year.

Another provision that is a problem is 28 U.S.C. 1359, which is the collusive joinder provision. It provides that you can't add fictive parties for purposes of establishing Federal jurisdiction. But it does not provide you can't add parties collusively for the purpose of defeating Federal jurisdiction. So when you take those two together, the reality of what happens is you can avoid joinder by sticking some parties in there as named plaintiffs who are going to be non-diverse.

And there are several different ways to fix that problem. One way which I would support is to abolish the complete diversity requirement. I agree with Senator Sessions. These are the kinds of cases, particularly when they are multi-party cases, that fundamentally belong in the Federal courts and really respond to the core purposes for which we have Federal diversity jurisdiction.

I will just finish up by saying I also think that the limitations on the extraterritorial of State courts in class action cases, which I heard the Justice Department saying they might support—I think that is also an area that would be helpful.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Elliott follows:]

PREPARED STATEMENT OF E. DONALD ELLIOTT

As a long-time teacher of complex civil litigation and class actions at Yale Law School, as well as a practicing attorney specializing in complex litigation, I am greatly concerned that recent decisions by some federal courts have restricted the rights of litigants in large, multi-party class actions to remove these cases to a neutral federal forum on grounds of diversity of citizenship. The main purposes for which diversity jurisdiction was created—preserving the appearance as well as the reality of no bias in favor of local litigants—are particularly relevant in large class-action litigation against out-of-state corporations. However, overly rigid interpretations of the judge-made requirement for "complete diversity" of citizenship among

all parties in class actions have made it virtually impossible to remove class actions to federal court.

I believe that removal is a brilliant innovation in our federal jurisprudence, and I strongly support the provisions of S. 353 that would make removal to federal court in class actions cases a reality again by revising the complete diversity requirement. The removal option not only guarantees the reality and the appearance of fairness to the litigants directly involved, but—even more importantly—the removal option gently discourages abuses in the state courts by offering litigants a competitive choice to take their business elsewhere. Like other governmental programs that improve systems by giving users the option to go elsewhere if they are dissatisfied, removal does not override state court autonomy to choose whatever law or class action rule the state may like; keeping a removal option alive merely provides potential competition from an alternative forum. Finally, I believe that removal may be important for an additional reason: in many instances overall efficiency in terms of speed and reduced transaction costs can be enhanced by concentrating complex cases in a single federal forum for resolution.

Thank you very much for the opportunity to discuss the important issues presented by the proposed legislation being considered by this Subcommittee today—S. 353, the Class Action Fairness Act of 1999. I am particularly interested in the provisions of the bill concerning the expansion of our diversity jurisdiction statutes to allow removal so that more interstate class actions to be heard by our federal courts.

I approach this subject from two different but related perspectives. First, I have taught complex civil litigation and class actions at Yale Law School since 1981—first, as a tenured professor ultimately holding the Julien and Virginia Cornell Chair in Environmental Law and Litigation, and since 1994, part-time as an adjunct professor at Yale while also practicing. I have spent a great deal of academic energy thinking and writing about how particular jurisdictional and procedural rules affect the resolution of complex disputes (particularly in environmental, toxic tort and medical and consumer product injury cases), and have served as an adviser to the Federal Courts Study Committee. Second, as a partner focusing on complex environmental litigation at Paul, Hastings, Janofsky & Walker LLP, I have had some experience confronting the practical effects of the current jurisdictional regime.

I. The Rising Tide of State Class Actions Is A Product Of The Federal Courts' Reluctance To Take Jurisdiction Over Interstate Class Actions

A. THERE IS A CLASS ACTION CRISIS IN THE STATE COURTS

The flood of class-action litigation in our state courts across the United States is too well documented to warrant significant discussion, much less debate.[1] Many out-of-state defense lawyers have had the experience of arriving at a state courthouse, only to see their opponent drive up in a car bearing a campaign sticker from the judge's last election. Why should we consider the state-court class-action explosion a crisis? For one simple reason: because the class action device has the (often realized) potential to put its heavy thumb on the scales of justice, affecting not only procedure but also in many instances the outcome of lawsuits. As I once observed in an article in the *University of Chicago Law Review,* judges often are inclined to certify cases for class-action treatment not because they believe a class trial to be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial.[2] Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has made the same point more recently and more bluntly: in his words, the mere act of certifying a class "often, perhaps typically, inflict[s] irreparable injury on the defendants."[3] When a class is certified in state court, where an out-of-state defendant has little confidence in the prospect of a fair and impartial trial on the merits, the coercive power of class certification is all the greater. Plainly, the judicial system is supposed to provide

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[1] Among other places, the ever-increasing rate at which state-court class actions are being filed against out-of-state corporate defendants has been documented in Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1, at ix–x (May 1, 1997) ("Advisory Committee Working Papers") (memorandum of Judge Paul V. Niemeyer to members of the Advisory Committee on Civil Rules); and Deborah Hensler, *et al.* (Institute for Civil Justice), Preliminary Reports of the RAND Study of Class Action Litigation, at 15 (May 1, 1997) ("ICJ Report") (stating that the "doubling or tripling of the number of putative class actions" has been heavily "concentrated in the state courts").

[2] *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure,* 53 U. Chi. L. Rev. 306, 323–24 (1986).

[3] *In re Rhone–Poulenc Rorer, Inc.,* 51 F.3d 1293, 1295 (7th Cir. 1995).

procedures and a *forum* for dispute resolution; it is not supposed to coerce particular outcomes.

B. THE FEDERAL COURTS HAVE PLAYED A SIGNIFICANT ROLE IN PRECIPITATING THE CLASS ACTION CRISIS IN THE STATE COURTS

Notwithstanding Chief Justice Marshall's admonition that the federal courts *must* assume jurisdiction over cases that come within the federal jurisdictional confines of the Constitution and applicable statutes,[4] the clear trend in the federal courts over the past several years has been to decline jurisdiction over interstate class actions in any and every way possible. For example, federal courts have given a very strong reading to the judge-made rule requiring "complete diversity"—the principle of federal diversity jurisdiction stating that no plaintiff in a lawsuit can be a citizen of the same state as any defendant. This rule may be quite sensible in other contexts, but in class actions, it virtually assures that large class actions will be kept out of federal court. The result has been that class-action plaintiffs' attorneys can evade the federal court system simply by naming (in addition to the real parties) a defendant with no connection to the class action other than shared citizenship with the named plaintiff. Blessing this practice, the U.S. Court of Appeals for the Eleventh Circuit recently considered a class action in which an Alabama citizen filed a class-action complaint against a Florida auto leasing company alleging the existence of a fraudulent pricing scheme. The Alabama plaintiff also named an Alabama auto dealership, which had no involvement in the development of the alleged pricing scheme, and which had virtually no connection whatever with any putative class member other than the single named plaintiff. Despite the conceded fact that 98 percent of the 17,000 "plaintiffs" involved in the case were unconnected to the non-diverse Alabama defendant, and therefore that the focus of virtually all—but not technically all—of the trial court's efforts would be on parties that were completely diverse, the Eleventh Circuit sent the case back to state court.[5]

The federal courts have also relied on the present diversity-jurisdiction statute's amount-in-controversy requirement—under which only cases that put more than $75,000 in issue may be heard in federal court—to keep interstate class actions out of federal court. Interpreting a previous (but fundamentally identical) version of the diversity-jurisdiction statute, the Supreme Court held in 1973 that the amount-in-controversy requirement must be met by each and every class member in a class action.[6] The Supreme Court did not address the issue of how certain categories of relief (such as attorney's fees, punitive damages, and injunctive relief) should be calculated for jurisdictional purposes, however. Unfortunately, many (though not all) lower courts have addressed this issue quite restrictively from a jurisdictional standpoint. For example, in cases where defendants have attempted to remove cases to federal court on the ground that a class-action complaint requests attorney's fees in excess of the required jurisdictional amount, a number of courts have held that the amount of fees requested cannot be attributed to all the class members, and therefore that such cases cannot be heard in federal court.[7] Similarly, in cases where defendants have attempted to remove cases to federal court on the ground that a complaint seeks punitive damages well above $75,000, courts have held that the amount of alleged punitive damages cannot be applied to the claims of all class members, and therefore have remanded such cases to state court.[8] And in cases where defendants have attempted to remove cases to federal court on the ground that a defendant's cost of complying with the injunctive relief requested by the plaintiff exceeds the jurisdictional amount, at least one federal appeals court has held that the

[4] *See Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264, 403 (1821) ("It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

[5] *See Triggs* v. *John Crump Toyota, Inc.,* 154 F.3d 1284 (11th Cir. 1998).

[6] *See Zahn* v. *International Paper Co.,* 414 U.S. 291 (1973).

[7] *See Meritcare, Inc.* v. *St. Paul Mercury Ins. Co.,* 166 F.3d 214 (3d Cir. 1999) (citing cases); *but see In re Abbott Laboratories, Inc.,* 51 F.3d 524 (5th Cir. 1995).

[8] *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.,* 1997 U.S. App. LEXIS 22267, at *26 (7th Cir. 1997) ("the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct"); *Gilman* v. *BHC Securities, Inc.,* 104 F.3d 1418, 1430 (2d Cir. 1997) (to same effect); *but see Allen* v. *R & H Oil & Gas Co.,* 63 F.3d 1326, 1335 (5th Cir. 1995) (permitting aggregation of punitive damages for purposes of satisfying jurisdictional amount requirement); *Tapscott* v. *MS Dealer Serv. Corp.,* 77 F.3d 1353, 1359 (11th Cir. 1996) (same holding).

amount-in-controversy requirement is not met and that the case therefore cannot proceed in federal court.[9]

The federal courts' contribution to the class action crisis is not limited to an increasingly narrow reading of the two statutory requirements for federal diversity jurisdiction. Federal courts also have demonstrated an increasing willingness, in the absence of congressional direction to the contrary, to seek out procedural technicalities on the basis of which to decline jurisdiction even when the two statutory requirements of diversity jurisdiction are satisfied. One very recent example of this phenomenon is an unpublished remand order issued by the U.S. District Court for the District of Arizona.[10] In that case, the plaintiff filed a class-action lawsuit in Arizona state court attacking a marketing practice of an auto manufacturer. To dissuade the manufacturer from removing the case to state court, the plaintiff named an Arizona auto dealer as a defendant and declined to state the amount of damages she sought. The manufacturer removed the case, arguing that the diversity-of-citizenship requirement was satisfied because the Arizona auto dealer had no connection with putative class members other than the named plaintiff herself, and that the plaintiff's request for attorney's fees, punitive damages, and injunctive relief were all sufficient to satisfy the amount-in-controversy requirement. The district court rejected these arguments and remanded the case to state court.

Within weeks of the remand order, the plaintiff filed a sworn disclosure statement disclosing that, in fact, she would not seek any relief from or make service upon the Arizona dealer defendant. Intrigued, counsel for the manufacturer asked the plaintiff's attorney to stipulate that the plaintiff sought damages of $75,000 or less. The attorney refused to stipulate. The manufacturer therefore removed the case to federal court again, relying on the federal statute permitting re-removal of cases upon the discovery of "other paper" showing that the requirements of federal jurisdiction are met. The manufacturer pointed out that the plaintiff had expressly disclaimed any right to relief against the only non-diverse defendant, and that the plaintiff's refusal to stipulate to damages less than the jurisdictional amount gave rise to an inference that she sought damages in excess of the jurisdictional amount. The district court agreed with the manufacturer both that there now was complete diversity of citizenship, and that the plaintiff's refusal to stipulate created an inference that her claimed damages exceeded $75,000. Nonetheless, the district court remanded the case to state court, all for the exceedingly technical reason that the attorney's refusal to stipulate did not constitute "other paper" upon which removal could occur under the relevant provision of our removal statutes (28 U.S.C. § 1446(b)).

In short, because there is no clear congressional mandate permitting interstate class actions to proceed in federal court, some federal courts are straining to avoid them.

II. The Constitutional Purposes Of Diversity Jurisdiction Support The Extension Of Federal Jurisdiction To Cover Interstate Class Actions

A. INTERSTATE CLASS ACTIONS IMPLICATE ALL THREE CONCERNS IDENTIFIED BY THE FRAMERS AS JUSTIFICATIONS FOR DIVERSITY JURISDICTION

Let me make clear at the outset that the decision whether or not to extend diversity jurisdiction to cover interstate class actions is a political decision, and not a constitutional one. The Constitution's only limitation on diversity jurisdiction is Article III's requirement that controversies be "between citizens of different states." The Supreme Court has regularly recognized that the decision to require complete diversity, and the decision to set a minimum amount in controversy, are political decisions not mandated by the Constitution.[11] It therefore is the prerogative of Congress to broaden the scope of diversity jurisdiction to any extent it sees fit, as long as any two adverse parties to a law suit are citizens of different states.[12]

In my view, extending diversity jurisdiction to cover interstate class actions is not only permissible, but desirable in light of the purposes that animated the framers of the Constitution in adopting the constitutional diversity jurisdiction principle. Di-

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[9] *See Packard* v. *Provident Nat'l Bank,* 994 F.2d 1039, 1050 (3d Cir. 1993) ("allowing the amount in controversy to be measured by the defendant's costs would eviscerate *Snyder's* holding that the claims of class members may not be aggregated in order to meet the jurisdictional threshold").

[10] *Dixon* v. *Ford Motor Co.,* Civ. A. 99–456 (D. Ariz.).

[11] *See, e.g., Newman–Green, Inc.* v. *Alfonzo–Larrian,* 490 U.S. 826, 829 n.1 (1989) ("The complete diversity requirement is based on the diversity statute, not Article III of the Constitution"); *Owen Equip. & Erection Co.* v. *Kroger,* 437 U.S. 365, 373 n.13 (1978) (to same effect).

[12] *See State Farm Fire & Cas. Co.* v. *Tashire,* 386 U.S. 523, 530–31 (1967).

versity jurisdiction generally is thought to be premised on three considerations, each of which I discuss in turn.

The impermissibility of locality discrimination

Perhaps the most important reason why the framers in 1787 thought it important to replace the Articles of Confederation with a new Constitution was the conviction that a loose confederation of states was a weaker form of government, and less protective of basic liberties, than a single, unified nation. As Judge Henry Friendly explained, diversity jurisdiction was an important component in the framers' plan to create a stronger union out of the old confederation; its central purpose was (and is) to protect citizens in one state from the injustice that might arise if they were forced to litigate in the courts of another state.[13] Quoting James Madison, Judge Friendly believed diversity jurisdiction to be essential to a strong union because it "may happen that a strong prejudice may arise in some state against the citizens of others, who may have claims against them."[14] A century and a half after Madison, Justice Frankfurter put a more practical face on Madison's understanding: "It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of the state court and yet not be sufficiently apparent to be made the basis of a federal claim."[15]

A number of scholars have argued, persuasively in my view, that the problem with local bias is based not only on the existence of such bias, but also on the possibility of a perception of such bias. Chief Justice Marshall himself recognized the constitutional significance of even the perception of bias:

> However true the fact may be, that tribunals of the states will administer justice as impartially as those of the nation, to the parties of every description, it is not less true, that the constitution itself either entertains apprehensions of this subject, or views with such indulgence the possible fears and apprehension of suitors, that it has established national tribunals for the decision of controversies between * * * citizens of different states.[16]

Thus, diversity jurisdiction not only was designed to protect against bias, but to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents.[17] Given this function, diversity jurisdiction should not be construed as parsimoniously as the recent federal decisions described above have done; instead, as others have recognized, the "prophylactic" function of diversity jurisdiction demands that it be extended liberally to cases in which legitimate concerns about locality discrimination might arise.[18]

In my view, these concerns are particularly weighty in the context of class actions against large, out-of-state corporations. Whatever one's view of the value of diversity jurisdiction generally (and I served as an adviser to the Federal Courts Study Committee, which expressed some doubt about the value of diversity jurisdiction in the modem era in the context of suits between individual citizens), there is no doubt in my mind that a federal forum which is perceived as neutral and unbiased will enhance the quality of justice in the context of large class actions against multiple parties, many of which are out-of-state corporations.

The undesirability of discrimination against interstate businesses

Part and parcel of the political failure of the Articles of Confederation was the economic failure of that regime. It had become clear by 1787 that, if individual states were permitted to enter into separate economic treaties with one another, and to impose tariffs and other restrictions on the free flow of goods across state lines, the economic health of the United States would falter. Discrimination against out-of-state business entities by means of state judicial processes was regarded as an equally great threat to the growth and economic health of the nation. As one commentator put it:

> No power exercised under the Constitution * * * had greater influence in welding these United States into a single nation [than diversity jurisdic-

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[13] *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 Harv. L. Rev. 483 (1928).

[14] *Id.* at 492–93.

[15] *Burford* v. *Sun Oil Co.,* 319 U.S. 315, 316 (1943) (Frankfurter, J., dissenting on grounds unrelated to diversity jurisdiction).

[16] *Bank of United States* v. *Devaux,* 9 U.S. (5 Cranch) 61, 87 (Marshall, C.J.).

[17] *See, e.g.,* Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts,* 48 Brooklyn L. Rev. 197, 201 (1982).

[18] *See* James W. Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future,* 43 Tex. L. Rev. 1 (1964).

tion]; 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."[19]

The importance of fostering confidence in the judicial system

Last, but certainly not least, the availability of a federal forum enhances the perception (among litigants and others) that justice is not meted out according to what one commentator has called "the Good Old Boy System."[20] Northwestern University law professor Martin Redish has compared the judicial system to a baseball game, and pointed out that in the same way sports fans would not trust an umpire to call balls and strikes fairly if he were affiliated with the home team, the public cannot be expected to have confidence in a judicial system without the life tenure and other protections of the federal judiciary—a system, like that in effect in 38 states,[21] where judges are beholden to their constituents and campaign contributors. Litigating lawyers typically refer to this as the "home court" advantage.

One important way in which the federal courts preserve public confidence in the judicial system is by maintaining procedures designed to minimize inconsistent results. Unlike state courts, the federal judiciary has the ability to consolidate numerous complex lawsuits involving similar allegations in a single district before a single judge.[22] By contrast, related state court cases that are not susceptible to consolidation often reach differing (and seemingly random) results, permitting class-action plaintiffs' attorneys to take multiple bites at the apple in the hope that, despite a number of losses on a particular issue, they will rack up a handful of lucrative wins. One recent example of this phenomenon involved a series of cases filed in state court against Ford Motor Company concerning the quality of paint on Ford cars and trucks. All of these cases were removed to federal court, where they stayed—except for one case, which a federal district judge in Texas remanded twice to state court. The removed cases were consolidated before a single federal judge in New Orleans, where all pretrial matters were conducted in a coordinated fashion. The Texas case proceeded on its own, in state court. After the completion of years of discovery, the federal judge issued what has already become a leading opinion, denying class certification in the consolidated federal cases.[23] Reviewing an identical record, an elected state judge in Texas reached the opposite conclusion and certified a class.[24] What can litigants and the public take from such a result, other than a sense of randomness and inconsistency?

Other witnesses today and at other hearings have noted the practice followed by many state judges of simply certifying classes as a matter of course,[25] the apparent willingness of state judges to approve class settlements that seem to benefit no one other than the plaintiff's attorneys,[26] and the fervor—demonstrated perhaps most recently in the breast-implant class litigation in federal court in Alabama and in Louisiana state court—with which state judges often advance cases that compete with previously filed (and possibly even certified) class actions in federal courts. All of these developments can have no other consequence than a serious erosion of public confidence and trust in the judicial process.

But in my view, the issue transcends whether individual state courts cases certifying classes are right or wrong, or what standards particular states adopt for certifying class actions. At the structural level, it is important to have the option—as we do in other areas of law—to remove cases to federal court. Removal is a brilliant innovation in our federal jurisprudence. It maintains the autonomy of state to develop their own law and their own procedures (without federal preemption) while at the same time creating a gentler incentive to keep them from going too far. The existence of a removal provision creates what economists call "potential competition." Removal is like the use of economic incentives, rather than command-and-con-

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[19] John J. Parker, *The Federal Jurisdiction and Recent Attacks Upon It,* 18 A.B.A. J. 433, 437 (1932); *see also* John P. Frank, *Historical Bases of the Federal Judicial System,* 13 Law & Contemp. Probs. 3, 27 (1948).

[20] Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 4 (May 1, 1997) (comments of consumer advocate Stephen Gardner).

[21] *See* Erwin Chemerinsky, Federal Jurisdiction § 1.5m at 34 (2d ed. 1994).

[22] *See* 28 U.S.C. § 1407 (providing for consolidation by the Judicial Panel on Multidistrict Litigation).

[23] *See In re Ford Motor Co. Vehicle Paint Litig.,* 182 F.R.D. 214 (E.D. La. 1998).

[24] *See Ford Motor Co.* v. *Sheldon,* 965 S.W.2d 65 (Tex. App.—Austin 1998), *writ granted.*

[25] *See* Advisory Committee Working Papers, Vol. 3, at 39 (testimony of Lewis Goldfarb, Chrysler Corporation) (noting that many state judges "almost see it as their civic duty to certify classes").

[26] *See* Lawrence W. Schonbrun, *The Class Action Con Game,* Regulation, Fall 1997, at 50.

trol regulation, in environmental regulation, or like a school choice voucher program that improves the public schools by giving students an option to go elsewhere. Removal does not override the states' freedom of action. It merely breaks a monopoly and creates a kind of competitive market discipline. If a state goes too far, and its decisions are perceived by litigants as unfair for whatever reason, the litigants may go to another forum that they perceive as more neutral.

Unfortunately, in the field of class actions, the option to remove to federal court has been more apparent than real, because of the decisions regarding diversity jurisdiction discussed above. In my view, the most important provisions of S. 353 are those that would make removal to federal court—which is available as a matter of course in other major litigation—available in class actions as well. As I stated above, this is important not only to insure fairness to the litigants themselves in the cases that are removed, but will, in the long run, I believe, exercise a salutary effect on improving the quality of justice in the state courts.

B. THE CURRENT STATUTE IS TOO BLUNT AN INSTRUMENT TO ACHIEVE ITS PURPOSE OF ENSURING THAT "IMPORTANT" CASES HAVE AN AVAILABLE FEDERAL FORUM

As I have already explained, the current diversity-jurisdiction statute contains two requirements, neither of which is constitutionally required: "complete" diversity of citizenship, and a minimum amount in controversy. Intuitively, these two requirements serve a single purpose: to ensure that "important" cases qualify for a federal forum, while protecting the federal docket from cases too trivial to merit the attention of overburdened federal judges. As the class-action explosion demonstrates, however, the current two statutory requirements are not up to their task. Perversely, under the present system, any legally insignificant dispute that happens to involve citizens of different states and a minimum amount in controversy—say, a slip-and-fall case involving a Virginia citizen and a Maryland grocery store owner, or a contract dispute between a businessman in Kansas City, Missouri, and his supplier in Kansas City, Kansas—qualifies for federal jurisdiction. But the Texas lawsuit against, Ford Motor Company—a lawsuit that, according to the plaintiffs' attorneys, involved hundreds of thousands of class members, each with tens of thousands of dollars in alleged damages—somehow is not "important" enough to warrant the federal courts' time.

Clearly, this result is indefensible. It is time we realized—in academia, in the profession, and in Congress—that the two current requirements of diversity jurisdiction are simply proxies for "importance." It is true that these proxies, because they have been in force for many years, have come to be embedded in the legal culture. But there is nothing sacred—and certainly nothing constitutional—about them. They are merely proxies, and highly imperfect ones at that. More important than fealty to these proxies is that we remember the underlying purpose they are intended to serve: to provide a federal forum for cases that are sufficiently large and important, judged against the three constitutional purposes I have described above. Interstate class actions clearly are important on any measure. Accordingly, I strongly support the proposed amendments.

III. Conclusion

I appreciate the opportunity to testify today before this Subcommittee. Please allow me to summarize. Interstate class actions are filed at a rate that increases every year. More and more, they are filed in state court in an effort to capitalize on the political goodwill that many local class-action plaintiff's attorneys have with their local elected judges. And federal courts, lacking any clear guidance from Congress, are bending over backwards to decline jurisdiction over these cases. This has created strong pressure on out-of-state defendants to settle cases, regardless of the merits of the claims involved. This situation is a real and tangible threat to due process in this country, and I urge Congress to take immediate steps to address the threat by restoring the right to remove these cases to a neutral, federal forum.

Senator GRASSLEY. Thanks to both of you, and we will have 5-minute rounds of questions as well for this panel.

I will start with you, Mr. Frank. I would like to have you comment on the Justice Department's concerns regarding diversity removal provisions in the bill. Do you think that the Justice Department's criticisms are justified?

Mr. FRANK. I think not, and I must acknowledge to you, sir, that I have been the principal defender of diversity through many Con-

gresses for many years. That is one of the reasons you are keeping it. So I am very strongly in support of the diversity jurisdiction generally.

At the same time, I have some sympathy with the feeling of the Department, evidently, that they don't want to inundate the system with cases. I also have a sense, as you gentlemen with more experience have, with the practical politics of the situation, because the plain gut fact of the matter is that you are either going to work this out with Justice or you won't get the bill through, I would fear.

And I listened to Ms. Acheson with very great interest. She and I had spoken before the meeting, and I heard her repeatedly encouraging discussions to see if some compromise can't be worked out. And I think that that is just, as I earlier suggested, essential.

I noted Senator Sessions nodding to me when I mentioned Judge Pointer of his State, who has done more than any other single judge in America to make the systems work well together, and by having joint hearings. And I am also a member of the Council of the American Law Institute. There is a bill to work out integration of State and Federal systems. Charlie Wright could be a useful guy for this discourse.

So I take the liberty of suggesting that while I personally believe strongly in the bill as it stands, I suggest that tactically it shouldn't be difficult to work out with Justice some way which would get away from perfectly outrageous situations. I have included an essay in my own statement on that Bank of Boston case that you spoke about. Of course, that is appalling, and we have just got to put a stop to that. And if there is no way to do it but running a steam roller through it, then please run a steam roller. But I think you could work something out.

Senator GRASSLEY. Thank you.

Professor Elliott, you heard the critics of our proposal argue that it would federalize class action procedures, so that if a Federal court denies certification, a State court can't turn around and certify the same class. Do you believe that most State courts already look to the Federal law as a class action procedural issue?

Mr. ELLIOTT. Overwhelmingly, they do. I think that is part of the problem. In many, many, many States, as a litigating lawyer, I think my clients and I would not particularly care whether we are in the Federal court or the State court because there are very similar rules. We do have some situations—and it is kind of a race to the bottom—where certain jurisdictions have developed rules that are extremely favorable to the plaintiff, and cases that have very little connection with that forum tend to get filed in those few areas.

But I think in the overwhelming majority of jurisdictions, the rule is pretty similar to the Federal rule, or even more restrictive than the Federal class action rule. But, again, I think that is why the approach of removal which is used in this bill is really such a good one because you are not going to remove a case to Federal court solely because of a difference in class action standards. You are going to make a decision based on the overall mix of whether or not the State court and the State judge and the State jury and the State procedural system as a whole is perceived as reasonably fair.

And if not, I think it is important, particularly in multi-State cases with out-of-state corporate defendants, that there be an opportunity to remove that case to a more neutral forum. I don't think that is federalizing the rule. I think it is really just the core purposes of diversity jurisdiction.

And let me note I have not been as strong a supporter of diversity jurisdiction as John Frank. I was one of the advisers to the Federal Court Study Committee that recommended some contracting of diversity jurisdiction. But if we have diversity jurisdiction at all, in my opinion, these kinds of cases where you have out-of-state, multi-State corporate defendants are really the core purposes for which diversity jurisdiction is created.

And I think it is ultimately very ironic that the simple slip-and-fall case between two citizens of different States can be in Federal court, and the kind of case that involves many, many people throughout the country and many corporations can't be effectively brought in the Federal court because of these problems with the removal provisions.

Senator GRASSLEY. Professor Elliott, would you please comment on the Justice Department's testimony of how far—well, this isn't just the Justice Department's testimony. How far will this legislation go toward addressing problems associated with class actions? I would also ask Mr. Frank that as well.

Mr. ELLIOTT. I think it is a useful first step, but I don't believe it goes far enough. I think there is plenty more work to be done in this area. As I indicated, I think there are abuses even under the Federal rule, but as a very moderate, balanced first step, restoring the right to remove cases back into the Federal court I think is a good first step.

Senator GRASSLEY. Would you like to comment, Mr. Frank?

Mr. FRANK. I simply feel that it is a very long and a very good first step, and I take the liberty of complimenting you on it, especially on that portion that you mentioned earlier. You are keeping the true State cases in State courts. In my State, for example, there is a pending class action about water rights. Now, that belongs in the State court. It involves our water. The plaintiffs are people involved in the State. It is a very legitimate State class action. You have protected that very, very thoroughly.

I have made my technical suggestions, which I respectfully submit would perhaps strengthen the bill and go squarely to where you want to go, Senator Grassley, and I hope you can consider them.

Senator GRASSLEY. The Senator from Alabama.

Senator SESSIONS. Thank you, Mr. Chairman. I agree with you, Professor Elliott, that really this is the heart and soul of what diversity is about. It is precisely the kind of case that is in harmony with the philosophy, I believe, of diversity, and it is appropriate.

I recall an individual who got elected chief justice of the Alabama Supreme Court and was narrowly defeated by a few votes this last time for reelection, but when he was in private practice, he made a closing argument that was presented in the Alabama Lawyer in which he said, looking at his jury, he wanted them to return a verdict, a big verdict, a verdict so big that it would have to be written

by the president of that New York corporation personally. And he wanted it so big, that the executive would cry when he wrote it.

There is a sense sometimes that juries can be inflamed against foreign defendants, and sometimes you end up with bizarre verdicts that are not always helpful. That is why we had some diversity to begin with, and I think we are moving away from that.

Mr. Frank, I would also note for you Judge Higginbotham is a University of Alabama graduate. So your three people there—Justice Black, and Higginbotham, and Judge Pointer—are all University of Alabama graduates.

Mr. FRANK. It is clear that Judge Higginbotham is very enthusiastic about that, and one of the meetings of the committee under his chairmanship was at the University of Alabama and I was allowed to give a lecture in the Black Room that is now in the building there. I hope you have seen it. It is really very nice.

Senator SESSIONS. It is very nice. Thank you for your continual interest in this. Like any piece of legislation, obviously, you had concerns that interested me. Some of the concerns you had at that time, you now believe have proven to have been correct, is that right?

Mr. FRANK. Yes.

Senator SESSIONS. So you would say to the legislative body, based on your personal experience and the experience we have had over these years, that it is time for us to improve the law so we can minimize those concerns?

Mr. FRANK. Yes, though I don't want to claim I have a crystal ball. Let me say nobody in America in the 1960's ever anticipated that we were going to get this massive growth. I repeat, what we thought we were dealing with was small matters.

May I add one other word? I am keenly aware that the Committee on Civil Procedure and the special committee headed by Judge Scirica has recently recommended that there be further study of the mass tort problem. I have read it. They have sent it to me. I strongly endorse that proposal of Judge Scirica, and at the same time that is no reason why you have to paralyze action on this particular difficulty. This is a subset of the problem; it is a severe abuse. And you are very wise in doing just what you are doing.

Thank you.

Senator SESSIONS. I thank you for that, and I agree 100 percent. We had hearings on the asbestos litigation. I believe 200,000 asbestos cases have been concluded; 200,000 are pending, and another 200,000 expected. Seventy percent of asbestos companies, 25 companies, are in bankruptcy, and only 40 percent of the money paid out by the asbestos companies has gotten to the victims.

In mass tort, we have got to do better. For those who love the law, we need some professors to be outraged about that. This money should have gone to victims and not the bureaucrats and lawyers in between, in my view. But that is to some degree another subject.

With regard to the Department of Justice, I hope your optimism is not too great, Mr. Frank, because I am not sure they want legislation. But I certainly would be prepared to work with you or the chairman, if he chose. I have spent some time personally with Judge Pointer, who I think is one of the country's finest district

judges, and he believes that this is not an undue burden on the Federal courts; a necessary burden, I assume he would call it. And he thinks your suggestions are on the right track.

Mr. Elliott, with regard to the attorneys' fees, aren't there circumstances in which there is a conflict of interest between the attorney and the clients, the thousands they may represent? Would you explain why we can't always rely on a fee agreement to be a fair setting of attorneys' fees?

Mr. ELLIOTT. I would be glad to, and I certainly agree with you that there is an inherent conflict between the attorney and the clients in class action cases. That is one of the reasons that we have the provisions that are unique in rule 23(e) in the Federal system requiring that the settlement agreements and the fee agreements have to be approved by the court because in a class action case, although you have some representative parties that are in some of the academic literature referred to as decorative figureheads, you can't really count on them to negotiate an agreement. So these fee agreements are not really negotiated with class action members in the way that they would be in a normal situation.

And along those lines, Senator Sessions, let me just make one remark. You mentioned the asbestos cases, and as you continue to draft this legislation, I think we have to be careful that we cover what are sometimes called quasi-class actions. I was involved in defending the—and the closing argument you mentioned reminded me of the times I had heard that.

I was involved in defending the 8,800-plaintiff Baltimore asbestos cases, at the time one of the largest asbestos cases ever. That was not filed as a class action.

Senator SESSIONS. 8,800 individual lawsuits?

Mr. ELLIOTT. 8,800. They just named 8,800 consolidated cases. And if you were to have a situation where your legislation granted removal, but it was limited to those cases that are class actions, you might create incentives for people to file these cases in the State courts under liberal joinder provisions, but simply to name 8,800 people.

So I think you need to think as the process goes forward about how this gets drafted so that we are really dealing with the multiparty cases, not just those that are formally class actions. I mean, we had a situation where people were using consolidation as an alternative to class actions, and you can get to pretty much the same result that way in many cases.

Senator SESSIONS. Thank you.

Senator GRASSLEY. The last question was something I was going to ask Mr. Frank, so I just wondered if you want to comment on the last question that he asked just to have a confirmation of everything we have talked about here today.

Mr. FRANK. I think Mr. Elliott has done this so well, and John Beisner is coming before you and he speaks for me very well. I do reiterate what I took the liberty of saying before. I really believe that if the right people expert in this field spent an afternoon together, they would solve this problem and come back to you with a proposal that could be unanimously accepted. It just isn't that difficult.

Some of the cases should stay in State courts, some of them shouldn't. You have made a brave step. Perhaps something further can be done, and it so needs to be done. Please don't let this valuable bill die because of a quarrel over that very important question. It just has got to be compromised somehow.

Thank you.

Senator GRASSLEY. Thank you, and I say thank you to the entire panel. Your contribution is very worthwhile for this project that we are going forth on.

Now, on our fourth and final panel, I would call Mr. Steve Morrison, Professor Richard Daynard, and Mr. John Beisner. Mr. Morrison is a partner with the Columbia, SC, law firm of Nelson, Mullins, Riley and Scarborough, as well as general counsel for Policy Management Systems Corporation. He is the witness that Senator Thurmond has referred to as being a constituent of his, and Senator Thurmond is glad to have Mr. Morrison here. He also serves as board chairman of the Lawyers for Civil Justice.

Professor Daynard is a professor at Northeastern University School of Law and is active in tobacco-related studies and litigation. He has published numerous articles dealing with tobacco liability.

Mr. Beisner is a partner in the Washington, DC, office of O'Melveny and Myers, and he has defended over 250 class action lawsuits in both Federal and State court.

I would ask Mr. Morrison to start.

PANEL CONSISTING OF STEPHEN G. MORRISON, GENERAL COUNSEL, POLICY MANAGEMENT SYSTEMS CORP., COLUMBIA, SC; RICHARD A. DAYNARD, PROFESSOR OF LAW, NORTHEASTERN UNIVERSITY SCHOOL OF LAW, BOSTON, MA; AND JOHN H. BEISNER, O'MELVENY AND MYERS, LLP, WASHINGTON, DC

STATEMENT OF STEPHEN G. MORRISON

Mr. MORRISON. Thank you, Mr. Chairman. Mr. Chairman, I am an old trial lawyer. I have had the privilege of trying over 200 cases to jury verdict in over 20 States in the United States, and I have seen home cooking in various places and I have seen some excellent judges and fundamental fairness.

Your bill restrikes the appropriate balance of fundamental fairness in class actions by allowing for the use of diversity jurisdiction to remove the case to Federal court. It is what the Framers intended and it is what we need as practicing lawyers.

Nicholas Negroponte, who is head of the media lab at the Massachusetts Institute of Technology, a fellow who foresaw the digital world that we are in now, wrote a book called *Being Digital* in 1996. He says if you are going to look to the future, looking straight ahead with your head down, you don't always see things. To see the future appropriately, you need to see it from peripheral vision because some of the things that come at you really come out of left field.

I think out of left field, we have had a situation where class actions have increased so dramatically from 1988 to 1998—up 1,000 percent in some areas, 300 percent in other areas. The RAND

study says most of them are in State courts. The focus has been on State court litigation.

So, Mr. Chairman, what I say is what is happening out there? Has corporate conduct really changed? Is the business world significantly more evil in more multiples across the country, in the United States? No, absolutely not.

What has changed is an attitude toward entrepreneurial litigation which is going to the lowest common denominator, that is the jurisdiction where they can get the best possible judge with the least possible rigor in the class certification process. Entrepreneurial litigators are bringing these cases in hometown jurisdictions. Now, why are they doing that? They are bringing them in hometown jurisdictions because the whole ball game in class action is about class certification.

When I am litigating a class, if I can prevent it from being certified, or at least get enough rigor in the class process by which you have a rational certification of people that are really injured, really in like situation, whose cases can be tried together rationally, then you can come up with a rational settlement or, better yet, a rational trial process by which you can go to a verdict.

There is a case down in Tennessee that is commented upon in several of the articles that are before you where a class action involving 23 million people nationwide was certified on the same day it was filed. What do you think the defendant has to do under those circumstances? The defendant is forced to settle with a 23-million-person multiplier in that situation. That is legal blackmail in a State court. You know those 23 million people didn't all live in Tennessee, nor were all the defendants in Tennessee. But there were enough defendants and enough plaintiffs in Tennessee to allow that to go forward. That was wrong.

And, you know, when we looked further into it, we found that within 10 days before that, the same lawyer in the same court in the same State of Tennessee had filed a case against the music industry for a class action. That is abusive, and that is what is going on. So we have a huge increase in monetary demands, no change in corporate behavior, and an entrepreneurial litigation going on.

Why? It is because the States are less rigorous. It is because the States are less able to manage this litigation. They have not been set up for it, they have not had the training in it, they do not have the clerks in it. Mr. Chairman, when I go to a State court in a small county, I am frequently confronted with a judge in a mass tort situation, class action or other mass tort, where the judge the next day will be hearing a divorce case, and the case right before mine was a juvenile crime case and the case right after mine is a slip-and-fall in a grocery store.

Now, the State courts have to deal with that. There are wonderful, brilliant State court judges in all of our States and they have to deal with justice on an individual level in that State, in that locality. That makes sense. But does it make sense for them to be handling a nationwide class action? No, it does not. That is what diversity jurisdiction is all about.

Now, when we take a look at what is happening, we get this certification, we get the blackmail multiplier in there. And then what we really have to do is look at who runs the case once that is done.

Well, Mr. Chairman, the person who runs the case is the self-appointed chief executive officer of the case; it is a lawyer. There are no clients.

In fact, in the Federalist documents there is a quote from William Lerache, who is probably one of the major class action plaintiff lawyers in the country, saying it is wonderful not to have a client. If your client is going to get $.08 at the end of the case, there is no client, there is no accountability. Now, that person has not been elected by a board of directors, not been elected by the shareholders, not been elected by the voters. That entrepreneurial litigator is then negotiating a class settlement that is really about that person's fee.

If I might just conclude, so who is getting tromped on here? The people that are really getting tromped on are the consumers. The consumer then ends up paying a huge fee for an $.08 settlement. The disclosure didn't come out on the fee. The disclosure didn't come out in plain English. The notification didn't come out in plain English.

And what is the solution to all of this? Interstate class actions should be in the Federal courts. Why? Mr. Chairman, the Federal courts are particularly able to handle these. They were designed for multi-State issues, to deal with them. They have a sensitivity toward the substantive law of each State.

Moreover, if you look at what is happening in the peripheral vision, the aggregation of large numbers of claims, as Senator Thurmond said in his opening statement, is creating social policy. In essence, the courts are being used by aggregating large numbers of claims to make public policy, absent an elected representative, absent a legislator.

Why is that significant? The Federal courts are extraordinarily sensitive to separation of powers, and so they are sensitive to the law of each State. They have a mechanism by which we are not going to duplicate these class action lawsuits, so there is a mechanism to manage them. Most of the Federal judges have two or three law clerks. Most of the Federal judges have a docket that is more manageable. They work extraordinarily hard, but the variety and size of cases is in a narrower band.

They are in a situation where, if they can have this appropriate jurisdiction, eliminating the sham defendant or the false joinder, as you have done here, and the amount in controversy claim-shaving abuse, all you do is take appropriate Federal actions in the U.S. district courts where they belong. I strongly endorse this bill as a very powerful first step and, as Professor Frank said, a long first step toward class action reform.

Thank you.

Senator GRASSLEY. Thank you, Mr. Morrison.

[The prepared statement of Mr. Morrison follows:]

PREPARED STATEMENT OF STEPHEN G. MORRISON

Thank you for this opportunity to speak to you today about the merits of S. 353, the Class Action Fairness Act of 1999. This important legislation at least partially addresses one of the most serious problems raised by class action litigation in our nation's legal system, and I therefore urge the members of this Subcommittee to give their careful consideration and support to this legislation.

Before spelling out the reasons for my support of this legislation, let me tell you about the multiple perspectives that I bring to this subject. Indeed, I have seen the subject matter of this legislation—class actions—"up close and personal" from four very distinct vantage points. First, I am a partner and practitioner trial attorney with the law firm of Nelson, Mullins, Riley & Scarborough in Columbia, South Carolina. In that role, I have had considerable involvement with the adjudication of class action litigation. Second, I am the General Counsel of Policy Management Systems Corporation, a publicly traded (NYSE) technology computer systems and technology services company. Third, I currently serve as Board Chairman of the Lawyers for Civil Justice (LCJ), a national coalition of the leading corporate counsel and defense bar organizations. Finally, I recently served as President of the Defense Research Institute, an organization of 21,000 lawyers defending civil cases in America's civil courts every day. My firm which has over 200 lawyers in North Carolina, South Carolina, and Georgia has been involved in defending dozens of state and federal class actions. My own personal experience in handling state and federal class actions involving both national and "local" issues and classes in managing multidistrict litigation forms the primary basis for my testimony.

I. The Number Of Class Actions Has Increased Exponentially

When it comes to class actions, there may be room for legitimate debate on a lot of issues. But there is no room for dispute on a key point—over the past several years, the number of putative class action lawsuits filed has skyrocketed. I have seen that phenomenon in my own legal practice. I have seen that phenomenon as a general counsel, both in dealing with the legal docket of my company and in corresponding with fellow general counsels of other companies. And I have seen that phenomenon in my work with Lawyers for Civil Justice, whose members have spent many hours discussing and analyzing the burgeoning "class action problem." Personally, I have experienced the explosive increase in class action suits through the over fifty class action cases recently or currently handled by my firm; multiple state court class action cases filed against Policy Management Systems Corporation over the cost of photocopying hospital and other medical records; and the alarming increase in state court class actions filed against corporate members of Lawyers for Civil Justice.

There's a lot more than just anecdotal evidence of this trend. Both this Subcommittee and its House counterpart held hearings last year in which ample evidence of the class action tidal wave was supplied. For example, the record of those hearings reflect statements from the Federal Judicial Conference's Advisory Committee on Civil Rules observing that over the past few years, U.S. companies have experienced 300–1,000 percent increases in the number of purported class actions filed against them.[1] And a study by the highly regarded RAND Corporation confirms this trend.[2]

Let me also observe that it is not only the number of these cases that has grown—the size of those cases has also grown. It is not unusual for the proposed classes in these cases now to encompass millions of Americans. And not surprisingly, with the number of class members growing in the average case, the monetary demands are growing as well. Thus, it is not unusual for a company to be served with a class action lawsuit seeking damages of a billion dollars or more.

This dramatic increase in the number of state court class actions and the size of the awards being sought is puzzling to say the least. Obviously, it is not attributable to any radical change in corporate behavior. I see no evidence that our nation's business leaders suddenly lost their moral compass, such that it is rampant corporate wrongdoing that is prompting these lawsuits. Instead, I think it is clear that the explosion of class action filings can only be attributed to the fact that certain members of the plaintiffs' bar have discovered that some of our state courts can be a fertile playing field for class litigation.

B. THE CLASS ACTION DEVICE IS BEING ABUSED

Given the immense stakes involved in nearly all class actions, one might think that these class actions would generally be filed and litigated in the federal district courts. After all, a core function of the federal courts is to adjudicate claims between

[1] Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1, at ix–x ("Working Papers 1") (memo to members of the Standing Committee on Rules and Procedure and the Advisory Committee on Civil Rules from Judge Paul V. Niemeyer).

[2] Deborah Hensler et al., Preliminary Results of the RAND Study of Class Action Litigation 15 (May 1, 1997) ("RAND Report").

the citizens of different states that involve substantial amounts of money. But there is compelling evidence that the recent growth in the number of class actions is primarily a *state* court phenomenon. The RAND Report notes that the "doubling or tripling of the number of putative class actions" has been "concentrated in the state courts."[3]

The reason for this explosion of state court class actions is simple. State courts in a number of jurisdictions have exhibited a relatively lax attitude toward class action lawsuits—that is, many local courts are willing to certify for class treatment cases that do not meet the basic, generally accepted class action requirements.[4] Not surprisingly, some members of the class action plaintiffs' bar have seized this obvious opportunity. They have taken their lawsuits to state courts that are less likely to exercise the rigorous case management necessary to ensure that all parties (including unnamed class members) receive due process. Having discovered an open door in state courts, plaintiffs' counsel are filing class action lawsuits that they would never have seriously considered bringing a few years ago.

In interviews for the RAND Report, many attorneys (including some plaintiffs' counsel), observed that "too many non-meritorious [class action lawsuits] are [being] filed and certified" for class treatment.[5] As a result, U.S. corporations (both large and small) are being forced to expend substantial resources defending an onslaught of cases, most of which do not come close to satisfying the class action prerequisites. By readily obtaining certification of huge classes in state courts, plaintiffs' attorneys are able to create enormous financial exposure and to thereby force settlements of cases that otherwise would not be taken seriously.

But corporations are not the only victims here. Class actions are supposed to be brought on behalf of class members—usually consumers. But in the class actions we are seeing today, class members are the forgotten participants. No one checks to see if the putative class members really want to have their claims asserted in a class action. No one asks the class members how or where they wish their claims to be asserted. No one confers with class members to find out if they wish to have their claims litigated. And most importantly, no one obtains input from class members about how they wish to have their claims settled (if at all). In short, consumers' claims are being used by attorneys as business ventures. Consumers have little or no control over how their claims are being used. Thus, not surprisingly, they exercise little or no control over what happens to their claims.

1. Defendants' due process rights are being ignored

The record shows that many state courts do not give a fair shake to either class action defendants or the members of the putative classes—only class counsel are benefited. The state court abuses of the class action device have become open and notorious. As defendants in state court class actions, U.S. companies are being denied fundamental due process rights. Let me describe a few types of problems defendants commonly incur in these courts.

Some state courts ignore the due process rights of out-of-state corporate defendants. In these jurisdictions, the defendant is not afforded a fair opportunity to contest the claims brought against it. The most outrageous example of this is the "drive-by class certification" in which a state court judge grants plaintiffs' motion to certify his claims for class treatment *before* the defendant even has a chance to respond to the motion (or, indeed, in some instances has even been served with the complaint).

For example, I noted in the record of the House hearings last year discussion of a lawsuit filed against a major car manufacturer in a Tennessee state court.[6] Plaintiffs filed several inches of documents with their complaint. Astoundingly, by the time the court closed on the very day that the action was filed, the judge had entered a nine-page order granting certification of a nationwide class of 23 million ve-

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[3] *See, e.g.* RAND Report, *supra* note 2, at 15.

[4] At the same time, federal courts have laid down clearer, firmer rules, governing when a matter may be afforded class treatment. The recent decisions of the U.S. Supreme Court in *Amchem Products* v. *Windsor,* 117 S.Ct. 2231 (1997), the Fifth Circuit in *Castano* v. *American Tobacco Co.,* 84 F.3d 734 (5th Cir. 1996), the Sixth Circuit in *In re American Medical Sys., Inc.,* 75 F.3d 1069 (6th Cir. 1996), the Seventh Circuit in *In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293 (7th Cir.) (Posner, J.), *cert. denied,* 116 S.Ct. 184 (1995), the Ninth Circuit in *Valentino* v. *Carter-Wallace, Inc.,* 97 F.3d 1227 (9th Cir. 1996), the Eleventh Circuit in *Andrews* v. *American Tel. & Tel. Co.,* 95 F.3d 1014 (11th Cir. 1996), have reminded federal district courts of the importance of taking the requirements of Rule 23 seriously; that is, matters may be certified for class treatment only if they clearly meet the certification prerequisites set forth in Fed. R. Civ. P. 23.

[5] RAND Report, *supra* note 2, at 22.

[6] *Sweet* v. *Ford Motor Company,* Civil Action No. L–10463 (Cir. Ct. for Blount County, Tenn.) (filed Jul. 10, 1996).

hicle owners—one of the largest class actions ever certified by any court.[7] In the order, the court stated that it had conducted "a probing, rigorous review" of the matter. I am not sure how you could possibly do that in a few hours on the day a case is filed. And I am quite sure that you could not do "a probing, rigorous review" when the defendant was never even notified about the lawsuit before that order was entered and was provided no opportunity to tell its side of the story. Only a few days earlier, the same plaintiffs' attorney had filed another multistate class action—one alleging antitrust violations in the music/compact disc industry—before the very same Tennessee state court.[8] Once again, in that major class action, the trial court entered an order granting class certification on the same day the complaint had been filed, long before the defendants were notified of the lawsuit and certainly before they had been afforded any opportunity to respond to the request for class certification.

Another common problem with state court class actions is the "I never met a class action I didn't like" phenomenon. Although most state courts will at least give the defendant a chance to respond to a class certification motion, many of them employ standards that are so lax that virtually every class certification motion filed is granted, even where it is obvious that the case cannot, consistent with basic due process principles, be tried to a jury as a class action. This problem is evidenced by the frequency with which state courts are readily certifying cases as class actions, while federal courts conclude that the very same cases cannot be litigated on a class basis. For example, I am aware of cases in which a state-court judge certified a nationwide class of persons who allegedly claimed that the house siding they had purchased was defective. Later, however, a federal district court judge presented with the same case rejected any prospect of certifying a class in that matter, finding that affording class treatment in that case obviously would deny the due process rights of the defendants and the purported class members.[9]

2. Consumers are being used and their rights are being trampled

The real purpose of the vast majority of class action lawsuits is to make money—not for consumers, but for the lawyers bringing the suit. As a result, consumers often are exploited and rarely receive substantial awards, while class action counsel frequently walk away with millions. For instance:

- The *Chicago Tribune* reported that in a class action against Arista Records seeking to recover the prices paid for albums by the rock duo Milli Vanilli (that contained the voices of other performers), class members obtained a settlement recovery of *$1 to $3 each.* But the court awarded the lawyers *$675,000.* And for those lawyers, that was not enough. They petitioned the court to increase their fee to *$1.9 million.*
- *Business Today* reported that in a class action against a cereal maker regarding the use of a food additive that had not injured any consumer, the consumers received (in settlement) a coupon entitling them to free cereal (if they bought more cereal). Meanwhile, the lawyers for the class were paid nearly *$2 million* in fees—approximately *$2,000 per hour.*
- The *Baton Rouge (La.) Advocate* reported that in a settlement of a state court class action involving toxic pesticide fumes from a chemical plant, the residents of a New Orleans neighborhood each received a few thousand dollars. But the class action lawyers walked away with over *$25 million* in legal fees and expenses.
- An article in the *San Diego Union Tribune* criticized the settlement of a state court class action in which the author had received *93 cents* and her class counsel had received *$140,000.*
- The *Chicago Tribune* reported that one state court class action settlement with a mortgage bank yielded an *$8.5 million* payment to the class attorneys, but a *$91.33 debit* to the class members' mortgage escrow accounts.

I am also very disturbed by the circumstances (discussed in more detail below) in which class counsel waive the rights of the class members (whose rights they are supposed to protect) in an effort to make a case more amenable to class treatment. In short, in order to achieve the class counsel's personal objective—to create a class action business venture—counsel frequently jettison purportedly viable claims and take other actions that are adverse to the interests of class members.

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[7] *See* Order Granting Nationwide Class Certification, *Sweet* v. *Ford Motor Company,* Civil Action No. L–10463 (Cir. Ct. for Blount County, Tenn.) (filed Jul. 10, 1996).

[8] *Robinson* v. *EMI Music Distribution. Inc.,* Civil Action No. L–10462 (Cir. Ct. of Blount County, Tenn.) (filed July 8, 1996).

[9] *Compare Naef* v. *Masonite Corp.,* No. CV–94–4033 (Circuit Court, Mobile County, Alabama), *with In re Masonite Hardboard Siding Prods. Litig.,* 170 F.R.D. 417, 424 (E.D. La. 1997).

These reports are particularly disturbing because they reveal how grossly the class action device has been distorted. The class action device was intended to protect consumers. It was not created to enable lawyers to get rich.

Before going any further, let me say that I am pleased that S. 353 addresses the issues of consumer exploitation and attorney misconduct in a number of its provisions.[10] For example, the class notices that class member receive frequently are written in small print and legalese. Since those notices typically are telling class members that they are about to give up important legal rights (unless they take appropriate action), it is imperative that they understand what they are doing and the ramifications of their actions. The bill requires notice of proposed settlements in all class actions, as well as all class notices, must be in clear, easily understood English and must include all material settlement terms, including the amount of attorneys' fees.

The bill also requires that state attorney generals be notified of any proposed class settlement that would affect residents of their states. The notice would give state attorney generals the opportunity to object if the settlement terms are unfair.

Senate Bill 353 requires that attorneys' fees in class actions be based on a reasonable percentage of damages actually paid to class members, the actual costs of complying with the terms of the settlement agreement, as well as any future financial benefits. In the alternative, the bill provides that, to the extent the law permits, fees may be based on a reasonable hourly rate. This provision would discourage settlements that give attorneys exorbitant fees based on hypothetical overvaluation of coupon settlements, yet allows for reasonable fees in all kinds of cases.

II. Federal Courts Are The Appropriate Forum For Litigating Interstate Class Actions

State courts are simply not the appropriate tribunals for many class action lawsuits, particularly those with interstate commerce dimensions. In many (if not most) instances, state court class action cases involve putative class members from multiple jurisdictions suing defendants from outside the forum state. This engenders the bizarre situation in which a state court in one state (*e.g.,* Massachusetts) is interpreting the state law of another (*e.g.,* South Carolina) and resolving the claims of South Carolina residents. What business does a Massachusetts court have dictating to South Carolina what its laws mean and in resolving the claims of its citizens? It is far more appropriate for a federal court to interpret the laws of various states, which is inherently what the constitutional concept of diversity jurisdiction is all about. Other state courts have adopted a different, equally unsatisfactory approach. They apply their own state's laws to all claims asserted in a purported class action, even though the class is comprised primarily of out-of-state residents and even though the laws of those class members' respective home states may be radically different.[11]

In addition to these problems, many state courts have neither the complex litigation experience nor the support staff necessary to address the complex, technical issues normally presented by class actions. And perhaps most importantly, they lack any mechanism for coordinating parallel litigation. Once a purported class action is filed, counsel in other jurisdictions often file "copycat" cases—purported class actions asserting basically the same claims on behalf of basically the same class members. Because state courts have no mechanism to consolidate cases, as do the federal courts, defendants are unfairly required to expend substantial resources defending these duplicative lawsuits. In such circumstances, there is no mechanism for achieving coordination and avoiding inconsistencies in results. Indeed, in some instances, the two state courts are forced to compete, each vying to control the litigation. This situation often works against the interests of the class members, as class counsel in the various cases sacrifice class members' rights in an effort to jockey for controlling position. The situation is also unfair to defendants, potentially giving the same classes several bites at the apple against a class action defendant.

If, however, overlapping or similar class actions are filed in two different federal courts, the multidistrict litigation process permits the transfer and consolidation of those cases for pretrial purposes, particularly the coordination of discovery. This is a much more efficient and effective system that does not needlessly waste judicial

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[10] However, I would urge the Congress to work with the courts through the rule making process rather than legislatively amending Rule 11 of the Federal Rules of Civil Procedure. Specifically, Congress should be cautious in the area of "mandatory" judicial sanctions. I would urge leaving discretion with the federal judges as to when and whether sanctions are appropriate in each case.

[11] *See, e.g., Snider* v. *State Farm Mut. Auto. Ins. Co.,* No. 97–C–114 (Ill. Cir., Williamson Co.) (order certifying nationwide class of state-law based claims).

or corporate resources. Federal courts are by far the more appropriate forum in which to adjudicate class actions. Virtually all federal judges have two or three law clerks on their staff; state court judges typically have none. Federal court judges are usually able to delegate some aspects of their cases (e.g. discovery issues) to magistrate judges or special masters; it is not the norm for such personnel to be available to state court judges.

The current law has been manipulated by plaintiffs' lawyers making removal of class actions to federal court virtually impossible. The state court class action environment has led to a sad reality: as a practical matter, the most important question determining the outcome of a class action lawsuit has now become, not the merits of the claims or the propriety of class treatment, but whether the case can successfully be removed to federal court. Because of the lackadaisical way in which some state courts treat class actions, a class action that stands practically no chance of succeeding in a federal court can result in a multi-million (or billion) dollar judgment if it ends up in state court. Thus, the fight over the existence of federal jurisdiction becomes, as a practical matter, the entire game. The lawyers who file class action lawsuits recognize this. Accordingly, they have become increasingly adept at manipulating their pleadings to keep their putative class actions out of federal court. Tactics include:

(1) Filing a complaint that, fairly read, gives rise to a claim under some federal statute, thereby qualifying the case for the assertion of federal question jurisdiction. To disguise this fact, the complaint will omit any explicit reference to the federal claim, or may even expressly disclaim any intent to pursue an available federal claim.

(2) On the diversity side, lawyers who want to keep a high-stakes class action out of federal court often manipulate the parties in an attempt to destroy complete diversity. Under traditional principles of diversity jurisdiction as applied to class actions, "complete diversity" exists only if the state of citizenship of all named plaintiffs is completely different than the state of citizenship of all named defendants. To destroy this, lawyers whose primary target is an out-of-state deep-pocket corporation sometimes name a token defendant who resides in the same state as one or more of the named plaintiffs. For example, a lawyer wanting to sue a company in Texas state court may name as a codefendant a Texas-based employee of that company.

The inherently fraudulent nature of this tactic is obvious: although all putative class members may conceivably have a claim against the defendant corporation, few (if any) of the putative class members had any dealings with the token in-state defendants, meaning that a classwide judgment against these defendants is impossible. As all parties recognize, the corporation is the only real target of the lawsuit. The in-state defendants are there only to facilitate the remand of the action to state court on the basis of the "absence of complete diversity." Once the jurisdictional battle is over, these defendants usually fall by the wayside.

(3) Alternatively, lawyers sometimes include on the *plaintiffs'* side of the case a named plaintiff who lives in the same state as the defendant. Thus, a defendant may, under the present law be served with a complaint in Alabama state court which purports to be brought by three Alabama residents and one resident of its home state. Again, the manipulative intent here is clear. Why would a plaintiff who has a grievance against a company within his or her home state travel all the way to some other forum to file a lawsuit? Obviously, the reason is that her lawyers are trying to prevent the corporation from defending against this inherently nationwide controversy in a federal court.

(4) The "amount-in-controversy" prong of the federal diversity requirement also is the subject of frequent manipulation. The U.S. Supreme Court's decision in *Zahn* v. *International Paper*[12] has been interpreted as holding that, in a putative class action, the "jurisdictional amount" requirement (now $75,000) is met only if each and every putative class member's individual claim is worth that amount. Exploiting this general rule, class action complaints often declare over and over again that all putative class members seek less than the jurisdictional amount (sometimes $74,999).

In recent years, some exceptions to the basic *Zahn* rule have developed. For example, some federal courts of appeals have held that class actions that seek punitive damages in excess of the jurisdictional amount may meet the amount-in-controversy requirement.[13] In response, class action complaints now purport

[12] 414 U.S. 291 (1973).
[13] *See Tapscott* v. *MS Dealer Serv.—Corp.,* 77 F.3d 1353, 1359 (11th Cir. 1996).

to "waive" any and all claims that might conceivably give rise to a punitive damage award (or at least limit punitive damages to a lesser amount).

These kinds of "claims-shaving" tactics raise disturbing issues of adequacy-of-representation and due process. While a single plaintiff suing solely in his own name surely is the "master of his complaint" and may limit the claims he asserts or the relief he seeks in order to stay in state court, a litigant (and his counsel) who seeks to represent large numbers of other people in a class action is constrained by his fiduciary obligations to the absentee members of the class. As several courts have recognized, it is inherently improper for a class action lawyer to unilaterally "waive" otherwise available claims that absentee claimants might wish to assert simply in the name of forum-shopping.[14] Nevertheless, it happens every day—class counsel sacrifice the claims of unnamed class members in order to keep their cases in state courts.

Crafty lawyers can exploit still other tricks to deprive an out-of-state class action defendant of its right to defend itself in a federal forum. For example, under current law, *all* defendants must consent to the removal of a case to federal court. If one defendant objects, the case cannot be removed. Accordingly, plaintiffs' lawyers sometimes join a "plaintiff-friendly" person or entity as a defendant, with the understanding the nominal defendant will use his status to veto any removal attempt.

Another abuse stems from the requirement that any lawsuit be removed to federal court within one year after its "commencement." Lawyers sometimes quietly file putative class actions in state courts that have no deadline for providing service, and then decline to serve the defendant until the one year deadline has expired. Alternatively, they include statements in their complaint designed to insulate the case from removal (such as assertions that only a nominal per-claimant amount is sought), wait one year, and then file an amended complaint that raises the amount-in-controversy or eliminates other impediments to removal only after the one year deadline has expired.

These pleading tactics (and others like them) invariably are employed in purported class actions that, by virtue of the inherent diversity of the real parties in interest and the amounts actually at stake, ought to be litigated in federal court. They are complicated lawsuits that require the substantial resources and expertise that the federal courts are uniquely situated to devote to them (and that state courts, which spend most of their time handling smaller matters, are not institutionally well-suited to handle). They are also lawsuits that present exceedingly high-stakes for the defendant, and therefore give rise to the risks of parochialism and prejudice that the federal court system is designed to prevent (but that, regrettably, infect some state court systems).

Such pleading tactics are intended to mask the inherently federal character of these lawsuits. They elevate the deliberately manipulated "form" of the lawsuit over its actual substance. They should be outlawed. The bulk of today's class actions—large cases with interstate commerce implications—plainly belong in the federal courts. Accordingly, I urge this Subcommittee to vote favorably on S. 353.

S. 353 addresses and resolves the problems associated with the adjudication of class actions in state courts by allowing more class action lawsuits to be removed from state court to federal court. The bill allows unnamed class members to remove to federal court class actions in which their claims are being asserted (within 30 days after they are formally notified about the class action). (This is a critical change, because if a state court is not protecting the class members' interests, this will be the only viable mechanism by which unrepresented class members can get their day in court.) It also allows defendants to remove to federal court.

With these removal possibilities in mind, the bill would create a modest expansion of federal jurisdiction over class actions. Under the bill, a class action would qualify for federal jurisdiction if the total damages exceed $75,000 and parties include citizens from multiple states. However, the bill provides that cases remain in state court where the substantial majority of class and primary defendants are from the same state and that state's law would govern, or the primary defendants are states and a federal court would be unable to order the relief requested.

Lastly, the bar on removing cases to federal court after one year would not apply to class actions (although a defendant would still have to remove within 30 days after first becoming aware of federal jurisdiction).

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[14] *See, e.g., Epstein* v. *MCA, Inc.,* 126 F.3d 1235 (9th Cir. 1997); *Ex parte Russell Corp.,* 1997 WL 641325 (Ala. Oct. 17, 1997).

III. Conclusion

The state court class action crisis has reached epidemic proportions. In order to close the floodgates on the filing of meritless class actions and recraft a legal tool that has been manipulated beyond recognition to the benefit of few and the greater detriment of millions of American consumers, the legislative system must provide the federal courts with the ammunition to enforce their right to hear interstate class actions cases. Under current law, most interstate class actions cannot be heard in federal court. The current statutes also allow plaintiffs' attorneys to game the system to keep class actions out of federal court. And finally, under the existing law, there is no mechanism by which class members can insist that their claims be heard in federal court. S. 353 would make modest procedural changes, but it would not alter substantive law.

This legislation will clearly improve the efficiency of the judicial system because federal courts have special procedural tools for dealing with the complex litigation and are better able to manage claims involving parties from multiple states. Furthermore, the overall workload of our judicial system because allowing more interstate class actions to be heard in federal court will permit consolidation of duplicative, competing and overlapping cases. America needs class action reform badly. S. 353 is a balanced, modest approach to correcting class action abuse.

The title of this bill—the "Class Action *Fairness* Act"—is very appropriate. But it also points out a unique twist in the present class action environment. As members of Congress, you hear the word "fair" all the time. Usually, however, deciding what is fair involves choosing between two or more parties with vested interests. If the Government needs to close one of two defense facilities, the two cities in which those facilities are based will make arguments about why the other city's facility is the one that should be closed. And it may be left to Congress to decide what is "fair"—to decide which city's facility should be closed. What is undeniable in that debate, however, is that both cities have a vested interest in the outcome. They both have community investments and jobs at stake.

What is strange about the current class action situation is that it is not "fair" to any of the parties with proper, vested interests. For all the reasons I have set forth above, it is not "fair" to the class members whose claims are at stake. And it is not "fair" to the defendants against whom those claims are being asserted. At present, the system is irrationally designed to benefit primarily the parties involved who really do not have a proper, vested interest—the attorneys who bring these lawsuits. I therefore applaud this legislative initiative and urge its passage.

Again, I thank the Committee for permitting me to present my views on this problem that is challenging our legal system.

Senator GRASSLEY. Professor Daynard.

STATEMENT OF RICHARD A. DAYNARD

Mr. DAYNARD. Thank you, Mr. Chairman. Like everyone else who has spoken today, I too find that there are class action abuses, some of them, particularly the one that has frequently been referred to, but others as well, I think quite outrageous. Where I disagree with most people who have spoken, but agree with Ms. Acheson, is that this is the wrong remedy for class action abuse. I think there are better remedies.

I, too, would be happy to think with you or anyone else on the subject of the appropriate remedies. I think this is the wrong one, and I think the example of tobacco cases makes that clear. In the case of tobacco cases, the removal provisions of Senate bill 353 would impede justice by preventing plaintiffs from ever getting their day in court. That would be the practical effect.

Beginning with the first lawsuits against the tobacco industry in 1954, and continuing for the next 4 decades, the industry managed to avoid ever paying damages to a single afflicted smoker, nonsmoker, or family member. Its principal strategy was to use or abuse every possible procedural device for the purpose of discouraging plaintiffs' attorneys from bringing such cases through guaranteeing that their expenses will exceed any possible recovery.

As an attorney for R.J. Reynolds Tobacco Company wrote following the dismissal of several individual cases, "The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of our money, but by making that other son-of-a-bitch spend all of his."

Now, to counter the tobacco industry's "bankrupt the plaintiff lawyer" tactics, plaintiffs' lawyers eventually began bringing class actions in both State and Federal courts on behalf of afflicted smokers and non-smokers. These class actions for the first time raised the amount of the possible recovery above the cost of bringing the cases, allowing plaintiffs' attorneys to prudently make the investment of time and money needed to even the playing field, thereby giving their clients a chance to have their cases heard on the merits.

This is indeed the principal historic justification for all 23(b)(3) class actions, to recruit effective advocates for injured parties who would otherwise be without redress. Unfortunately, the Federal courts have been unwilling to permit individual tobacco victims to band together in class actions.

Beginning with the Fifth Circuit's reversal of the trial court's class certification in *Castano* v. *American Tobacco Co.* in 1996, Federal courts have uniformly refused to certify these cases. They have articulated various reasons. Ironically, three of the reasons cut strongly against the remedy that you have provided in Senate bill 353.

First, as the *Castano* court noted, there have been so few tobacco cases actually going through the courts that it is often difficult to know how the supreme courts of the various States, which are the ultimate arbiters of State-based common law under the doctrine of *Erie Railroad* v. *Tompkins,* would decide various legal issues that they present. Indeed, the court repeatedly refers to the *Castano* case, a national class action on behalf of all addicted smokers, as an immature tort. And it suggests quite reasonably that State courts should have the first crack at addressing these State law issues.

Second, there is a concern expressed by the Federal courts in these cases that the Seventh Amendment may stand in the way of a viable class action trial plan to the extent that such a plan may risk having a later jury reconsider an issue decided by a previous jury. Whether or not that concern is justified is a matter of Federal constitutional law. It is simply irrelevant in State class actions, since the Seventh Amendment has not been held binding upon the States under the 14th Amendment. While various States may have similar constitutional provisions, the interpretation of those provisions are entirely a matter for the courts of each State and may well be less restrictive than the Seventh Amendment.

Third, the Federal courts have been concerned about—and it is provided in the Federal rules, in rule 23(b)(3)(D)—they are concerned about the difficulties likely to be encountered in the management of the class actions. While it is perfectly appropriate for Federal courts to exercise their discretion to decline class certifi-

cation in light of such difficulties, it is not appropriate for them to decide that the cases would also be too difficult for State courts to bother with.

Yet, section 4 of 353 contemplates exactly that, that class actions could be removed from State courts, stripped of class action status, perhaps because of manageability problems, and then remanded to State court as a collection of individual actions. This would be an extraordinarily paternalistic act on the part of the Federal courts with respect to the State courts, telling them that they, the State courts, would have such difficulties running the case as a class action that they may not even try.

The arrogance of this assertion becomes particularly clear if there are hundreds or thousands of named plaintiffs rather than just a handful. Many State courts could well decide that their docket control needs require the case to run as a class action. Yet, Senate bill 353 could easily end up preventing the State from operating its court docket in a cost-efficient manner, a result that I believe may well be forbidden by the Tenth Amendment.

The State court tobacco cases, on the other hand, have been proceeding well. As might be expected, some classes have been certified, while others have not. And I mention in my written testimony at least four cases that have been certified and are important cases. The tobacco companies have, of course, notice that they are vulnerable to class actions in State court, but not in Federal court.

The primary defendants in tobacco cases are from different States, guaranteeing that all tobacco class actions would be removable under Senate bill 353, all of them. Whatever the reasons for the uniform run of Federal court decisions, and whether or not these are justified in terms of the needs, capacities and priorities of the Federal court system, to send tobacco class actions to Federal court is to send them to their death. That is the practical effect. That is why section 4 of Senate bill 353 could well be entitled "The Tobacco Industry Relief Act of 1999."

Now, like Mr. Frank, I too have some thoughts about section 5 on rule 11. I won't go through them here. I think that rule 11 would have the unintended effect of essentially stymieing the development of the law, both common law and statutory interpretation and constitutional law. And I think that is also very ill-advised.

Thank you.

Senator GRASSLEY. Thank you, Professor Daynard.

[The prepared statement of Mr. Daynard follows:]

PREPARED STATEMENT OF RICHARD A. DAYNARD, J.D., PH.D.

My name is Richard Daynard. For the past 30 years I have been a law professor at Northeastern University School of Law. For much of this time I taught and thought about the nature of the legal process. For the last 15 of these years I have specialized in toxic torts and complex litigation, and especially in tobacco litigation.

I would like to comment today on two aspects of S. 353, section 4 (removal jurisdiction) and section 5 (Rule 11). Though my comments on section 4 are brief, my comments on section 5 are even briefer, and I would like to begin with those.

SECTION 5

Section 5 would make sanctions mandatory for Rule 11 violations, and would make lawyers financially responsible if they are found that they have made a

"[]frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

This section would tend to stunt the natural processes for developing, extending, and refining legal doctrine, processes that all of us learned about in law school, and that Justice Cardozo, Prof. Karl Llewellan, and many others have described so well. The common law, constitutional law, and even the interpretation of specific statutes have developed as they have, thanks in no small part to the willingness of lawyers to challenge, and even radically challenge, existing doctrines and interpretations. *Buick* v. *McPherson, Erie R.R.* v. *Tompkins, Baker* v. *Carr, Brown* v. *Board of Education*—the list could go on, covering every field of law and many thousands of cases, where the law as it is today is the result of creative lawyers having thought and argued "outside the box", challenging the then-accepted paradigms, conventional wisdom, and politically correct thinking about what the law is and should be.

Under Section 5 these organic processes, what Oliver Wendell Holmes called "the life of the law", would atrophy. Lawyers would be frightened to challenge the status quo, because it is often impossible to know in advance how a particular judge will respond to a creative, but perhaps politically incorrect, argument. The judge might accept the argument, might recognize the argument as nonfrivolous but reject it anyhow, or might reject it and find it frivolous. There is simply no way an attorney can know for sure which way the judge will respond. Section 5 strongly encourages the attorney to "play it safe" by not making the argument at all, even though the law (that is, all of us) might have benefited had the argument been made and accepted by the trial judge, or by a higher court on appeal. With the processes of legal development and refinement stymied, the law becomes stagnant and grows increasingly distant from justice.

Not only is Section 5 poisonous to the natural processes of legal development; it is also totally unnecessary. Lawyers do not intentionally make frivolous arguments. "Frivolous arguments" are a subset of "losing arguments", and no one in his right mind intentionally makes a losing argument. Indeed, the fear of losing the case, and in the instance of contingency fee plaintiffs' attorneys of losing one's investment, is more than sufficient to discourage attorneys even from playing close to the line.

SECTION 4

Section 3 provides original federal district court jurisdiction for almost all class actions—those in which any class member is a citizen of a different state than any defendant. Abstention is required if the substantial majority of the plaintiff class are citizens of the same state as the "primary defendants", and the case is based primarily on that state's laws.

This section, by itself, is benign. However, it provides the necessary predicate for Section 4, which permits any defendant or any plaintiff class member to remove any class action that is within the federal court's original jurisdiction.

Unlike Section 5, Section 4 does not impede justice by interfering with the development of legal doctrine. Rather, in a range of cases, and particularly in tobacco cases, it impedes justice by preventing plaintiffs from ever getting their day in court.

Beginning with the first lawsuits against the tobacco industry in 1954 and continuing for the next four decades, the industry managed to avoid ever paying damages to a single afflicted smoker, nonsmoker, or family member. Its principal strategy was to use or abuse every possible procedural device, for the purpose of discouraging plaintiffs' attorneys from bringing such cases by guaranteeing that their expenses will exceed any possible recovery. As an attorney for R.J. Reynolds Tobacco Company wrote, following the dismissal of several individual cases, "the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his." *Haines* v. *Liggett Group, Inc.,* 814 F. Supp. 414 (D.N.J. 1993).

To counter the tobacco industry's bankrupt-the-plaintiff's-lawyer tactics, plaintiffs' lawyers eventually began bringing class actions—in both state and federal courts—on behalf of afflicted smokers and nonsmokers. These class actions for the first time raised the amount of the possible recovery above the cost of bringing these cases, allowing plaintiffs' attorneys to prudently make the investment of time and money needed to even the playing field, thereby giving their clients a chance to have their cases heard on the merits. This is, indeed, the principal historic justification for Rule 23(b)(3) class actions: to recruit effective advocates for injured parties who would otherwise be without redress.

Unfortunately, the federal courts have been unwilling to permit individual tobacco victims to band together in class actions. Beginning with the 5th Circuit's reversal of the trial courts class certification in *Castano* v. *American Tobacco Co.,* 84 F.3d 734 (1996), federal courts have uniformly refused to certify these cases. They have articulated various reasons.

Ironically, three of the reasons given cut strongly against S. 353. First, as the Castano court noted, there have been so few tobacco cases that it is often difficult to know how the supreme courts of the various states—the ultimate arbiters of state-based common law under the doctrine of *Erie Railroad* v. *Tompkins*—would decide various legal issues that they present. Indeed, the court repeatedly refers to the case, a national class action on behalf of all addicted smokers, as "an immature tort". And it suggests, quite reasonably, that state courts should have the first crack at addressing these state law issues.

Second, there is a concern that the Seventh Amendment may stand in the way of a viable class action trial plan, to the extent that such a plan may risk having a later jury reconsider an issue decided by a previous jury. Whether or not that concern is justified as a matter of federal constitutional law, it is irrelevant in state class actions, since the Seventh Amendment has not been held binding upon the states under the Fourteenth Amendment. While various states may have similar constitutional provisions, the interpretations of those provisions are entirely a matter for the courts of each state, and may well be held less restrictive than the Seventh Amendment.

Third, the courts have been concerned about "the difficulties likely to be encountered in the management" of the class actions. While it is appropriate for federal courts to exercise their discretion to decline class certification in light of such difficulties, see Rule 23(b)(3)(D), it is not appropriate for them to decide that the cases would also be too difficult for state courts to bother with. Yet Section 4 of S. 353 contemplates exactly that—that class actions could be removed from state court, stripped of class action status (perhaps because of manageability problems), and then remanded to state court as a collection of individual actions. This would be an extraordinarily paternalistic act on the part of the federal courts with respect to the state courts—telling them that they (the state courts) would have such difficulties running the case as a class action that they may not even try. The arrogance of this assertion becomes particularly clear if there are hundreds or thousands of named plaintiffs, rather than just a handful: many state courts could well decide that their docket control needs require the case to run as a class action. Yet S. 353 could easily end up preventing the state from operating its court docket in a cost-efficient manner—a result that may well be forbidden by the Tenth Amendment.

The state court tobacco cases, on the other hand, have been proceeding well. Some classes have been certified, while others have not. Among those that have been certified are *Broin* v. *Philip Morris Companies, Inc.,* an action by a class of nonsmoking flight attendants tried in a Florida state court in 1997, and eventually settled by the tobacco industry for a $300 million research fund, waiver of the statute of limitations, and a de facto concession in the individual follow-on cases that environmental tobacco smoke causes a variety of disease; *Engle* v. *R.J. Reynolds Tobacco Co.,* an action by a class of nicotine-addicted afflicted Florida smokers which has been in trial in a Florida state court since July, 1998; *Scott* v. *American Tobacco Co.,* a class of addicted Louisiana smokers scheduled for trial in Louisiana state court this coming fall; and *Richardson* v. *Philip Morris Companies, Inc.,* a class of addicted and of afflicted Maryland smokers, certified as a class by a Maryland trial judge in January 1998 and presently under appeal in the Maryland courts.

The tobacco companies have, of course, noticed that they are vulnerable to class actions in state court, but not in federal court. The "primary defendants" in tobacco cases are from different states, guaranteeing that all tobacco class actions would be removable under S. 353. Whatever the reasons for the uniform run of federal court decisions, and whether or not these are justified in terms of the needs, capacity, and priorities of the federal court system, to send tobacco class actions to federal court is to send them to their death. That is why Section 4 of S. 353 could well be entitled, "The Tobacco Industry Relief Act of 1999." Thank you.

Academic preparation

Massachusetts Institute of Technology (1970–1980): Ph.D. in Urban Studies and Planning (specializing in Law and Social Policy): Columbia University Sociology Department (1968–1970): M.A., Faculty Fellow; Harvard Law School (1964–1967): J.D. *cum laude,* Harvard Legal Aid Bureau; Columbia College (1960–1964): A.B. *summa cum laude,* Phi Beta Kappa, Siff (University-wide) Prize in Philosophy of Science, Kinne Prize in Humanities, Regents Scholarship; Bronx High School of Science (1957–1960): Mathematics Award, Honor Society.

Professional employment

Northeastern University School of Law: Assistant Professor of Law (1969–1972); Associate Professor of Law (1972–1973); Professor of Law (1973–present). Hon. Henry J. Friendly, United States Court of Appeals for the Second Circuit, New York City (July 1967–August 1968). Law Clerk; Columbia University School of Law (September 1968–June 1969); Associate in Law (teaching fellow); Tufts New England Medical Center; Instructor in Psychiatry (1976–1989). Consultant, Consumers Union, New York Office (1979); Consultant and Lecturer (1986–Present); Expert Witness before various state insurance commissions (1988).

Bar admissions/recognition

New York 1967; U.S. Court of Appeals, 6th Cir. 1986; U.S. Supreme Court 1986; U.S. Court of Appeals, 11th Cir. 1987, U.S. Court of Appeals, 5th Cir. 1996; Who's Who in American Law (6th ed., 1989; 7th ed., 1992; 8th ed., 1994, 9th ed. 1996, and 10th ed., upcoming); Who's Who in America (51st ed., 1997); Who's Who in the World (15th ed., 1998); Who's Who in Finance and Industry (31st ed., 1999); The Gleitsman Foundation Certificate of Special Recognition, (1998); Smoking or Health Award, American Lung Association of Massachusetts (1991).

Smoking and health responsibilities

President, Group Against Smoking Pollution of Massachusetts (1983–); President, Stop Teenage Addiction to Tobacco (1995–), Vice President (1991–1995), Board of Directors (1990–); President, Clean Indoor Air Educational Foundation (1984–1992), Tobacco Control Resource Center, Inc. (1993–); Chairman, Tobacco Products Liability Project (1984–); Editor-in-Chief, *Tobacco Products Litigation Reporter* (1985–); Associate Editor, *Tobacco Control: An International Journal* (1998–); Member, Advisory Committee on Tobacco Policy and Public Health (Koop–Kessler Committee) (1997); Advisory Board, Tobacco Divestment Project (1990–); Member, American Society of Heating, Refrigeration and Air Conditioning Engineers, Standing Committee on Indoor Air Ventilation (SSPC–62), and Subcommittee on Health and Comfort (1992–); Member, National Coordinating Committee on Tobacco Policy Research (1990–1993); Secretary, Tobacco Control Council, National Association for Public Health Policy (1990–); Advisory Board, Foundation for a Smoke-Free America (1989–); Board of Directors, Americans for Nonsmokers Rights (1991–); Member, Harvard Institute for the Study of Smoking Behavior and Policy, Study Group (1986–1989); Chair, New England Tobacco Control Professionals Study Group (1989–1990).

Principal Investigator, Robert Wood Johnson Foundation's Americans with Disabilities Act Smokefree Policy Research and Evaluation Project (1994–1995); Principal Investigator, Massachusetts Tobacco Control Program's (MTCP) Legal Policy Research Project (1994); Principal Investigator, MTCP Americans with Disabilities Act Smokefree Demonstration Project (1994–96), Principal Investigator, National Cancer Institute's Legal Interventions to Reduce Tobacco Use (1995–); Principal Investigator, Robert Wood Johnson Foundation Legal and Political Strategies and Local Tobacco Control; peer reviewer, medical and public health journals and book publishers, University of California Tobacco Related Disease Research Program, and 1995 Surgeon General's Report; submitted *amicus curiae* briefs in four appellate cases, as well as to the U.S. Supreme Court; wrote model for Massachusetts ordinances banning smoking in public places (1975).

Testified (or submitted testimony) before congressional and state legislative committees, Federal interagency Committee on Smoking & Health, administrative agencies, and local governmental bodies in several states; Appeared on national television and radio programs (including "Nightline," "Today," "This Week with David Brinkley," "McNeil–Lehrer," "Frontline," "Crossfire," "Inside Business," CBS, NBC and ABC Evening News, and "All Things Considered"), on British, German, and Spanish television, on British, Canadian, Australian, and Korean radio, and on local programs in many cities; extensively quoted in national magazines and newspapers (including *Time, Business Week, Barrons, New York Times, Washington Post, and Wall Street Journal*), in the international press, in wire service stories, in syndicated columns, in regional newspapers throughout the U.S., and in legal and medical publications; Subject of feature articles in *Wall Street Journal* (April 20, 1987), *New York Times* (February 14, 1988), and *Boston Sunday Globe* (May 1, 1994).

Delivered Ford Hall Forum lecture with Surgeon General Koop (October 10, 1985); lectured on tobacco products liability to doctors at several local hospitals and at the Royal Society of Medicine, London, to attorneys in bar committee and continuing legal education meetings, to public health students at Harvard and Boston University, to meetings of local lung, public health, and civic associations, and to annual conferences of Stop Teenage Addiction to Tobacco (1986–); Mellon lecture at

University Of Pittsburgh Law School (1987); presented papers at 6th World Conference on Smoking and Health (Tokyo, 1987); Keynote address at Asian–Pacific Conference on Control of Cigarette Smoking (Teipei,1989); Keynote Address, 7th World Conference on Tobacco and Health (Perth, 1990); chaired or co-chaired 11 nationwide meetings of plaintiffs' attorneys and public health advocates, three ATLA section meetings, and several press conferences; invited speaker, American Public Health Association, 1986, 1988, 1989, 1990, 1992; 1996; 1997; American Society for Preventive Oncology (Washington, 1989); Commentator, Association for Consumer Research (New Orleans, 1989), on effects of cigarette advertising on smoking behavior; 15th International Cancer Congress (Hamburg, 1990); International Symposium on the Control of Tobacco-Related Cancer and Other Diseases (Bombay, 1990); Workshops on Passive Smoking and Nonsmokers' Rights, 7th World Conference on Tobacco and Health (Perth, 1990); World Conference on Lung Health (Boston, 1990); Faculty, Fifth Summer Conference, Stanford Center for Research in Disease Prevention (July, 1990); International Conference on Cancer Prevention (Bethesda, 1991); leader, Workshop on Legal issues in Tobacco Control, "Tobacco Use: An American Crisis," Wash., D.C. (January 1993); Conference on "Tobacco Use: An American Crisis" (Washington, 1993) National Workers' Compensation and Occupational Medicine Seminar (Hyannis, 1993); American Society of Addiction Medicine (Atlanta, 1993); American Trial Lawyers Ass'n (Tucson, 1994); Mass. Tobacco & Youth Conference (Boston, 1994); President's Cancer Panel (Virginia, October 5, 1994); 9th World Conference on Tobacco and Health (Paris, 1994); European Conference on Tobacco and Health (Helsinki 1996); 10th World Conference on Tobacco and Health (Beijing 1997): lecturer to business executives on legal implications of smoking in the workplace at conferences sponsored by the New Hampshire, Massachusetts, Connecticut and Indiana Lung Associations (1986–); St. Louis ASSIST Coalition (1994), and at conferences an Connecticut, Rhode Island and Massachusetts sponsored by the Environmental Protection Agency (1994–); lectured to faculty seminar at Johns Hopkins University Department of Epidemiology (1995); lectured to National Dental Tobacco-Free Steering Committee (Bethesda, 1996); Harvard Law School Conference on the Tobacco Settlement: Should Tort Law Be on the Table? (Cambridge, Mass. 1997).

Selected publications

"Tobacco Products Liability Litigation as an Antismoking Strategy," in Aoki, M. et. al. *Smoking and Health 1987,* 409–413; "Tobacco Liability Litigation as a Cancer Control Strategy," 80 *J. Nat. Cancer Institute* 9 (1988); "The *Cipollone* Documents," 24 *Trial* 50 (November, 1988) (with Laurie Morin); "Up from the Ashes: Cigarette Litigation and the *Dewey* Decision," 5 *Toxics Law Reporter* 630 (1990); "Proving Causation in Lawsuits Involving Environmental Tobacco Smoke," in *Proceedings of Pre-conference Workshop on Passive Smoking* (1990) 84–89; "Worldwide Litigation," in *Tobacco & Health 1990: The Global War,* 189–191; "Product Warnings—Tobacco" (with Laurie Morin) in *Handling Product Warning Cases* (Wiley, 1991); "Health Hazards of Secondhand Smoke" (with Stanton Glantz), *Trial* (June 1991) 37–39; "Recent Developments in Tobacco Litigation—1991," 1 *Tobacco Control: An International Journal,* 1992; 1:37–45; "Tobacco Litigation—Purpose, Performance, and Prospects," in National Cancer Institute Monograph: *International Conference on Cancer Prevention: Facts, Maybes, and Rumors* (1992, #12, 53); "Redress for Injury Caused by Environmental Tobacco Smoke" (with Edward Sweda), 28 *Trial* #3, 50 (March 1992); "Judicial Action for Tobacco Control," in Roemer, R., ed., *Legislative Action to Combat the World Smoking Epidemic* (1992); "Controlling Cancer by Suing Tobacco Companies: The Potential for India in the Light of the U.S. Experience," *Control of Tobacco-related Cancers and Other Diseases, International Symposium, 1990,* P.C. Gupta, J.E. Hamner, III and P.R. Murti, Eds, (Oxford University Press, Bombay, 1992); "Cipollone Ruling Sends Industry a Message: Say Goodbye to Federal License to Lie," 20 *Prod. Safety & Liab. Rptr.* 712 (1992); "Tobacco in Court" (edited special issue and wrote two articles), 17 *World Smoking and Health* #2 (1992); "When Cigarettes Start Fires: Industry Liability," (with Andrew McGuire) 28 *Trial* 411, 44 (1992); 23 *Trial Lawyers Quarterly* 22 (1993); "Report of the Tobacco Policy Research Study Group on Tobacco Litigation" (with others), 1 *Tobacco Control* 537 (Supp. 1992); "Tobacco Use as a Sociologic Carcinogen: The case for a Public Health Approach." (with Thomas Novotny, Patricia Shane, and Gregory Connolly), in *Cancer 1992* (V. DeVita, ed.); "Chipping Away at the Legal Immunity of Tobacco Companies," *Priorities* 11 (Summer 1993); "Smoking Out the Enemy: New Developments In Tobacco Litigation," 29 *Trial* 16 (November 1993); "Tobacco Products Liability Suits in Massachusetts—a Neglected Opportunity," 1 *J. Mass. Aca. Trial Attys* #3 50 (Jan. 1994) (with Friedman); "Second-hand Smoke and the ADA: Ensuring Access for Persons with Breathing and Heart Disorders," 13 *St. Louis Univ.*

Public Law Rev. 635 (1994) (with Mark Gottlieb and Jennifer Lew), "Catastrophe Theory and Tobacco Litigation," 3 *Tobacco Control* 59 (1994); "The Third Wave of Tobacco Liability Cases," 30 *Trial* (November 1994); "The Third Wave of Tobacco Litigation in the U.S. and Beyond," *World Health Organization Tobacco Alert* (April 1995) (with Graham Kelder and Mark Gottlieb); "The Tobacco Industry Under Fire," *Trial* (November 1995) (with Kelder); "Tobacco Industry Tactics," *British Medical Bulletin* (January, 1996) (with Sweda); "Waiting to Exhale: Tobacco Companies Hold Their Breath Over a New Legal Challenge That Could Have a Crushing Effect," *The Boston Sunday Globe* Focus Section (February 11, 1996) (with Kelder), "Tobacco Litigation as a Public Health and Cancer Control Strategy," *Journal of the American Medical Women's Association* (March 1996) (with Kelder): "The Role of Litigation on the Effective Control of the Sale and Use of Tobacco: Litigation as Substitute for and Supplement to Conventional Means of Regulation Thwarted by the Tobacco Industry," 8 *Stanford Law & Policy Review* 1 (1997) (with Kelder), "The Many Virtues of Tobacco Litigation, *Trial* (November 1998) (with Kelder); "A Year of Living Dangerously: The Tobacco Control Community Meets the Global Settlement," *Public Health,* (November/December 1998) (with Michele Bloch and Ruth Roemer).

Richard A. Daynard holds a J.D. from the Harvard Law School and a Ph.D. in Urban Studies and Planning (specializing in Law and Social Policy). Since 1969, he has been a Professor of Law at the Northeastern University School of Law. Professor Daynard has been involved in a number of organizations devoted to the study of tobacco and public health policy and implementation. He has served as President of the Group Against Smoking Pollution of Massachusetts (GASP) from 1993–present; Chairman of the Tobacco Products Liability Project from 1984–present; President of the Tobacco Control Resource Center from 1984–present; Editor-in-Chief of the *Tobacco Products Litigation Reporter;* and President of Stop Teenage Addiction to Tobacco (STAT) from 1996–present, among others. He has published numerous articles in such journals as *The Journal of the American Medical Association; Tobacco Control: An International Journal; Cancer; Trial; and Tobacco and Health.* His experience and expertise on tobacco law, policy, and litigation places him in the middle of the public debate over smoking, leading to appearances on *Nightline; Today; This Week with David Brinkley; Frontline; Crossfire,* the ABC, NBC, CBS, CNN, MS–NBC, CNBC, and FOX news programs; and on National Public Radio, ABC, CBS, and BBC radio programs.

Senator GRASSLEY. Now, Mr. Beisner.

STATEMENT OF JOHN H. BEISNER

Mr. BEISNER. Thank you, Mr. Chairman. I very much appreciate the opportunity to participate in this hearing this afternoon. What I would like to do is spend a few minutes highlighting parts of my written testimony and to respond to some of the points made earlier by the Justice Department.

The first point I would like to make is that the Justice Department, particularly in its written testimony, seems to be saying that we don't see much of a problem out there with class actions. I think that statement was tempered somewhat by the oral statements of Ms. Acheson this afternoon, and I hope that that is a breakthrough, as Mr. Frank suggested earlier, for discussions on that subject. Hopefully, that will be a major outcome of this hearing today.

I was particularly struck by Ms. Acheson's describing the hypotheticals that both of you presented to her as being, "over the edge" at one point. I am sure that the people back at my office this afternoon will be happy to hear that the cases that we are working on are deemed by the Justice Department to be, "over the edge," because let me assure you that I have got a hundred on my docket that are exactly like the hypotheticals you were putting. These are not hypotheticals that are drawn out of the air. These are what these cases really are.

And I fear that part of the problem may be that we need to perhaps do a better job of getting some more information to the Justice Department on this subject. Between this subcommittee and the House subcommittee, you have now had four hearings on this subject. This is the first one the Justice Department, I believe, has participated in, and I think that perhaps we may have an information flow problem here and we need to be getting more information to the Justice Department so that there is a better understanding of this issue.

The second point I would make is that I am deeply troubled by what seemed to be in the Justice Department's testimony somewhat of a direct assault on the notion of Federal diversity jurisdiction. The Justice Department's testimony suggests that when a State law-based lawsuit is removed to Federal court, the State where the lawsuit was originally filed is somehow deprived of its right to resolve that controversy.

That argument ignores what Federal diversity jurisdiction is all about. It is a mechanism by which a State law-based claim may be moved from a local court to a Federal court to ensure that all the parties are going to have a level playing field and to ensure that interstate commerce interests are protected. This isn't a concept that the courts made up. It is not something that Congress came up with. It is in Article III of the Constitution.

As Professor Elliott testified earlier, that concept is particularly applicable to these sorts of interstate class actions. And, again, it is disturbing to me to hear the Justice Department seemingly suggest that that constitutional concept should be ignored in these sorts of cases.

A third point I would make is that it is also somewhat troubling to me what the Justice Department seems to be suggesting as an alternative to the legislation that is being proposed here because I think that alternative really may be quite an affront to States' rights, as opposed to this legislation.

The Department suggests that we should instead be talking about legislation—and I am quoting their written testimony here—"focusing on the appropriate limits on State authority to bind out-of-state plaintiffs." Now, under that approach, we would actually be curtailing the authority of State courts. Such legislation, I fear, although I haven't seen exactly what the Justice Department is talking about, might be a declaration that, contrary to the Full Faith and Credit Clause of the Constitution, State court judgments wouldn't be honored nationwide.

Besides being constitutionally suspect, I fear that such an approach is unfair. Basically, what I think Justice is saying in their testimony is that it would be preferable to have a statute that would prevent State courts from issuing judgments that apply to out-of-state plaintiffs, while at the same time encouraging State courts to be able to issue judgments that would be applicable to out-of-state defendants.

Finally, as has been discussed by a number of witnesses, we have this issue of whether the jurisdictional removal provisions of S. 353 would federalize all class actions. And others have noted, I really think that that suggestion ignores the current class action land-

scape. They have already been federalized. The oddity here, though, is that they have been federalized by State courts.

We are not talking about the Federal Government coming in and telling States what to do, which is what you normally think of when you hear the word "federalism." It is State courts going in and telling 49 other States what their laws are. I wanted to note that a shining example of this appeared last September 27 in the New York Times, on page 29 to be precise. In a full-page article, the Times reported on a multi-billion-dollar class action that is now pending in a county court in downstate Illinois.

The banner headline on that article said, "Suit Against Auto Insurer Could Affect Nearly All Drivers." The article said that all kinds of people are alarmed about this lawsuit. It quoted Public Citizen as being alarmed. Ralph Nader was alarmed. The attorneys general of Massachusetts, New York, Pennsylvania and Nevada were all alarmed. The National Association of State Insurance Commissioners were alarmed.

Well, why were all these people alarmed? Well, their concern is that this county court in Illinois is on the verge of telling all of the other States what their auto insurance laws are going to be. In the context of this nationwide class action, that court is set to decide whether auto insurance companies' use of after-market auto parts, as opposed to the auto parts made by the original vehicle manufacturers, in repairing insureds' vehicles is fraudulent behavior.

The problem is that some States encourage or require insurance companies to use those sorts of after-market parts as a way of lowering insurance costs. Nevertheless, the Illinois court is set to apply Illinois law to all 50 States, and according to the Times article may thereby, "overturn insurance regulations or State laws in New York, Massachusetts and Hawaii, among other places."

In short, this Illinois court, which was elected by and is accountable only to the 61,000 residents of Williamson County, IL, is going to make what amounts to a national rule of insurance. That is the sort of federalization that we are talking about with State court class actions.

Thank you.

[The prepared statement of Mr. Beisner follows:]

PREPARED STATEMENT OF JOHN H. BEISNER

In hearings over the past eighteen months, this Subcommittee and its House counterpart have heard considerable evidence of a severe state court class action crisis. The record reflects an explosion in the number of such cases being filed, prompted largely by a lax attitude toward class actions among some state courts. Some state courts operate without basic class certification standards and in disregard of fundamental due process requirements, resulting in injury to both unnamed class members as well as to corporate defendants. Another problem is that certain state courts are "federalizing" such litigation. By their laxity, they have become magnets for a disproportionate share of interstate class actions and are thus dictating national class action policy. Further, in litigating multistate class actions, those state courts are also frequently dictating the substantive laws of other jurisdictions. Considerable waste and inconsistent judicial rulings are occurring because there is no mechanism for coordinating overlapping, "competing" class actions (*i.e.,* cases in which the same claims are asserted on behalf of basically the same classes) pending simultaneously in state courts around the country.

Witnesses at a March 5, 1998 House hearing (representing widely varied interests) expressed broad agreement that the wisest, least disruptive solution was the expansion of diversity jurisdiction over interstate class actions, allowing more such cases to be heard in federal courts. As one witness noted, "you have heard today

from professors, from plaintiff's lawyers, from defense lawyers, from consumer representatives, from business people, from a whole range. And it is striking * * *. that * * * you've heard from everyone * * * that * * * increasing the ambit of * * * diversity jurisdiction * * * to [encompass more class actions] is a good idea."

S. 353's jurisdictional/removal provisions would be a significant step toward resolving the state court class action crisis. They would fix a technical flaw in our current diversity jurisdiction statutes (enacted before the modern day class action) that bars federal courts from hearing most interstate class actions—the judicial system's largest lawsuits, often involving millions of dollars disputed among thousands of parties residing in multiple jurisdictions. This change would also make more broadly available the statutory mechanisms by which federal courts (but not state courts) may coordinate overlapping, competing class actions. Those provisions would allow both plaintiffs and defendants greater access to our federal courts without undesirable side effects. The bill would not alter any party's substantive legal rights. The bill would leave purely local disputes to the exclusive purview of state courts. And the bill would still allow state courts to hear class actions when parties prefer that forum.

The notice provisions of S. 353 would lessen the possibility that class actions will injure the interests of unnamed class members (as they now often do). The bill's attorney's fee limitations have potential to curtail some of the most egregious fee abuses, particularly some counsel's tendency to claim fees on the basis of speculative, amorphous benefits to a class.

I very much appreciate this opportunity to participate in today's discussion of S. 353, the Class Action Fairness Act of 1999.

At the outset, I want to disclose the sources of my perspectives on this subject. Basically, I am an "in-the-trenches" class action litigator. Over the past 19 years, I have been involved in defending over 250 class action lawsuits on a wide variety of subjects before the federal and state courts of 28 states at both the trial court and appellate level. On the basis of that experience, I wish to share a few thoughts about the problems that exist in the class action arena and about the respects in which I believe that S. 353 would be a positive, effective response to those problems.

I. There Is A Continuing State Court Class Action Crisis

It is exceedingly ironic that although class actions are probably one of the most complex procedural devices in our legal system, the general public has an acute awareness of what they are. From the citizen perspective, class actions are not pretty. Jury researchers—the people who survey potential jurors in anticipation of trials—will tell you that in most locales, the general public tends to view class actions as a blight on our legal system. Citizens correctly perceive that not all class actions are bad. But if you ask for a definition of a class action in those jury research settings (as I have on occasion), you will probably get an answer like: "Class actions are lawsuits in which the lawyers get all of the money and the people don't get anything." And you will also be told that class actions are usually lawyer-manufactured. The public senses that these lawsuits do not get started like a normal lawsuit does—a person walking into the lawyer's office and asking that redress for an injury be pursued. Instead, the public perceives that class actions are initiated when a lawyer gets an idea about filing a lawsuit (*e.g.,* by reading about an issue in the newspaper) and then goes off to find somebody to front the lawsuit (*i.e.,* the named plaintiff or class representative).

I do not mean to suggest that Congress should legislate in this highly technical legal arena based on such public perceptions. But for better or worse, the record shows that these perceptions are disturbingly accurate. And those perceptions of class actions are adversely skewing the public view of our legal system as a whole. Because of their size and scope, class actions receive disproportionate amounts of press attention. But even more significantly, class actions regularly touch more citizens than virtually any other aspect of our legal system. Indeed, given the proliferation of class actions in recent years, each of us sitting in this room—whether we know it or not—is a class member in numerous pending class actions. If you have ever bought a product or used a service, there are multiple class actions on file in which somebody is supposedly trying to vindicate your rights in some way. And because of the notice rules, citizens get a lot of mail about these cases—the only mail that most people ever get from a court. Most of the legalese that they see in those notices, they do not fully comprehend. But what they do understand is that their rights are often being manipulated to benefit other interests.

To understand the class action abuse problem, one need only consider for a moment the general concept that we are discussing. If I told you that the House had just passed a new bill that would allow lawyers to bring lawsuits without first ob-

taining permission from the parties on whose behalf the lawsuit supposedly was being brought, you presumably would be shocked. How could the House possibly conclude that we should allow lawyers to bring lawsuits not authorized by the claimants?

Rightly or wrongly, that's exactly what class actions are. They are a giant anachronism. In the midst of a legal system in which individual rights are paramount—a system in which a lawyer normally cannot do much of anything without the informed consent of his or her client—we have this device through which a lawyer can walk into a court and say: "I am bringing claims on behalf of millions of people, even though I don't know exactly who or where they are and even though I have not obtained their permission to bring this lawsuit on their behalf."

Clearly, such a device invites abuse. It permits lawsuits in which the claimants play little or no role; lawsuits in which the lawyers call all of the shots without really even hearing the views and desires of their clients. Further, it allows attorneys to bring lawsuits where the real parties in interest have manifested no interest in suing. Plainly, such lawsuits present great risk that the lawyers who bring them will substitute their interests for those whose claims are at issue. In short, class actions are a powerful, abuse-inviting device that must be carefully policed by the courts to avoid legal catastrophe. Unfortunately, at least in many of our state courts, that careful supervision is not occurring.

A. CONGRESS HAS ALREADY AMASSED AN AMPLE RECORD OF CLASS ACTION ABUSE

This hearing is not the first occasion on which Congress has received indications of state court class action abuse. Over the past eighteen months, Congress has been bombarded with warnings that something is badly amiss with class actions. The alarm bells have been ringing. Almost daily, there are press reports about class actions being used to deny (not protect) due process rights—instances in which the legitimate interests of *both* class members *and* defendants are being ignored or injured.

In October 1997, this Subcommittee held a hearing on class action abuses. Last year, the Subcommittee on Intellectual Property and the Courts of the House Judiciary Committee held two such hearings (one in March and another in June). The record that emerged from those three sessions indicates that the alarm bells are ringing for good cause: state court class action abuse is rampant.

Those earlier hearings amply documented several serious problems:

- Some courts (particularly state courts) are not properly supervising proposed class settlements. The result is that class counsel become the primary beneficiaries; the class members (the persons on whose behalf the actions were brought) get little or nothing—or worse. For example, at all three hearings last year, there was discussion of the now infamous *Bank of Boston* class action settlement. At this Subcommittee's October 1997 hearing, both Senator Herb Kohl (D.—Wis.) and his constituent, Martha Preston, a member of the class, described the settlement as a "bad joke."[1] At a March 1998 House hearing, Ralph G. Wellington, a Philadelphia attorney, elaborated, noting that the state court in that case approved a class settlement under which

  [m]ost of the 700,000 [class members] received minimal direct economic benefit; some received no direct benefit at all. Indeed, most had their mortgage escrow accounts * * * deducted in order to pay several million dollars to the class counsel who had been approved to protect their interests. In short, having been included in a lawsuit they never envisioned, they had their own money from their own escrow accounts taken to pay class counsel for what many believe to have been a very dubious benefit.[2]

- According to several data sources, there has been an explosion in the number of state court class actions in recent years. Witnesses tied this phenomenon to the tendency of certain state courts to have an "anything goes" attitude toward class actions. At the March 1998 House hearing, Rep. James Moran (D.—Va.) observed that "[o]pportunistic lawyers have identified those states and particular judges where the class action device can be exploited." And offering specific examples, he decried the fact that "legitimate business enterprises * * * are being severely harmed by existing class action practice" and that "[i]n other cases, where businesses may be legitimately at fault, injured consumers receive little, while the plaintiffs attorneys are enriched." Similarly, John W. Martin,

[1] Opening Statement of Sen. Herb Kohl, "Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees," S. Hrg. 105–504 (Oct. 30, 1997).

[2] Unless otherwise noted, quotations attributed to witnesses at the "March 1998 Hearing" are from the prepared statements of those persons submitted for the hearing.

Jr., then the Vice President-General Counsel of Ford Motor Company, observed that "[t]he real purpose of the vast majority of class action lawsuits is to make money—not for consumers, but for the lawyers bringing the suit." Noting specific state court examples, he urged that "[a]s a result, consumers are exploited and rarely receive substantial awards, while class action counsel frequently walk away with millions."

- The lax attitude toward class actions manifested by some state courts has constitutional (due process) ramifications. For example, Mr. Martin cited cases in which state courts had engaged in "drive-by class certification[s]"—situations in which judges "grant[] plaintiffs' motion to certify his claims for class treatment *before* the defendant even has a chance to respond to the motion (or, indeed, has even been served with the complaint)."
- He also expressed concern about the "'I never met a class action I didn't like' phenomenoe"—state courts that "employ standards that are so lax that virtually every class certification motion is granted, even where it is obvious that the case cannot, consistent with basic due process principles, be tried to a jury as a class action." He cited examples of cases in which state courts had certified classes that federal courts had found uncertifiable. In some of those cases, the federal court cited due process or other constitutional reasons for finding class certification inappropriate; yet, the state courts charged ahead.
- Because the class action device is such a powerful tool, it can give an attorney unbounded leverage. John L. McGoldrick, Senior Vice President and General Counsel of Bristol-Myers Squibb Company, observed at the March 1998 House hearing that where class actions are not properly controlled by the courts handling them, there can be "the perverse result that companies that have committed no wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5 percent chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages."
- The fundamental problem is the failure of some state courts to manage class actions so as to avoid the considerable potential for abuse. Rep. Moran testified that "[m]any state courts lack the complex litigation training, experience and resources necessary to deal with [interstate class actions]" and that "state court judges, who are elected in most states, are more prone to bias when the defendant is a large, out of state corporation." As Mr. McGoldrick put it, "[i]n some places, state court judges do not appreciate the raw power of the class action device and the need to circumscribe its usage. As a result, the rights of both defendants and the class members on whose behalf the actions were brought get ignored."
- This situation has encouraged the all too frequent filing of frivolous class actions in state courts. For example, Mr. Martin offered specific examples illustrating that due to the erosion of state court class action standards, "class actions that are being filed assert claims that are utterly without merit (or marginal at best)." And he noted that in interviews conducted for a study on class actions by the RAND Corporation's Institute for Civil Justice, "many attorneys (including some plaintiffs' counsel) observed that 'too many non-meritorious [class action lawsuits] are [being] filed and certified' for class treatment."
- The current situation in which class action litigation is being focusing in state courts is resulting in enormous waste, inconsistent results, and the risk of harm to class members' interests. More specifically, both Mr. McGoldrick and Mr. Martin noted the problems created whenever overlapping or "copycat" class actions are filed, a frequent occurrence. When such "copycat" cases are pending in different federal courts, they may be consolidated before a single judge through the Judicial Panel on Multidistrict Litigation, thereby ensuring uniform management of the litigation and consistent treatment of all legal issues. But when duplicative class actions are filed in two or more state courts in different jurisdictions, the "competing" class actions must be litigated separately in an uncoordinated, redundant fashion because there is no mechanism for consolidation of state court cases. As a result, state courts may "compete" to control the cases, often resulting in harm to all parties involved. Counsel also "forum shop," going from court to court trying to obtain a different result on class certification or other issues. And class counsel in the various cases may compete with each other to achieve a settlement, a phenomenon that can work to the disadvantage of the class members.
- Mr. Martin observed that "[t]he 'anything goes' mentality in state courts has led to a sad reality: as a practical matter, the most important question determining

the outcome of a class action lawsuit has now become, not the merits of the claims or the propriety of class treatment, but whether the case can successfully be removed to federal court." He then offered numerous examples of ways in which lawyers who file class action lawsuits manipulate their pleadings to keep their purported class actions out of federal court (*e.g.,* by naming defendants who defeat diversity but who have no real role in the litigation, by waiving class claims that might give rise to federal jurisdiction, by changing claims after the one-year removal deadline has passed).

B. THE STATE COURT CLASS ACTION CRISIS HAS NOT ABATED

Little has changed since last year's class action-related hearings, except that we now have more data confirming that the state court class action crisis is for real. Most notably, a new publication—*Class Action Watch*—recently printed the results of a survey of major company experiences with class actions.[3] In particular, the survey found that the number of class actions pending against the responding companies had increased dramatically over the ten-year period 1998–1998. As indicated by other data collection efforts, that growth was most pronounced among state court class actions. Over the ten-year period, the number of state court class actions pending against the respondents rose by *1,042 percent*—a greater than *ten times increase.*[4] In contrast, the growth of pending federal cases was substantially less—only around 338 percent.[5]

The survey also provided strong support for the contention that if state courts in a particular locale begin manifesting an "laissez-faire" attitude toward class actions, they will become a magnet for such matters. For example, the survey noted that for years, the level of class action activity in Texas was relatively low. But of late, some Texas intermediate appellate courts have issued class certification-related decisions suggesting that Texas courts have a lower threshold for class certification than do our federal courts (even though Texas has adopted the federal class action rule and supposedly follows federal class action precedents). The effects of these decisions are not surprising. While the surveyed companies had experienced a *110 percent growth* in the number of pending Texas state court class actions in the five-year period 1988–1993, that growth recently has accelerated dramatically.[6] In the more recent five-year period (1993–1998), those companies reported a *338 percent increase* in the number of class actions pending against them in Texas state courts.[7]

The survey also indicated that as the Texas courts seemingly became less rigorous about class actions, they were more frequently being called upon to hear class actions involving non-Texas residents. For example, the survey noted that both in 1988 and 1993, certified classes were almost always confined to Texas residents.[8] By 1998, however, nationwide class actions were relatively common in Texas state courts.[9]

C. OTHER PROBLEMS WITH STATE COURT CLASS ACTIONS ARE EMERGING

Over the past year, several other problems attributable to state court class actions have become increasingly apparent. I would like to focus on just two:

1. Overly broad classes put class member rights at risk

Because of the entrepreneurial motivations that underlie most class actions, it is not surprising that counsel try to make them as broad as possible. In short, why sue for a class of 1,000 people when you can sue for a class of 20 million people? A 20-million person class gives an attorney far more leverage against the defendant. And it creates the potential for a much larger pot of attorneys' fees (with no significantly larger investment).

The problem with this approach is that it causes the entire lawsuit to proceed on a lowest common denominator basis. The "average" claim becomes the claim by which the entire action is judged; class members with larger, more serious claims are simply lumped into the group and not given individual attention. Further, to make the litigation work as a class action, class counsel begin "shaving off" (*i.e.,*

[3] *Analysis: Class Action Litigation—A Federalist Society Survey,"* Class Action Watch (Federalist Society Litigation and Practice Group, Class Action Subcommittee) at 1 (Vol. 1, No. 1).
[4] *Id.* at 5.
[5] *Id.*
[6] *Id.* at 7.
[7] *Id.*
[8] *Id.* at 8.
[9] *Id.* The survey also contains data supporting the view of Mr. McGoldrick and others noted above that class actions provide extraordinary leverage to force settlements, regardless of whether those settlements make sense for either the class members or the defendants. *Id.* at 7–8.

waiving) the more complicated claims that may preclude trying the matter on a class basis. For example, certain legal theories requiring individual proof (*e.g.,* fraud claims requiring individual demonstrations of reliance) may be thrown overboard. Likewise, claims for certain types of injuries (*e.g.,* personal injury, property damage) may be excluded from the scope of the action. These "shortcuts" can be devastating for certain class members.

Let me use as an example a recently filed class action lawsuit that has garnered considerable attention—the now infamous "toothbrush" class action. According to a press release, this lawsuit, which is pending in state court in Chicago, assails the American Dental Association and several toothbrush manufacturers for failing to warn of the risk of a toothbrush-related injury known as "toothbrush abrasion"[10] According to a press report, the "hard evidence" that backs this lawsuit is, in significant part, a toothpaste commercial that claimed that 36 million people brushed their teeth too hard.[11] I suspect that a lot of people have reacted to this lawsuit in the manner of one letter to the editor:

> I wonder if one can sue this attorney and his client for being abrasive and irritating. Any attorneys out there want to take up the challenge? We could make it a class-action suit against all ridiculous lawsuits such as this.[12]

Admittedly, I know little about this lawsuit. But if it is like most actions of this general type, the proposed class includes (a) a few people who actually claim to have suffered physical injury and (b) millions of people who simply claim to be at risk of injury. This paradigm poses two major problems. The people who claim actual injury are going to get lost in the lawsuit. If the matter actually gets adjudicated or settled on a class basis, the focus will be on the biggest group—the people who supposedly are just "at risk." If the case is tried, the jury likely would find for the defendants under this apparently bizarre theory. Or if the case is adjudicated in plaintiffs' favor or is settled, the remedy will focus on the "at risk" group (*e.g.,* something like warnings and/or new toothbrushes). But what happens if somebody out there actually sustained physical injury? What if there actually are a few people who rightfully should have been warned by a dentist that they have a very rare dental situation requiring an unusual dental hygiene regimen?

Unless those persons are properly notified of what is going on in the lawsuit and closely follow the content of the notices (assuming that is possible), they will be out in the cold. If the case is tried and the class loses, their rights to pursue their claim's for actual injury likely will be extinguished. Or even if plaintiffs win or obtain a settlement, the relief probably will not address their actual injury at all. And they will not be able to obtain individualized relief because the class victory or the settlement will preclude them from seeking more.

In some cases, class counsel seek to avoid these potential results by excluding people who actually have sustained personal injury, limiting the purported class to people who are merely at risk. But that approach creates another similar problem. If the case proceeds on a class basis and the class loses, all of the class members probably will be precluded from pursing claims if in fact they do experience actual injury in the future, in which case they may have a more compelling individual case to present to a jury. (For example, in the toothbrush case, if a jury found the warnings provided by the defendants to be adequate, each class member presumably would be precluded from arguing to the contrary in a personal injury action in the future.) Likewise, if the case is resolved (by settlement or trial) on the basis of minimal relief, each class member likely would be precluded from later asserting claims against the defendants if the risk came to fruition—if they discover later that they have actually experienced dental injury of some sort.

Federal courts have become sensitive to this problem and increasingly have refused to proceed with class actions that put class members' rights at risk in this manner.[13] In contrast, state courts generally have been oblivious to this problem.

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[10] The attorneys who brought the lawsuit have even set up a website regarding the action—at "www.toothbrush.com." Among other things, it advises that if one suspects that he/she has toothbrush abrasion, they should "[f]irst, take care of your health" and then second, call for more information about the lawsuit at 1–877–SORE GUMS.

[11] *Not Too Abrasive, But Suit Causes Ache,* Chicago Tribune, April 14, 1999, at Business 1.

[12] *Rubs the Wrong Way,* Chicago Sun-Times, April 22, 1999, at 30.

[13] *See, e.g., In re Ford Motor Co. Bronco II Prod. Liab. Litig.,* 177 F.R.D. 360, 368 (E.D. La. 1996) (denying class certification because requested relief "does not encompass death, injury, property damage or other consequential damage"; noting that "by attempting to tailor their action in such a way as to improve their ability to establish commonality, class representatives may in fact create an adequacy problem"); *Feinstein* v. *The Firestone Tire and Rubber Co.,* 535 F. Supp. 595, 600–01 (S.D.N.Y. 1982).

Indeed, I am not aware of any state court that has even attempted to address this issue.

2. State courts are "federalizing" substantive and procedural law

I have heard criticisms that S. 353 would "federalize" all class actions. That criticism overlooks a perversity of the current class action landscape—class actions have already been federalized *by the state courts.*

When I say "federalized," I do not mean that the *federal* government has come in and told states what they are supposed to do. What I am talking about is "false federalism"—the current situation in which one state court goes around telling the other 49 state courts what their laws should be. 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 end up dictating the *substantive* laws of other states, sometimes over the protests of officials in those other jurisdictions.

A shining example appeared on page 29 of the September 27, 1998 edition of the *New York Times.* In a full-page article, the *Times* reported on a multi-billion dollar class action pending in a rural county court in down state Illinois.[14] The headline says: "Suit Against Auto Insurer Could Affect Nearly All Drivers."

The article says that all kinds of people are "alarmed" about this lawsuit. Public Citizen is "alarmed." Ralph Nader is "alarmed." The Attorneys General of Massachusetts, New York, Pennsylvania, and Nevada are "alarmed." The National Association of State Insurance Commissioners is "alarmed." Why are all of these people "alarmed?" Their concern is that the rural county court in Illinois is on the verge of telling all of the other states what their auto insurance laws are going to be. In the context of a nationwide class action, that court is set to decide whether auto insurance companies' use of "aftermarket" auto parts (as opposed to auto parts made by the "original equipment manufacturer" ("OEM")) in repairing insureds' vehicles is fraudulent behavior. The problem is that some states *encourage* or *require* insurance companies to use non-OEM parts, a policy intended to lower insurance rates. Nevertheless, the Illinois court is set to apply Illinois law to all other fifty states, and according to the *Times* article, may thereby "overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places." In short, this Illinois county court, which was elected by and is accountable only to the 61,000 residents of Williamson County, Illinois, is going "to make what amounts to a national rule on insurance." The Illinois Supreme Court has declined to stop the court;[15] the U.S. Supreme Court has also refused to intervene.[16]

Another example of this phenomenon is a class action now pending in the state court for Coosa County, Alabama.[17] That suit was brought on behalf of the over 20 million people who have certain types of airbags in their motor vehicles. The lawyers therein are asking that the court order that the design of those federally-mandated airbags be declared faulty. That court may be the ablest and the most conscientious in our judicial system. But from a federalism policy standpoint, this situation defies logic. Why should an Alabama state court tell 20 million people in all 50 states what kind of airbag that they may have in their cars? What business does an Alabama state court have in presiding over this purportedly nationwide action when fewer than 2 percent of the claimants are Alabama residents and none of the out-of-state defendants even do business in the court's district? That Alabama court is accountable only to the 11,000 residents of the county that elects the court. Nevertheless, if counsel in that case have their way, that court will be dictating national airbag policy.

Under the current situation, *procedural* class action law has also been federalized to a large extent—in the same perverse way. Even though only a minority of state courts are routinely failing to exercise sound judicial judgment on class action issues, those courts have become magnets for a wildly disproportionate share of the interstate class actions that are being filed. In short, attorneys file their class actions in the minority of courts that are most likely to have a "laissez-faire" attitude toward the class device. That distinct minority of state courts are essentially setting the national norm; they are effectively dictating national class action policy.

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[14] In the trial court, the action is captioned *Snider* v. *State Farm Mut. Auto. Ins. Co.,* No. 97–L–114 (Ill. Cir. Ct., Williamson County).

[15] *See* Insurance Indus. Litig. Reporter, April 1, 1998, at 18 (noting that the Illinois Supreme Court had denied petitions to halt the action).

[16] *See Speroni* v. *State Farm Mut. Auto. Ins. Co.,* 119 S. Ct. 276 (1998).

[17] This lawsuit is captioned *Smith* v. *General Motors Corp., et al.,* Civ. A. No. 97–39 (Cir. Ct. Coosa County, Ala.). Although the trial court initially certified a nationwide class in this action before the defendants were even served, the court subsequently lifted that order.

The new *Class Action Watch* testimony (discussed previously) tends to confirm this observation. But anyone doubting that this phenomenon is occurring need look no further than the testimony of Dr. John B. Hendricks at the March 1998 House hearing. He offered a docket study of state court class actions in one jurisdiction showing (a) that class actions had become disproportionately large elements of the dockets of some county courts, (b) that many of the class actions were against major out-of-state corporations lacking any connection with the forum county, and (c) that the proposed classes in those cases typically were not limited to in-state residents and often encompassed residents of all 50 states. Dr. Hendricks identified one state court judge who had granted class certification in 35 cases over the preceding two years. As Dr. Hendricks stated, "[t]hat's a huge number of cases when one considers that during 1997, all 900 federal district court judges in the United States combined certified a total of only 38 cases for class treatment." The study failed to uncover any instance in which that judge had ever denied class certification. Clearly, that court alone was playing a radically disproportionate role in setting national class action policy.[18]

II. S. 353 Is A Modest, Well-Reasoned Answer To The State Court Class Action Crisis

From the record now before Congress, one could develop strong support for far reaching (some would say "radical") responses to the state court class action crisis. For example, Congress could enact federal legislation simply prohibiting state courts from using the class action device at all. Or Congress could perform major surgery on the class device itself (*e.g.,* change procedural rules to allow class actions to be used only to pursue injunctive relief (not monetary damages) and thereby eliminate the economic incentives that encourage abuse of the device).

Instead, S. 353 takes a middle-of-the-road course, proposing very modest changes. Nevertheless, its multi-pronged approach should be effective in addressing many of the most serious class action problems that have been identified.

A. PROVISIONS EXPANDING FEDERAL JURISDICTION

At the March 1998 House hearing, the witnesses were asked their views about a suggestion that the state court class action crisis could be quelled by expanding federal diversity jurisdiction to accommodate more class actions with interstate implications:

- Prof. Susan Koniak, a member of the faculty at the Boston University Law School who described herself as being from the "plaintiffs' bar," responded that expanding federal jurisdiction over class actions would be

  > a good idea. There's the polybutylene pipe case, which is one of the biggest class actions, was in Union City, Tennessee, in the state court, where no one could get there, you couldn't fly in to object. And that's common. Often these [state] courts are picked, and they are in the middle of nowhere. You can't have access to the documents and I don't think it's a full answer, but I think it should be done.[19]

- Former U.S. Attorney General Dick Thornburgh concurred, noting that

  > [m]ost of the complaints that arise out of alleged inequitable treatment in these suits in state courts are in states where the judges are elected, and must * * * depend on contributions which come from potential party litigants.

He stated that an expansion of federal jurisdiction over class actions is warranted because "federal courts have shown a much greater propensity to bring some sensible adjudication to the creation of classes and the progress of class cases."[20]

- In her prepared oral remarks, Elizabeth Cabraser, a leading plaintiffs' class action attorney, opined that

  > much of the confusion and lack of consistency that is currently troubling practitioners and judges and the public in the class action area could be addressed through the exploration, the very thoughtful exploration, of legislation that would increase federal diversity jurisdiction, so that more class action litigation could be brought in the federal court. Not because the federal courts necessarily

[18] The Alabama Supreme Court has recently issued several rulings that may dampen this behavior. But when such action is taken in one state, counsel simply move the class action show to another jurisdiction where the courts have shown a lax attitude toward regulating the class device.

[19] *See* Federal News Service Transcript, *Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts, House Comm. on the Judiciary* (March 9, 1998), at 19 ("FNS Transcript").

[20] *Id.* at 19–20.

have superior judges, but because the federal courts have nationwide reach; they have the statutory mechanisms that they need to manage this litigation, so litigation can be transferred and coordinated in a single forum.[21]

- Both Mr. Martin and Mr. John Frank indicated their support for expanding federal diversity jurisdiction over purported class actions. And Mr. McGoldrick concluded the inquiry by telling the Subcommittee:

  [Y]ou have heard [today] from professors, from plaintiff's lawyers, from defense lawyers, from consumer representatives, from business people, from a whole range. And it is striking to me that those of us who frequently disagree—my friend Ms. Cabraser and I frequently disagree—but you've heard from everyone the notion that diversity jurisdiction, increasing the ambit of it to permit class actions, is a good idea. And it seems to me that that's something this committee should weigh heavily in its deliberations.[22]

S. 353 embraces the simple, elegant response to the state court class action crisis considered by this diverse group of witnesses—a correction of the fact that federal courts lack jurisdiction to adjudicate interstate class actions, lawsuits that typically involve millions of dollars in dispute among thousands of parties residing in multiple jurisdictions. That change would aid resolution of the current state court class action crisis by eliminating restrictions that have forced both unnamed class members and defendants to have their claims heard before some tribunals that are ill-equipped to handle complex litigation and otherwise less vigilant about due process rights. Further, as Ms. Cabraser noted at the March 1998 House hearing, the change would make available in most class actions the "statutory mechanisms" that federal courts (but not state courts) may wield "to manage [class] litigation," so that overlapping, competing class actions "can be transferred and coordinated in a single forum."[23] And most importantly, the change would contribute to greater uniformity in the standards for deciding whether a controversy may be afforded class treatment.

As drafted in S. 353, this solution would be implemented without undesirable side-effects. The bill would not alter any party's substantive legal rights. The bill would not permit removal of truly local disputes; such matters would remain within the exclusive purview of the relevant state courts. And the bill would not preempt state courts' authority to hear class actions of any sort; if the parties prefer to litigate a particular interstate class action before an appropriate state court, they may do so.

The jurisdictional changes envisioned in S. 353 are entirely consistent with the current concept of federal diversity jurisdiction. At present, the statutory "gatekeeper" for federal diversity jurisdiction—28 U.S.C. § 1332—essentially allows invocation of diversity jurisdiction in cases that are large (in terms of the "amount in controversy") and that have interstate implications (in terms of involving citizens from multiple jurisdictions). By nature, class actions typically fulfill these requirements. Because they normally involve so many people and so many claims, class actions invariably put huge sums into dispute and implicate parties from multiple jurisdictions. Yet, because section 1332 was originally enacted before the rise of the modern day class action, it did not take account of the unique circumstances presented by class actions. As a result, that section, as a technical matter, tends to exclude class actions from federal courts.[24] That technical omission would be corrected by S. 353.

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[21] *Id.* at 33–34.

[22] *Id.* at 42.

[23] *See* 28 U.S.C. § 1407 (statute providing for transfer and consolidation of actions through multidistrict litigation mechanism).

[24] At present, class actions not presenting federal questions often may not be brought in or removed to federal courts under diversity jurisdiction theories because of two U.S. Supreme Court decisions interpreting section 1332. First, in *Snyder* v. *Harris,* 394 U.S. 332, 340 (1969), the Court ruled that in determining whether the parties satisfied the diversity prerequisite, a court should look only to the named parties (ignoring the unnamed class members). That ruling allows class proponents to avoid federal diversity jurisdiction by naming as plaintiffs parties who are non-diverse with a defendant, even though a significant number of the unnamed class members (if not the vast majority of class members) do not share the defendant's citizenship. Second, in *Zahn* v. *International Paper Co.,* 414 U.S. 291 (1973), the Court held that the "amount in controversy" requirement in section 1332 is satisfied in a purported class action only if each and every member of the purported class is shown separately to satisfy the jurisdictional amount threshold (presently $75,000). That ruling means that even though class actions invariably are huge controversies, involving millions (or billions) of dollars of claimed damages, they cannot be heard in federal court. For example, an action involving 100,000 class members may

Continued

S. 353 would make this correction by amending 28 U.S.C. § 1332 (the diversity jurisdiction statute) to extend federal diversity jurisdiction to cover any class action (with an aggregate amount in controversy in exceeding $75,000) in which there exists "partial diversity" between plaintiffs (including all unnamed members of any plaintiff class) and defendants, an approach wholly consistent with Article III of the Constitution.[25] This expanded jurisdiction, however, would not encompass disputes that are not interstate in nature—cases in which a class of citizens of one state sue one or more defendants that are citizens of that same state would remain subject to the exclusive jurisdiction of state courts. Further, federal courts would be required to abstain from hearing certain local cases and state action cases. Thus, contrary to what has been argued by some critics, the bill would not move all class actions into federal court. Consistent with existing diversity jurisdiction precepts, it would preserve exclusively to state court jurisdiction what are primarily local controversies.

The amendments also would facilitate the removal to federal court of any purported class action that falls within the additional grant of federal diversity jurisdiction over class actions described above. The bill would not change the existing diversity jurisdiction removal procedures applicable to purported class actions, save for three exceptions intended to correct some of the tactics used by counsel to avoid federal jurisdiction over interstate class actions.[26] In addition, the bill would authorize *unnamed class members* (not just defendants) to remove cases. This even-handed change would allow class members to move cases to federal court (within a reasonable time after notice is given) if they are concerned that the state court has not or will not adequately protect the absent class members' interests.

To avoid leaving before federal courts controversies not warranting the attention of the federal judiciary, the legislation would require a federal court to dismiss any case (that is in federal court solely due to the expanded diversity jurisdiction provisions) that it has determined may not be afforded class treatment. However, the bill specifies that an amended action may be refiled in state court. Further, the bill also protects the interests of the unnamed class members by specifying that federal tolling law will apply to the limitations periods on the claims asserted in the failed class action.

B. THE NOTICE PROVISIONS

The bill contains provisions (a) requiring that any formal, court-ordered notice to the class contain a "short summary written in plain, easily understood language"

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put millions of dollars at stake, but it would not be subject to federal jurisdiction unless each class member had $75,000 at issue or a total of $7.5 billion for the purported class!

[25] *See, e.g., State Farm Fire & Cas. Co.* v. *Tashire,* 386 U.S. 523, 530–31 (1967) ("in a variety of contexts, [federal courts] have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens"). In *State Farm,* the Court noted that the concept of "minimal diversity" providing the basis for diversity jurisdiction in the class action context had already been discussed in *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921). On several subsequent occasions, the Court has reiterated its view that permitting the exercise of federal diversity jurisdiction where there is less than complete diversity among the parties is wholly consistent with Article III. *See, e.g., Carden* v. *Arkoma Associates,* 494 U.S. 185, 199–200 (O'Connor, J., dissenting) ("Complete diversity * * * is not constitutionally mandated."); *Newman-Green, Inc.* v. *Alfonzo-Larrian,* 490 U.S. 826 (1989) ("The complete diversity requirement is based on the diversity statute, not Article III of the Constitution."); *Owen Equipment & Erection Co.* v. *Kroger,* 437 U.S. 365 (1978) ("It is settled that complete diversity is not a constitutional requirement."); *Snyder* v. *Harris,* 394 U.S. 332, 340 (1969) (in a class action brought under Fed. R. Civ. P. 23, only the citizenship of the named representatives of the class is considered, without regard to whether the citizenship of other members of the putative class would destroy complete diversity).

[26] *First,* the legislation would amend 28 U.S.C. § 1441(b) to confirm defendants' ability to remove all purported class actions qualifying for federal jurisdiction under the revised section 1332 (as discussed above) regardless of the state in which the action was originally brought.

Second, 28 U.S.C. § 1446(b) would be amended to provide that a defendant could remove a putative class action at any time (even at a date more than one year after commencement of the action), so long as the action is removed within 30 days after the date on which the defendants may first ascertain (through a pleading, amended pleading, motion order or other paper) that the action satisfies the jurisdictional requirements for class actions (as set forth in the proposed section 1332(b)). This provision is intended to prevent parties from filing cases as individual actions and then recasting them as purported class actions (or as broader class actions) after the one-year deadline for removal has passed.

Third, S. 353 would amend 28 U.S.C. § 1446(a) to allow any class action defendant to remove an action. At present, an action typically may be removed only if all defendants concur. This provision is intended to address situations in which local defendants with little at risk or defendants "friendly" to the named plaintiffs may preclude other defendants with substantial exposure from gaining access to federal court.

and (b) otherwise detailing the required contents of such notices. Further, the bill requires that the Attorney General of the United States and the attorneys general of any states in which class members reside be notified of any proposed class action settlement. As noted above, many state courts have not been vigilant about protecting the rights of unnamed class members, particularly those with claims that arguably may be more significant than the claims of the average class member. Further, some courts have not adequately balanced attorney compensation with what has been achieved for the class.

Many of these problems will be alleviated if the federal courts are allowed to hear more interstate class actions. However, expanding public awareness of proposed class actions and proposed settlements thereof will lessen the possibility that class actions will injure the unnamed class members that they are intended to benefit.

C. ATTORNEY'S FEES PROVISIONS

As was detailed previously, attorney's fees are the root cause of the tidal wave of class actions that we are experiencing and of the most serious class action abuses that we are seeing. S. 353 would limit such fees to a "reasonable percentage of the amount of" (a) damages actually paid to the class, (b) future financial benefits to the class attributable to the cessation of alleged improper conduct, and (c) costs actually incurred by defendants in complying with terms of any order or agreement. Reasonable lodestar fees will be available in any event.

These are very modest fee limitations. They do not address the fact "percentage of fund" fee awards in class actions are usually wholly unwarranted. Allowing plaintiffs' counsel to receive a significant percentage of the recovery in an *individual* lawsuit might be justified as bearing some relationship to the amount that an attorney legitimately should expect for prosecuting the claim (particularly when the attorney and his/her client presumably have agreed on the percentage). But a major purpose of a *class action* device is to achieve efficiencies—to prosecute large numbers of claims simultaneously with substantially reduced effort for all involved. Thus, counsel prosecuting a class action cannot reasonably expect a substantial percentage of whatever fund is created as a result of prosecuting a whole class of claims—there must be a substantial discount reflecting the efficiency of the class exercise. Otherwise, counsel are receiving a major, totally unjustifiable windfall.

In short, if enacted, the attorney's fees provisions in S. 353 will not substantially slow the engine driving class action growth. However, the bill's provisions are modest steps in the right direction. They do have the potential to curtail some of the more egregious fee abuses, especially the tendency by some counsel to claim fees on the basis of theories of speculative, amorphous benefits to the class.

III. Conclusion

Thank you again for the opportunity to comment on S. 353. I respectfully urge the Subcommittee to recommend the bill favorably to the full Judiciary Committee.

Senator GRASSLEY. Thank you very much for your testimony.

The Senator from Alabama, would you lead off?

Senator SESSIONS. Thank you.

Mr. Morrison, you talked about lawyers not talking to their clients in these cases. They don't know who they are. When I was attorney general, there was an election contest actually involving the very justice I just mentioned who made that closing argument before he was president of the Alabama Trial Lawyers Association. But at any rate, the lead plaintiff on the case was dead for 6 months. They filed a class action in the name of only one plaintiff, as I recall, so obviously they hadn't been consulting with their client. And there is just no pattern of that.

Mr. MORRISON. There is no pattern.

Senator SESSIONS. I mean, the lawyers take over the case, and it is their case and they run it and there is no input from the client.

Mr. MORRISON. That is right, exactly, Senator Sessions, and that is how you get coupon settlements, $.08 settlements, future vague medical monitoring settlements. Those aren't about the health and

welfare and well-being of so-called victims. Those are about the entrepreneurial litigator cashing out. In essence, what many lawyers have found—and let's just call a spade a spade—is that having a class action is better than having a "dot com" company go public in these days. That is what it is all about.

Senator SESSIONS. Big money, that is for sure.

I would like to ask you, Mr. Beisner, about this power. I remember back in law school, Dean Harrison used to ask a question: in the conflict of laws, may the isle of Tobago bind the whole world? Can a county in Chicago actually do this, a county court, in effect, under our system of respect for verdicts in many cases, be able to do that?

Mr. BEISNER. My understanding, although I am not involved in the case, is that this is going to happen. The Illinois Supreme Court has declined to intervene, and indeed the parties involved took the issue to the U.S. Supreme Court, which also declined to intervene. So it is going to happen.

Senator SESSIONS. Under the current state of law, this complex public policy question will be decided by a county court in Illinois?

Mr. BEISNER. That is correct.

Senator SESSIONS. With regard to the question of the mass tort, this is something I am not sure I can articulate the difference. What is the difference in the problem that we as policymakers deal with when you have a breast implant-type situation, which I guess was filed as a class action—or let's take asbestos that was not. Is there a distinction here?

Mr. BEISNER. Well, I think that if you are talking about the difference between mass torts and the use of class actions in that context and class actions generally—and I don't want to over-generalize here, but I think the main difference is that frequently or most often in a mass tort situation, you have people who are saying I have been injured in some way. You often in those cases have the sorts of people who may well go to a lawyer and say, I have a problem, would you please try to find a remedy here.

These are claims that at least to some extent are going to be filed and are going to be part of the system anyway, and the challenge to the courts in those circumstances is how are we going to process those. When you are talking about non-mass tort class actions, I think you are often there getting more into the arena of lawyer-manufactured cases. Those are the instances where the claim is probably most apparent only in the mind of the lawyer who brought the case and where the vast majority of people out there probably don't care a whit about whether this claim is asserted.

Senator SESSIONS. Now, asserted that you have 60 or 100 cases like this. Are you serious? I mean, you personally are working on 100 cases?

Mr. BEISNER. Yes.

Senator SESSIONS. Give me an example of what you are talking about, the kind of litigation.

Mr. BEISNER. I can give you an example of one which is in your home State of Alabama, in Coosa County, to be straightforward about that. And this is a case——

Senator SESSIONS. I don't think that was one of the six counties.

Mr. BEISNER. No, it is a different one.

Senator SESSIONS. But it is not much bigger than those.

Mr. BEISNER. It was a class action involving well over 20 million in all 50 States, and it is basically anybody who has an airbag in their vehicle. And they brought this lawsuit against GM, Chrysler and Ford, and they are basically asking that GM, Chrysler and Ford send back $500 to all of these people because they claim the airbag is defective in those vehicles.

So what you have there is the potential that in this one court, where the judge has been elected by the 11,000-or-so residents of Coosa County, he will be presiding over this multi-billion-dollar trial, if the judge decides to go forward with it, deciding whether or not basically everybody's airbag out there is defective. And, indeed, that judge and that court will be setting our Federal airbag policy.

Senator SESSIONS. Well, I think that is extraordinary, and it does raise serious questions. I think those are the kinds of decisions that may—well, let me ask you, it didn't get in Coosa county because the plaintiffs and the defendants somehow agreed that this would be a good place to try it? One party got to select the county, is that right?

Mr. BEISNER. That is correct.

Senator SESSIONS. So, presumably, they searched all over to find the county they wanted to file in. They could have filed it in any county virtually in the United States?

Mr. BEISNER. That is correct, and we attempted to remove it to Federal court because none of the auto company defendants really do any business—there aren't even any auto dealers in that county. But because they named as a defendant an auto dealer in Alabama, we were unable to remove that case to Federal court.

Senator SESSIONS. Mr. Chairman, that is a dramatic statement. What he has said is, as I understand it—correct me if I am wrong—this statement that you have a right to remove is really a hollow thing because you can almost always in a case like this add a non-diversity defendant.

Mr. BEISNER. And I could assure you the auto dealer who was named in that lawsuit didn't have a great deal to do with how the airbag in those vehicles was designed.

Senator SESSIONS. But because he was a defendant, there was not complete diversity?

Mr. BEISNER. That is correct.

Senator SESSIONS. Mr. Morrison, how do you see that as a policy?

Mr. MORRISON. Senator, as a policy what is happening is sham defendants, fraudulent defendants, are being joined in to prevent removal to Federal court. And I was struck earlier when the testimony of the Justice Department was finished and you were asking questions about the six counties in your State. If you had those same six counties and you had an extraordinarily high incidence of cancer, the public would want you to look into it and figure out what was going on.

What you have is the legal equivalent of a high incidence of cancer in those six counties because people are self-selecting those counties, designing lawsuits to stay in those counties, and taking the class actions in those specific counties. Alabama is not the only place. I could name counties just about in every State where there

is a friendly jurist or a friendly loosening of the rules that takes place, where people will design the case to stay before that judge, get it certified, get the blackmail settlement and basically go public with the attorneys' fees.

Senator SESSIONS. I understood it, I think, but I did not really comprehend the depth of it that a plaintiff who has got an action in every airbag in America can search the whole United States to find the single county where there may be only one judge that he knows is favorable and bring the lawsuit there and get a verdict that binds the world. It is really pretty dramatic and I appreciate you sharing that with us.

Senator GRASSLEY. I will start with Mr. Morrison. I have just got a couple of short questions. Both the Justice Department and Professor Daynard have suggested that if this bill is passed, some people will not get their day in court. Are they right?

Mr. MORRISON. No, sir. I couldn't disagree more with that suggestion. This bill—and I think the genius of the bill is it doesn't have anything to do with the substantive rights of the individual. It doesn't change that individual's rights. If the individual has a claim under South Carolina law, my home State, or a claim under Michigan law, where I grew up, then that claim still exists and they have the right to pursue that claim vigorously in the Federal court, with full respect for that substantive law, or in the State court if that is the appropriate place for it and it is an appropriate State class action.

Moreover, the door is not slammed. I think Professor Frank said it best. There are plenty of class actions that are, in fact, local class actions. A local water pollution case, a local water rights case, a local case against a county or a tax assessor where something has gone wrong—those are local State class actions and should be brought.

This bill does nothing to diminish the substantive legal rights of one human being. What it does allow for is a fair adjudication of those rights in an appropriate forum. What it does allow for is the removal of interstate class actions. That is all it does. It is a very modest proposal with no damage to alleged victims.

Senator GRASSLEY. Mr. Beisner, your comments?

Mr. BEISNER. I am not sure there is much I can add to what Mr. Morrison said, but I think that one of the things we need to recognize is that the reason why in Federal courts, as Professor Daynard was suggesting earlier, some class actions are not certified is because frankly in a lot of instances the plaintiffs' counsel become over-ambitious with what they are doing. They try to mix together people whose claims really aren't common, and the Federal courts have been calling counsel on that and saying we are not going to allow you to do that.

Frankly, that is the issue that I think is presented in a lot of these cases. I think that if the classes are properly crafted, that issue would not exist. And so to suggest that State courts are allowing classes Federal courts are not, I don't think is a fair comparison. I think that the problem is that the Federal courts are beginning to say you have got to craft these classes more carefully, and they are right from a due process standpoint.

Senator GRASSLEY. Mr. Beisner, let me ask you, the Justice Department, as you heard, suggests that the passage of the diversity removal provisions in the bill would somehow infringe on the State courts' ability to offer redress to their citizens. Is that accurate?

Mr. BEINSER. Again, I think the answer to that question really goes back to what Mr. Morrison was saying earlier. It will not prevent States from providing redress. Substantive law would not be affected by this bill. States may pass whatever statutes they wish to provide remedies for whatever sort of wrongdoing may exist out there. This won't affect that in the least.

Senator GRASSLEY. I thank you all for coming today. I think that this hearing has shown that there is a real problem with class actions. I think the Senator from Alabama has been impacted very heavily by this testimony, and I think that we should move forward with our bill to address this phenomenon. I think that fundamental fairness demands it, and I look forward to working with other Senators on the Judiciary Committee and with Senator Kohl and others to make this bill a reality. And I receive in advisement the suggestions of people today, the witnesses that we have had who have been willing to help as well.

Thank you all very much. The subcommittee is adjourned.

[Whereupon, at 4:02 p.m., the subcommittee was adjourned.]

APPENDIX

PROPOSED LEGISLATION

II

106TH CONGRESS
1ST SESSION

S. 353

To provide for class action reform, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3, 1999

Mr. GRASSLEY (for himself, Mr. KOHL, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for class action reform, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Class Action Fairness
5 Act of 1999".

6 **SEC. 2. NOTIFICATION REQUIREMENT OF CLASS ACTION**
7 **CERTIFICATION OR SETTLEMENT.**

8 (a) IN GENERAL.—Part V of title 28, United States
9 Code, is amended by inserting after chapter 113 the fol-
10 lowing new chapter:

1 **"CHAPTER 114—CLASS ACTIONS**

"Sec.
"1711. Definitions.
"1712. Application.
"1713. Notification of class action certifications and settlements.
"1714. Limitation on attorney's fees in class actions.

2 **"§ 1711. Definitions**

3 "In this chapter the term—

4 "(1) 'class' means a group of persons that com-
5 prise parties to a civil action brought by 1 or more
6 representative persons;

7 "(2) 'class action' means a civil action filed pur-
8 suant to rule 23 of the Federal Rules of Civil Proce-
9 dure or similar State rules of procedure authorizing
10 an action to be brought by 1 or more representative
11 persons on behalf of a class;

12 "(3) 'class certification order' means an order
13 issued by a court approving the treatment of a civil
14 action as a class action;

15 "(4) 'class member' means a person that falls
16 within the definition of the class;

17 "(5) 'class counsel' means the attorneys rep-
18 resenting the class in a class action;

19 "(6) 'plaintiff class action' means a class action
20 in which class members are plaintiffs; and

21 "(7) 'proposed settlement' means a settlement
22 agreement between or among the parties in a class

1 action that is subject to court approval before the
2 settlement becomes binding on the parties.

3 **"§ 1712. Application**

4 "This chapter shall apply to—

5 "(1) all plaintiff class actions filed in Federal
6 court; and

7 "(2) all plaintiff class actions filed in State
8 court in which—

9 "(A) any class member resides outside the
10 State in which the action is filed; and

11 "(B) the transaction or occurrence that
12 gave rise to the class action occurred in more
13 than 1 State.

14 **"§ 1713. Notification of class action certifications and**
15 **settlements**

16 "(a) Not later than 10 days after a proposed settle-
17 ment in a class action is filed in court, class counsel shall
18 serve the State attorney general of each State in which
19 a class member resides and the Attorney General of the
20 United States as if such attorneys general and the Depart-
21 ment of Justice were parties in the class action with—

22 "(1) a copy of the complaint and any materials
23 filed with the complaint and any amended com-
24 plaints (except such materials shall not be required
25 to be served if such materials are made electronically

1 available through the Internet and such service in-
2 cludes notice of how to electronically access such
3 material);
4 "(2) notice of any scheduled judicial hearing in
5 the class action;
6 "(3) any proposed or final notification to class
7 members of—
8 "(A)(i) the members' rights to request ex-
9 clusion from the class action; or
10 "(ii) if no right to request exclusion exists,
11 a statement that no such right exists; and
12 "(B) a proposed settlement of a class ac-
13 tion;
14 "(4) any proposed or final class action settle-
15 ment;
16 "(5) any settlement or other agreement contem-
17 poraneously made between class counsel and counsel
18 for the defendants;
19 "(6) any final judgment or notice of dismissal;
20 "(7)(A) if feasible the names of class members
21 who reside in each State attorney general's respec-
22 tive State and the estimated proportionate claim of
23 such members to the entire settlement; or
24 "(B) if the provision of information under sub-
25 paragraph (A) is not feasible, a reasonable estimate

of the number of class members residing in each attorney general's State and the estimated proportionate claim of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under paragraphs (3) through (6).

"(b) A hearing to consider final approval of a proposed settlement may not be held earlier than 120 days after the date on which the State attorneys general and the Attorney General of the United States are served notice under subsection (a).

"(c) Any court with jurisdiction over a plaintiff class action shall require that—

"(1) any written notice provided to the class through the mail or publication in printed media contain a short summary written in plain, easily understood language, describing—

"(A) the subject matter of the class action;

"(B) the legal consequences of being a member of the class action;

"(C) the ability of a class member to seek removal of the class action to Federal court if—

"(i) the action is filed in a State court; and

1 "(ii) Federal jurisdiction would apply
2 to such action under section 1332(d);
3 "(D) if the notice is informing class mem-
4 bers of a proposed settlement agreement—
5 "(i) the benefits that will accrue to
6 the class due to the settlement;
7 "(ii) the rights that class members
8 will lose or waive through the settlement;
9 "(iii) obligations that will be imposed
10 on the defendants by the settlement;
11 "(iv) the dollar amount of any attor-
12 ney's fee class counsel will be seeking, or
13 if not possible, a good faith estimate of the
14 dollar amount of any attorney's fee class
15 counsel will be seeking; and
16 "(v) an explanation of how any attor-
17 ney's fee will be calculated and funded;
18 and
19 "(E) any other material matter; and
20 "(2) any notice provided through television or
21 radio to inform the class members of the right of
22 each member to be excluded from a class action or
23 a proposed settlement, if such right exists, shall, in
24 plain, easily understood language—

1 "(A) describe the persons who may poten-
2 tially become class members in the class action;
3 and
4 "(B) explain that the failure of a person
5 falling within the definition of the class to exer-
6 cise such person's right to be excluded from a
7 class action will result in the person's inclusion
8 in the class action.
9 "(d) Compliance with this section shall not provide
10 immunity to any party from any legal action under Fed-
11 eral or State law, including actions for malpractice or
12 fraud.
13 "(e)(1) A class member may refuse to comply with
14 and may choose not to be bound by a settlement agree-
15 ment or consent decree in a class action if the class mem-
16 ber resides in a State where the State attorney general
17 has not been provided notice and materials under sub-
18 section (a).
19 "(2) The rights created by this subsection shall apply
20 only to class members or any person acting on a class
21 member's behalf, and shall not be construed to limit any
22 other rights affecting a class member's participation in the
23 settlement.
24 "(f) Nothing in this section shall be construed to im-
25 pose any obligations, duties, or responsibilities upon State

1 attorneys general or the Attorney General of the United
2 States.

3 **"§ 1714. Limitation on attorney's fees in class actions**

4 "(a) In any class action, the total attorney's fees and
5 expenses awarded by the court to counsel for the plaintiff
6 class may not exceed a reasonable percentage of the
7 amount of—

8 "(1) any damages and prejudgment interest ac-
9 tually paid to the class;

10 "(2) any future financial benefits to the class
11 based on the cessation of alleged improper conduct
12 by the defendants; and

13 "(3) costs actually incurred by all defendants in
14 complying with the terms of an injunctive order or
15 settlement agreement.

16 "(b) Notwithstanding subsection (a), to the extent
17 that the law permits, the court may award attorney's fees
18 and expenses to counsel for the plaintiff class based on
19 a reasonable lodestar calculation.".

20 (b) TECHNICAL AND CONFORMING AMENDMENT.—
21 The table of chapters for part V of title 28, United States
22 Code, is amended by inserting after the item relating to
23 chapter 113 the following:

"114. Class Actions ..... 1711".

1 **SEC. 3. DIVERSITY JURISDICTION FOR CLASS ACTIONS.**

2 Section 1332 of title 28, United States Code, is
3 amended—

4 (1) by redesignating subsection (d) as sub-
5 section (e); and

6 (2) by inserting after subsection (c) the follow-
7 ing:

8 "(d)(1) In this subsection, the terms 'class', 'class ac-
9 tion', and 'class certification order' have the meanings
10 given such terms under section 1711.

11 "(2) The district courts shall have original jurisdic-
12 tion of any civil action where the matter in controversy
13 exceeds the sum or value of $75,000, exclusive of interest
14 and costs, and is a class action in which—

15 "(A) any member of a class of plaintiffs is a
16 citizen of a State different from any defendant;

17 "(B) any member of a class of plaintiffs is a
18 foreign state or a citizen or subject of a foreign state
19 and any defendant is a citizen of a State; or

20 "(C) any member of a class of plaintiffs is a
21 citizen of a State and any defendant is a foreign
22 state or a citizen or subject of a foreign state.

23 "(3) The district court shall abstain from hearing a
24 civil action described under paragraph (2) if—

25 "(A)(i) the substantial majority of the
26 members of the proposed plaintiff class are citi-

1 zens of a single State of which the primary de-
2 fendants are also citizens; and
3 "(ii) the claims asserted will be governed
4 primarily by the laws of that State; or
5 "(B) the primary defendants are States,
6 State officials, or other governmental entities
7 against whom the district court may be fore-
8 closed from ordering relief.
9 "(4) In any class action, the claims of the individual
10 members of any class shall be aggregated to determine
11 whether the matter in controversy exceeds the sum or
12 value of $75,000, exclusive of interest and costs.
13 "(5) This subsection shall apply to any class action
14 before or after the entry of a class certification order by
15 the court.
16 "(6)(A) A district court shall dismiss, or, if after re-
17 moval, strike the class allegations and remand, any civil
18 action if—
19 "(i) the action is subject to the jurisdiction of
20 the court solely under this subsection; and
21 "(ii) the court determines the action may not
22 proceed as a class action based on a failure to sat-
23 isfy the conditions of rule 23 of the Federal Rules
24 of Civil Procedure.

1 "(B) Nothing in subparagraph (A) shall prohibit
2 plaintiffs from filing an amended class action in Federal
3 or State court.
4 "(C) Upon dismissal or remand, the period of limita-
5 tions for any claim that was asserted in an action on be-
6 half of any named or unnamed member of any proposed
7 class shall be deemed tolled to the full extent provided
8 under Federal law.
9 "(7) Paragraph (2) shall not apply to any class ac-
10 tion, regardless of which forum any such action may be
11 filed in, involving any claim relating to—
12 "(A) the internal affairs or governance of a cor-
13 poration or other form of entity or business associa-
14 tion arising under or by virtue of the statutory, com-
15 mon, or other laws of the State in which such cor-
16 poration, entity, or business association is incor-
17 porated (in the case of a corporation) or organized
18 (in the case of any other entity); or
19 "(B) the rights, duties (including fiduciary du-
20 ties), and obligations relating to or created by or
21 pursuant to any security (as defined under section
22 2(a)(1) of the Securities Act of 1933 or the rules
23 and regulations adopted under such Act).".

1 **SEC. 4. REMOVAL OF CLASS ACTIONS TO FEDERAL COURT.**

2 (a) IN GENERAL.—Chapter 89 of title 28, United
3 States Code, is amended by adding after section 1452 the
4 following:

5 **"§ 1453. Removal of class actions**

6 "(a) In this section, the terms 'class', 'class action',
7 and 'class member' have the meanings given such terms
8 under section 1711.

9 "(b) A class action may be removed to a district court
10 of the United States in accordance with this chapter, ex-
11 cept that such action may be removed—

12 "(1) by any defendant without the consent of
13 all defendants; or

14 "(2) by any plaintiff class member who is not
15 a named or representative class member without the
16 consent of all members of such class.

17 "(c) This section shall apply to any class action be-
18 fore or after the entry of any order certifying a class.

19 "(d) The provisions of section 1446 relating to a de-
20 fendant removing a case shall apply to a plaintiff removing
21 a case under this section, except that in the application
22 of subsection (b) of such section the requirement relating
23 to the 30-day filing period shall be met if a plaintiff class
24 member files notice of removal within 30 days after receipt
25 by such class member, through service or otherwise, of the
26 initial written notice of the class action.

1 "(e) This section shall not apply to any class action,
2 regardless of which forum any such action may be filed
3 in, involving any claim relating to—
4 "(1) the internal affairs or governance of a cor-
5 poration or other form of entity or business associa-
6 tion arising under or by virtue of the statutory, com-
7 mon, or other laws of the State in which such cor-
8 poration, entity, or business association is incor-
9 porated (in the case of a corporation) or organized
10 (in the case of any other entity); or
11 "(2) the rights, duties (including fiduciary du-
12 ties), and obligations relating to or created by or
13 pursuant to any security (as defined under section
14 2(a)(1) of the Securities Act of 1933 or the rules
15 and regulations adopted under such Act).".
16 (b) REMOVAL LIMITATION.—Section 1446(b) of title
17 28, United States Code, is amended in the second sentence
18 by inserting "(a)" after "section 1332".
19 (c) TECHNICAL AND CONFORMING AMENDMENTS.—
20 The table of sections for chapter 89 of title 28, United
21 States Code, is amended by adding after the item relating
22 to section 1452 the following:

"1453. Removal of class actions.".

1 **SEC. 5. REPRESENTATIONS AND SANCTIONS UNDER RULE**
2 **11 OF THE FEDERAL RULES OF CIVIL PROCE-**
3 **DURE.**

4 Rule 11(c) of the Federal Rules of Civil Procedure
5 is amended—

6 (1) in the first sentence by striking "may, sub-
7 ject to the conditions stated below," and inserting
8 "shall";

9 (2) in paragraph (2) by striking the first and
10 second sentences and inserting "A sanction imposed
11 for violation of this rule may consist of reasonable
12 attorneys' fees and other expenses incurred as a re-
13 sult of the violation, directives of a nonmonetary na-
14 ture, or an order to pay penalty into court or to a
15 party."; and

16 (3) in paragraph (2)(A) by inserting before the
17 period ", although such sanctions may be awarded
18 against a party's attorneys".

19 **SEC. 6. EFFECTIVE DATE.**

20 The amendments made by this Act shall apply to any
21 civil action commenced on or after the date of enactment
22 of this Act.

○

QUESTIONS AND ANSWERS

RESPONSES OF ELEANOR ACHESON

Questions from Senator Grassley:

Question 1: Ms. Acheson, in your oral testimony you acknowledged – to a certain extent – that there are abuses occurring in the class action area. You also acknowledged that there are certain scenarios where class action lawsuits would be better brought in federal court. Could you tell me what those are and why? On the other hand, what kinds of class action lawsuits should stay in state court? Why?

Answer: As I noted in my written testimony, the Justice Department agrees with you that there may be situations where class action lawsuits may be appropriately brought in federal court regardless of the litigants' citizenship. For example, lawsuits arising from a single accident (such as an airplane crash) are likely candidates for federal, as opposed to state, class actions. As noted in a recent letter to Chairman Hyde, the Department supports legislation (H.R. 967) that would create federal jurisdiction for such cases. As the Working Group on Mass Torts observed in its February 1999 report to the Chief Justice and Judicial Conference of the United States, however, these new uses of federal class actions deserve further study. *See* Report on Mass Tort Litigation 38, 67-70 (1999).

Question 2: At the hearing, you indicated that the Justice Department's willingness to work with the Subcommittee in crafting legislation that the Department could support to address problems occurring in the class action area. Could you provide the Subcommittee with specific changes and/or suggestions to our bill?

Answer: The Justice Department agrees with the sponsors of this bill that there have been some instances of abuse of class actions in both the state and federal courts: those instances include situations in which judges have approved settlements that reward attorneys at the expense of class plaintiffs; defendants have been able to play one nationwide class action against others in a "race to the bottom" for the lowest settlement; and out-of-state (or, in federal court, out-of-District) plaintiffs have been bound to settlements without receiving what many would consider sufficient notice of their rights to "opt out." We are willing to work with this Subcommittee in fashioning legislation that would address these abuses.

As noted in my testimony, the Department does not believe that federalizing class actions would solve the problems that currently affect class actions; indeed, those same problems can and probably do occur in federal court. Federal judges might still approve unfair settlements (and the anecdotal evidence suggests they have, from time to time). Moreover, moving class actions to federal court would not guarantee that out-of-district plaintiffs received any greater notice in federal court than out-of-state plaintiffs do in state court.

There are a number of other possible solutions. First, we could consider ways to

encourage state and federal judges to give class action certification, settlement, and attorneys fees issues greater scrutiny. This would ensure that judges do not approve settlements that are unfair to the parties involved. Second, we could consider a provision requiring out-of-state plaintiffs to "opt in" affirmatively to a state lawsuit before they could be bound by any resulting judgment. This proposal would not only protect the rights of out-of-state, absent plaintiffs by ensuring that they are bound only if they have actual notice (which they would need if they were to "opt in"), but would also be likely to significantly reduce the number of nationwide class actions, which will concomitantly reduce the ability of defendants to engage in "reverse auctions" because the "competing" class actions will not involve the same plaintiffs. Third, we could consider requiring class plaintiffs in federal class actions to provide all class and settlement notices in "plain English," which could then be used as models for similar action in state courts. We might also consider provisions to consolidate discovery when there are multiple, state-based class actions or a "first-to-certify" rule that places all but the first-certified class action on hold. Some of these proposals raise important constitutional and policy-based questions, but the Department is open to working with this Subcommittee through these challenging issues.

Question 3: I agree with Mr. Beisner's testimony that there is a unique "federalism" problem occurring within the current system – state courts are currently adjudicating multistate plaintiff class action cases and making binding decisions for the nation. Don't you think that there is a problem with this? Shouldn't the federal courts be making these decisions rather than state courts? Don't the interstate ramifications of these decisions cause you concern?

Answer: We agree with Mr. Beisner that there is a problem with state courts purporting to bind nationwide classes of plaintiffs, but do not believe that letting federal courts try these actions is a good solution. If our concern is to keep national policy-making in the federal courts, then federalization is not the solution because federal courts are no more able than state courts to set national policy – both are bound by Supreme Court precedent to apply relevant state law to the class plaintiffs. If our concern is to limit the reach of state courts, federalization goes too far because it restricts the ability of states to provide remedies to their own citizens. A better way to prevent state courts from making binding decisions for nationwide classes of plaintiffs, as we discussed above, would to be to require out-of-state plaintiffs to "opt in" to state class actions. Under such a rule, the reach of state courts would be limited to their in-state residents and out-of-state plaintiffs who affirmatively join the class action.

Question 4: What is the Justice Department's response to arguments made by Professor Elliot that there is sound constitutional basis for having interstate class actions brought in federal court? Do you deny that interstate commerce and diversity concerns are

overwhelming grounds to at least remove these kinds of cases to federal courts?

Answer: The Department agrees with Professor Elliot that the Constitution does not mandate either a rule of complete diversity or a rule of minimal diversity with respect to class actions. The Department disagrees with him that "interstate class actions," which he seems to define as any class action involving a plaintiff and a defendant from different states, belong in federal court. For the reasons outlined in the response to your third question, we do not believe that a lawsuit should be adjudicated in federal court simply because it involves plaintiffs from different states and affects interstate commerce, even if such a rule would be constitutionally permissible. While the Constitution does not require maximum diversity, the Constitution clearly contemplates a two-tiered system of government – with the Supremacy Clause's preemptive effect counter-balanced by the Tenth Amendment's protection of state sovereignty. Accordingly, we question whether a policy of federalizing class actions brought by multi-state plaintiffs who could have brought individual actions in their home States would be consistent with the federalism values embodied in the Constitution.

Question 5: Do you believe that the Justice Department's suggestion that Congress dictate class action rule changes to the states is a better way to address problems with class actions, rather than providing a federal forum for interstate class actions as an option, as does our bill? Isn't removal a far less intrusive way to deal with this issue? Isn't it also more consistent with notions of federalism?

Answer: The Department does not suggest that Congress dictate class action rule changes to the states. Doing so might raise constitutional issues under the Tenth Amendment. Rather, we believe it would be more appropriate to modify the federal notice rules, along the lines we suggested in the answer to your second question, which could then be used as models for similar state rules. This model rules approach would seem to be less intrusive than federalization of class actions, which would deprive states of the ability to provide remedies in their own state courts for their own citizens because many class actions involving numerous in-state plaintiffs would be removable to federal court.

Question 6A: At one point in the hearing, you indicated that issues of due process are not implicated when one is dealing with interstate class actions involving plaintiffs and defendants from many different states brought in a state court. So are you saying that defendants and unnamed plaintiffs can be dragged into any state court, regardless of whether there are questions about the fairness and impartiality of that forum? Isn't this why federal diversity jurisdiction is a constitutional requirement in the first place?

Answer: We do not suggest that due process is never implicated in class actions involving litigants from several states, only that due process is not violated automatically by such procedures. The protections of the Constitution's Due Process Clauses act as important constitutional backstops, whether a class action proceeds in federal or state court. As a result, the fairness and impartiality assured by the clauses are available to litigants in every forum.

Question 6B: The Justice Department's written testimony states that "[i]f there are class action procedures in state courts that protect the due process rights of the parties but are objectionable on policy grounds, these policy issues should be addressed in the state courts and legislatures." If there are class action procedures in state courts that *deny* the due process rights of parties, should those problems be left to the state courts and legislatures? If so, is it the Justice Department's general position that if states are denying citizens their due process rights, neither Congress nor the Executive Branch should take any action and should leave those matters to the state courts and legislatures?

Answer: No. The Justice Department does not take the position that the federal government should stand aside if there is credible evidence of due process violations in state courts and states are unable or unwilling to address those violations. But we do not face that situation here, for we have scant evidence of due process violations. Where such evidence does exist, we have no reason to believe that the state court systems are incapable of remedying their own problems. In fact, some have already done so. See Written Testimony, at 5 n.4. It is the Department's position not to assume that states are incapable of redressing federal constitutional violations, and not to address that presumed incompetency by bypassing effective state remedies with immediate federal relief. Indeed, the federal courts have for over a century insisted that state courts be given the first opportunity to rectify any constitutional violations raised by state convicts in their federal habeas petitions. This "exhaustion" doctrine reflects a healthy respect for the competency of the state courts, one that we feel is equally valid in this context.

Question 6C: If a federal court denies class certification in a case based on a finding that litigating the matter on a class basis would deny some or all parties certain of their due process rights, would it be appropriate for a state court subsequently to certify such a case for class treatment?

Answer: If a due process violation were to arise from trying a particular lawsuit as a class action in federal courts and the same violation were to occur if the class were certified in state court, the Department agrees with you that it would be inappropriate for the state court to certify the class because doing so would violate the Constitution.

Question 6D: To the extent that the limits on class certification in the federal courts are based on due process considerations, should the states be free to have looser class certification standards?

Answer: As you know, the States, as sovereigns within our federal system of government, are free – and, indeed, are encouraged – to experiment with both their substantive and their procedural law. Only if the actions of the states exceed the limits of the U.S. Constitution is this experimentation inappropriate.

Question 7: Does federal court diversity jurisdiction serve a useful purpose? What is that purpose? Additionally, in the view of the Justice Department, what kinds of cases should be heard in federal court as a matter of diversity jurisdiction? Isn't it true that what our statutes basically say is that to be in federal court, a case should fundamentally involve residents of different states and involve a substantial amount of money?

Answer: The Justice Department believes that diversity jurisdiction serves a useful purpose. Initially, this basis of federal jurisdiction ensured that citizens from one state were not subject to the local biases of the courts of other states. In our modern, mobile society, there is arguably less risk of local bias and prejudice in the state courts and thus, less of a need for diversity jurisdiction, but diversity jurisdiction continues to serve as an incentive for state courts to remain fair to out-of-state litigants. As you point out, diversity jurisdiction is currently available to persons who are from different states, where no plaintiff and no defendant are from the same state, and where the dispute involves at least $75,000. See 28 U.S.C. § 1332. This definition requires maximum diversity, not the minimal diversity that S. 353 proposes. The Department believes that the current definition of diversity jurisdiction is appropriate to achieve its purposes.

Question 8: The Justice Department's written testimony suggests that allowing removal to federal court of a class action "concerning a [non-citizen defendant] corporation's operations within [a] state," "even if the defendant had substantial operations in the state" would be inappropriate. By this comment, are you suggesting that for purposes of federal diversity jurisdiction, a corporation should be deemed a citizen of any state in which it has "substantial operations"? If so, how does the Justice Department square its position with the fact that Article III authorization of federal diversity jurisdiction was intended, *inter alia*, to encourage corporations to develop substantial operations outside of their home state without fear of unfair treatment by the local court systems of other jurisdictions?

Answer: In the passage you cite from the written testimony, the Department was explaining why the exception for primarily in-state class actions contained in S. 353 would preclude removal of many class actions. As an example, the Department was

hypothesizing a case involving an inherent "in-state" issue – a corporation's operations within a state – that would not fit within S. 353's exception (and would therefore be removable) as long as some other "primary defendant" in the case were from a different state. See Written Testimony at 6. The Department was not implying that a corporation should be deemed to be a resident of any state in which it has "substantial operations."

Question 9: Ms. Acheson, do you see there to be an inherent conflict of interest between the plaintiff class and their lawyers? It is clear that certain plaintiff class lawyers' primary motivation for bringing these lawsuits is to generate increased attorneys' fees. Do you believe that in order to effectively address issues of consumer exploitation and attorney misconduct, we must somehow address attorneys' fees? Do you believe our proposal that fees be based on actual damages paid to the plaintiff would help discourage settlement schemes which just enrich the class lawyers to the detriment of the plaintiff class?

Answer: As noted in the written testimony, we agree with S. 353's sponsors that there is evidence to suggest that some attorneys have entered into class action settlements that are not in their clients' best interests. On the other hand, the Department does not believe that such incidents demonstrate that there is an inherent conflict of interest between plaintiff classes and their lawyers, or that S.353's proposed solution to this abuse is the best policy response. Moreover, where a disagreement may arise between class plaintiffs and class counsel, existing law already gives class plaintiffs the tools to protect themselves. See Evans v. Jeff D., 475 U.S. 717 (1986) (class plaintiffs may enter into a settlement waiving class attorneys fees). By imposing a uniform standard for the assessment of attorneys fees in class actions, S. 353 would create different methods for calculating fees in cases applying the same substantive law, depending on whether the action was a class action. S. 353 would also displace the carefully crafted attorneys fees structures contained in other statutes, even though widely divergent policy considerations prompted the development of those various fee rules. For example, courts in civil rights class actions have frequently provided for multipliers or other increases to the lodestar calculation in assessing prevailing plaintiffs' attorneys fees to reflect the complexity of the litigation and/or the resources necessary to counter a "scorched earth" defense. See, e.g., Rodriquez-Hernandez v. Miranda-Velez, 132 F.3d 848, 860 (1st Cir. 1998). Civil rights actions also focus on injunctive relief to correct widespread discrimination, and accordingly do not lend themselves to the sort of proportionality analysis and "actually paid" fee rule proposed by S. 353. In the Department's view, legislation aimed at encouraging state and federal judges to give greater scrutiny to fee awards would be more effective and less damaging to the already existing developed law on federal attorneys fees provisions.

Questions from Senator Thurmond:

Question 1: Ms. Acheson, your written testimony appears to be critical of Federal court diversity jurisdiction. Does the Administration believe that diversity jurisdiction should be eliminated?

Answer: The Department is not critical of diversity jurisdiction as it is currently defined. Diversity jurisdiction, as noted in our response to Senator Grassley's seventh question, is part of our constitutional structure and serves a number of useful purposes. The Administration does not believe that diversity jurisdiction should be eliminated.

Question 2: Ms. Acheson, diversity jurisdiction in Federal court helps prevent out-of-state businesses and individuals from being treated unfairly in a state court. However, it is very easy for a class action suit to remain in state court because only one plaintiff must be from the state same as a defendant. Are you concerned that out-of-state businesses sometimes are treated unfairly in state court class actions?

Answer: This Subcommittee has heard testimony providing anecdotal evidence of unfair treatment of out-of-state businesses at the hands of state courts. One of the most egregious examples offered was one Alabama county court that had certified class actions on an ex parte basis, but the Alabama Supreme Court took action to correct the problem. See Written Testimony at 5 n.4. To the extent that class action plaintiffs are manipulating diversity solely for purposes of defeating removal, some narrowly tailored legislative response may be warranted. In such a case, Congress might consider requiring federal courts hearing removal petitions to consider more carefully whether certain parties were added solely to defeat diversity, and to ignore such parties when evaluating a removal petition.

Question 3: Ms. Acheson, do you agree that the number of class action lawsuits being filed in many state courts has increased considerably in recent years, such as in Texas, and if so why do you think this is happening?

Answer: Unfortunately, there is little reliable information about the increase, if any, in the number of class action lawsuits being filed in any state, including Texas. States do not generally keep records of the number of class action filings from year to year, and neither does the Justice Department. The Preliminary Result of the RAND Study of Class Action Research indicates that the number of class action filings in state courts appears to be on the rise.

With regard to Texas, the only data we know of comes from the Federalist Society's Litigation Practice Group survey of entities doing business in Texas. From what we understand about the methodological approach of that study – that

it tabulated only a small number of companies' experiences (so that the nature and magnitude of any increases found may simply be the result of sampling error and may not be statistically significant); that it polled a population of companies that were not randomly selected; and that seventy percent of those companies did not respond at all (perhaps because they had not experienced significant class-action problems) – the study may show only that, of those companies selected for survey and willing to respond, most reported an increase in class action lawsuits. Finally, we do not know why class actions lawsuits are on the increase, if they are.

Question 4: Ms. Acheson, in your testimony, you criticize the notification provisions of the Class Action Fairness Act. However, many have raised concerns that plaintiffs attorneys in some class actions have a personal interest in settling cases that are not as good as they should be for the plaintiffs. Do you believe that it is good to encourage State Attorneys General to get involved in class action lawsuits?

Answer: The Department of Justice is concerned that the notification provisions of S. 353 (new § 1713) are not an effective response to notice and fairness concerns about class action settlements. We think it would be extremely burdensome to require plaintiffs to serve on the Attorney General of every state in which a named or unnamed class member resides copies of (1) the complaint, (2) any amended complaints, (3) notices of any hearings, (4) proposed class notices, (5) final class notices, (6) proposed settlements, (7) final class settlements, (8) contemporaneous agreements among counsel, (9) judgments or dismissal notices, and (10) judicial opinions. Prudent class lawyers would be forced to interpret these provisions to require service on the Attorneys General in all 50 states. Yet in the vast majority of class actions involving private parties, the Attorneys General are unlikely to have any legal interest in the underlying matter and, as a result, would probably not be able to intervene in the litigation because of the rules on standing. Also, § 1713 would also delay approval of any proposed settlement until 120 days after such service, which would unduly impede relief to deserving claimants and would also disrupt state court processes.

This provision is also likely to lead to false expectations about what, if anything, the state Attorneys General could and would do in response to such papers. Indeed, we are concerned that a State Attorney General's inaction may be viewed as acquiescence to the notice provided to plaintiffs in its state, even if the notice was ineffective in informing the plaintiffs of their rights to "opt out." As a result, the bill is not effective at guaranteeing that out-of-state class members receive meaningful notice of the right to "opt out" of a class action in another forum. The Attorneys General notice provision would thus impose great burdens and costs on class counsel, which may discourage State and federal civil rights and other actions, but would yield little countervailing benefit.

Questions from Senator Torricelli:

Question 1: In your testimony, you state that "We do not believe that the case has been made that there are abuses intrinsic to state court class actions that justify the wholesale removal of these cases from state courts." This statement cuts to the heart of this issue – that is the question of why we are attempting to make this wholesale change to the system of class actions.

Are you aware of any empirical evidence that federal courts are superior to state courts in how they resolve class action cases. Are federal courts more efficient? Are state courts more prone to permitting collusive settlements?

Answer: We are not aware of any empirical evidence that federal courts are superior to state courts in how they resolve class action cases; we are not aware of any empirical evidence that federal courts are more efficient at resolving class action litigation; and we are not aware of any empirical evidence that state courts are more prone to permitting collusive settlements.

Question 2: As noted by Chief Justice Rehnquist in the 1997 Year-End Report on the Federal Judiciary and the Department in today's testimony, the past decade has seen a great expansion in the caseloads of federal courts. The number of federal filings has risen 16 percent. In 1997, 22,603 civil cases had been pending for over 3 years in the federal courts. The Ninth Circuit Court of Appeals alone has postponed 600 oral arguments in civil cases over the past several years.

This is the result, in large part, of both the action and inaction, of this Committee, such as the federalization of criminal drug statutes, procedural requirements such as the Speedy Trial Act, and the continued high level of judicial vacancies, which today stand at 65.

What impact does the Department believe this bill will have on the case loads of federal courts? Do federal courts currently have the resources to deal with the influx of class action cases?

Given the impact on federal caseloads, does this bill present an efficient use of the nation's judicial system?

Answer: This bill would increase the caseloads of federal courts.

The Chief Justice has noted that the great volume of pressing business before the federal courts is currently straining their resources to their limit – a limit that is steadily shrinking because of the rising number of federal court vacancies. Adding an unknown number of new class action filings to the federal caseload would only further burden a system that is already in clear need of additional resources.

It is important to prioritize our Nation's use of the federal judiciary so that it is

limited to those situations where it can do the most good. Over the last several years, Congress has steadily expanded federal jurisdiction with respect to crime. It may not be reasonable to expect the limited number of federal judges, who are already struggling to address their civil and criminal dockets, to efficiently and effectively manage a significant increase in complex, demanding and resource-intensive class action cases that will by and large be disposed of on state law grounds.

Questions from Senator Kohl:

Question 1: I understand that some people, including the Justice Department, believe our removal section sweeps too broadly. While we disagree, perhaps we can find some common ground.

Do you believe that there are some class actions that would be best placed in federal court, even if complete diversity is lacking? For example, do you think that multiple, overlapping multistate class actions involving the same claims and the same class members would be better handled in federal court, where they can be consolidated into one court with lead counsel appointed (pursuant to multidistrict statute) and a dangerous "race to settlement" could be prevented? And what about a nationwide class action – like a suit about defective air bags on behalf of millions of car owners nationally? Wouldn't it be better to have a federal court decide which of many state laws apply, and have a federal court make what in effect would be national policy?

Answer: As stated in our response to Senator Grassley's first question, single-accident mass tort class actions might well be appropriately heard in federal court absent diversity of citizenship among the parties. We do not believe, however, that removal to federal court is warranted in the situations you outline in your question. The question implies that allowing those class actions to remain in state court raises three concerns: it preserves the possibility that there to be a "race to settlement," it requires state courts to make difficult choice of law questions, and allows state courts to make national policy. In the Department's view, however, only the first of these concerns – the race to settlement – is actually problematic. There is no reason to believe that state courts are incapable of resolving choice of law questions, since they are routinely called upon to apply federal law and to resolve issues involving claims based on other states' law. There is also little danger that state courts will be making "national policy" in these multi-state class actions. State courts are generally not in a position to set national policy because they are obligated by Supreme Court precedent to apply the law of the relevant states only to the case before them. As a final matter, the Department believes it is possible to prevent any race to settlement without federalizing class actions – perhaps by requiring out-of-state plaintiffs to "opt in" – and a narrower solution would allow the state and federal courts to share the burden of litigating class

actions and would not deprive states of the ability to provide redress for their own citizens.

Question 2: Do you believe that something is amiss when a state court certifies a class, while a federal court says the same class should not be certified?

Answer: Not on those facts alone. To be concerned that there was something amiss when a state court certifies a class that a federal court declined to certify, one would have to believe that (i) there is something wrong with the states setting a policy that differs from the federal government's policy regarding class certification; and (ii) the certification standards set by the federal government are somehow more "correct" than the state standards. As to the first point, it is a fundamental tenet of the federalism created by our Constitution that the states are free to set policy that differs from the federal government, especially when that policy concerns the governance of their own state courts. As to the second, we have been presented with no evidence to demonstrate that the federal certification standard is somehow the "better" policy choice.

Question 3: Do you believe that as a general matter federal courts have better resources than state courts for managing class actions?

Answer: We are not certain what you mean by better resources. If you mean more resources, there are far more judges in state court than in federal court. Although it is difficult to generalize, state trial courts also handle, on a daily basis, more claims under state tort or consumer law than federal district courts which, in general, handle federal question cases more frequently than diversity cases. Federal courts are not well equipped to handle the volume of cases routinely managed by the state courts. There are more than 10,000 trial judges in general jurisdiction state courts while our Article III federal judiciary has some 647 trial judges.

Moreover, as noted by Chief Justice Rehnquist, federal caseloads have increased significantly during the past decade. As Senator Torricelli notes in his questions, in 1997, 22,603 civil cases had been pending for over 3 years in the federal courts. And as you know, the Federal Judicial Center has found that class actions are among the most resource intensive cases, taking three times the median time from filing to disposition and requiring five times as much judicial time as other civil cases.

The Judicial Conference of the United States has stated that a similar proposal to transfer just Y2K-related state class actions to federal court would strain the limited resources of the federal judiciary and delay justice for claimants.

Expansion of federal jurisdiction over nearly every state class action in the manner proposed in S. 353 is arguably even more inconsistent with the objective of preserving the federal courts as tribunals of limited jurisdiction. Judicial federalism relies on the principle that state and federal courts together comprise an integrated system for the delivery of justice on the United States. This bill, if passed, would effect a major reallocation of class action workloads to the federal courts, which could potentially overwhelm federal judicial resources as well as the capacity of the federal courts to resolve not only state class actions but other civil cases as well.

In addition to the potential adverse docket impact on the federal courts, S.353 would deprive state courts of the power to hear many state law-based class actions affecting their citizens and might well create incentives for plaintiffs who prefer a state forum to bring a series of individual claims, burdening the state courts and thwarting state policy choices favoring efficiency through the aggregation of state law claims.

Question 4: Our bill would require that class notices, including notices of proposed settlements, be in plain, clearly understood English, and that settlement notices include certain details, like the amount and source of attorneys' fees. Do you believe that class notices are sometimes too confusing for class members to understand, and do you believe our provision is a step in the right direction?

Answer: Yes, the Department believes that a requirement that notices of proposed settlements be in plain, clearly understandable language is a good idea and that this provision would be a step in the right direction if it were imposed on the federal courts. Your plain language notice proposal for federal courts could serve as a model for state legislatures and courts to consider.

Question 5: On a scale of one to 10, how would you rate the following kinds of cases, in terms of whether there is a strong argument for federal jurisdiction? (10 being a strong argument for federal jurisdiction, down to one as a weak argument.) Please explain your responses. [17 examples then follow]

Answer: Your question asks the Department to rate 17 different scenarios, on a scale of 1 to 10, on the degree to which they implicate the policy concerns that justify federal jurisdiction. We do not think it is meaningful or revealing to assess the propriety of federal jurisdiction with these scenarios. Instead, we will provide our views on the central issues implicated by the numerous scenarios.

These scenarios posit class actions that vary in terms of the residency of the plaintiffs and defendants, the amount in controversy, and whether in-state or out-

of-state law is to be applied. In the Department's view, neither of the last two factors is relevant to whether a particular class action belongs in state or federal court. State courts often apply the law of other jurisdictions when they resolve contract disputes with choice-of-law provisions, or when they examine federal law in § 1983 actions; thus, we do not find anything inherently "federal" about resolving choice-of-law issues. Nor are we persuaded that the amount in controversy makes a case more or less "federal." While necessary for diversity jurisdiction, a large amount in controversy is not sufficient to create such jurisdiction. Moreover, state courts routinely resolve cases with millions of dollars at stake.

We recognize, however, that state class actions involving plaintiffs from many different states and purporting to resolve issues on a nationwide basis do present special problems, as we have outlined in our response to your first question. But in our view, federalizing class actions is not the best solution to these problems. S. 353's removal provisions, for example, would not ensure that out-of-state plaintiffs received more meaningful notice of the class action before they could be bound. S. 353 could also constrain the states' ability to provide a remedy to their own citizens in their own courts, for it would allow a defendant to remove a class action, even if the action involved all in-state plaintiffs and in-state law, as long as one of the primary defendants was from another state.

The Department thinks it is possible to protect out-of-state parties without making nearly all class actions removable to federal court. These other proposals strike a better balance between protecting out-of-state litigants and respecting federalism. As we mentioned in our response to the other Senators' questions, the Department would work with you on a rule to require out-of-state class plaintiffs to affirmatively "opt in" to class actions before they can be bound by any judgment. This rule, unlike a removal rule, would assure that these absent or unnamed class members receive meaningful notice. We believe such a rule would also reduce the number of nationwide class actions, which would make it impossible for class action defendants to play one class against another in the race to settlement. Nor would these greater benefits come at the cost of the states' right to provide a remedy to their own citizens. This is just one example, however. We hope that we can work with this Subcommittee to develop other potential solutions as well that address the problems with class actions you are concerned about and, at the same time, protect both the interests of out-of-state litigants and the ability of states to provide their citizens with an avenue of redress in their courts.

LEWIS AND ROCA LLP
LAWYERS

Phoenix Office
40 North Central Avenue
Phoenix, Arizona 85004-4429
Facsimile (602) 262-5747
Telephone (602) 262-5311

Tucson Office
One South Church Avenue Suite 700
Tucson, Arizona 85701-1620
Facsimile (520) 622-3088
Telephone (520) 622-2090

MCI ID:
697-6314

John P. Frank
(602) 262-5354
Internet: jpf@lrlaw.com

Our File Number
31519-60004

May 13, 1999

The Honorable Charles E. Grassley
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Re: **S. 353, The Class Action Fairness Act**

Dear Senator Grassley:

Thank you for permitting me to testify before your Subcommittee on the class action bill. I now make response to the questions asked in your May 11 letter.

Questions from Senator Thurmond

1. Mr. Frank, you state in your testimony that Federal Rule 23 as written assumed that a class action would have plaintiffs as the true representatives of the class, but that this assumption has proved to be a fiction. Please explain the actual role of representative plaintiffs in class action lawsuits.

A. For the most part, the representative has become a fiction. Some attorneys are using the same "representative" on a number of cases. The representative becomes simply a pawn to counsel.

2. Mr. Frank, some argue that mandatory Rule 11 sanctions such as those in the Class Action Fairness Act would stunt the natural process for developing and extending legal doctrine. Do you agree, or do you believe that Rule 11 sanctions are important to combat frivolous lawsuits?

A. The Rule 11 provision does not belong in this statute for two reasons: (1) As drafted, this covers all the actions in the federal courts and is not related particularly to class actions. This form of Rule 11 was widely criticized by the bar and was replaced with the current Rule 11, which is working very well. The draft as it stands pulls into this valuable bill all of the baggage which dragged down earlier Rule 11 and as such would severely handicap the prospects of the bill. (2) Even more important, the Rule 11 device of sanctions after the case is over, locks the door after the horse is stolen. As I developed in my main statement, the time to knock out frivolous cases is before they get started, not after they have loaded the courts and

cost a vast expenditure of time and money. Trivial or frivolous cases should be weeded out before the matter is certified in the first place, rather than waiting for years to penalize someone for having brought a worthless matter after it has been litigated.

3. Mr. Frank, in previous hearings, we have discussed the problem that there is a unreasonably disparity between the amount of recovery plaintiffs receive from a class action compared to the recovery that their attorneys receive. Do you believe this disparity is a growing problem, and that it is appropriate that this legislation link attorneys fees to the plaintiffs' actual recovery?

A. This proposal to link fees to actual in-the-pocket recovery for plaintiffs is the most value part of the bill; it is the heart of the reform and should be fully preserved.

Questions from Senator Kohl

1. In your written testimony, you commend the provision of our bill that requires notice of proposed class settlements to state attorneys general, so they can object if they think the settlement is unfair. Why do you believe state attorneys general should get notice of proposed settlements? Are you concerned that sometimes no one seems to be looking out for the interests of class members, because both the class lawyers and the defendants have a personal interest in getting the settlement approved? And do you agree with Judge Easterbrook, who, dissenting in the Bank of Boston case, wrote that under the current system it is difficult for a court to undertake a true "fairness" inquiry before approving a class settlement? As he explained, class lawyers and defendants "may even put one over on the court, a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means it lacks essential information."

A. The addition of the state attorneys general is a splendid idea; it brings into the proceedings a true representative of the public, someone who is not simply trying to make money out of the situation.

2. Do you believe that something is amiss when a state court certifies a class, while a federal court says the same class should not be certified?

A. The state/federal relationship problem is too complex for this uniform answer. It is possible for the state and federal courts to work collaboratively on these matters and still get rid of the gross frauds to which the bill is now addressed. I commend to your attention the suggestion made at the hearing that you might wish to consult Judge Patrick Higginbotham and Judge Sam Pointer, the most experienced federal judges, on effective state/federal cooperation; and you might also take a look at the

American Law Institute proposed statute dealing with the federal/state cooperation in these cases. From the plain political as well as practical standpoint, this is the largest problem you have and it does not permit of casual answer.

3. Do you believe that as a general matter federal courts have better resources than state courts for managing class actions?

A. See answer to No. 2.

4. Our bill would require that class notices, including notices of proposed settlements, be in plain, clearly understood English, and that settlement notices include certain details, like the amount and source of attorneys' fees. Do you believe that class notices are sometimes too confusing for class members to understand, and do you believe our provision is a step in the right direction?

A. Your bill is absolutely a step in the right direction.

5. On a scale of one to 10, how would you rate the following kinds of cases, in terms of whether there is a strong argument for federal jurisdiction? (10 being a strong argument for federal jurisdiction, down to one as a weak argument) Please explain your responses.

a) Multiple class actions in several state courts, each involving same class members from all 50 states, same claims, millions of dollars sought in damages, same multiple defendants, governed by primarily state law outside of state where cases filed ("Overlapping class actions against multiple defendants")

A. 10. This is the classic case in which there ought to be one superintending court; the waste otherwise is egregious.

b) Multiple class actions in several state courts, each involving same class members from all 50 states, same claims, millions of dollars sought in damages, and same single defendant, governed by primarily state law outside of state where cases filed ("Overlapping class actions against single defendant")

A. 9. The emphasis here is that it may be possible with only one defendant to get some abatements of some of those other cases.

c) Single class action, class members from all 50 states, millions of dollars sought in damages, multiple defendants all from outside of state where case is filed, governed by primarily out-of-state law ("Nationwide class actions, multiple out-of-state defendants, out-of-state law")

A. 8. A strong state judge will be able to make a choice of law. If the case is fraudulent going in, this is precisely what needs to be avoided. (I am not seeing enough studies to satisfy me as to whether we are exaggerating the choice of law problem. An action which involves simple negligence may be, in any case, uniform law and the parties can follow the Restatement.

To a degree I evade this question because the whole problem needs a larger solution. If the Department of Justice holds to its veto line on the transfer of diversity cases, we will be at impasse. Some overall compromise has to be made with the Department; I have suggested mechanisms and would be glad to help in brokering that if it would be useful. I found Ms. Acheson's comments at the hearing warmly responsive to suggestions for trying to solve these inter/intra state problems by compromise. This problem won't be solved by nibbling around the edges.

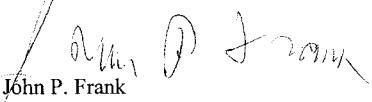
d) Same as (c), except governed by law from state where case filed (Nationwide class, multiple out-of-state defendants, in-state law)

A. As above.

I would make the same generalized answer for* e) *through* q) *– this needs a world-class solution.

As you work this through, don't overlook Dean Kane of the Hastings Law School. She was the reporter on the American Law Institute's proposed code for the federal/state handling of class actions and is a resourceful source of ideas.

Very truly yours,



John P. Frank

JPF/cc

Response from Prof. Elliott

Questions from Senator Grassley

1. In her written testimony, Assistant Attorney General Acheson suggests that Congress should "provide models for states to follow" if it believes that state courts are encouraging class action abuse. Do you think that this is more of a federalism problem than what our bill attempts to accomplish? Is the removal provision in S. 353 preferable to the Justice Department's suggestion that Congress dictate state class action reform?

Removal is a long-established part of our federal system of jurisprudence, and I do consider removal preferable to the federal government making "suggestions" to the states about how state class action laws should be drafted. I do not know for sure how the Department of Justice would provide suggested "models" to the states, but I do fear that there could be some serious federalism concerns with that approach. Some might see it as implicitly demeaning of the states' autonomy.

Questions from Senator Thurmond

1. Mr. Elliott, do you believe it is a significant problem today that some state judges certify classes as a matter of course without significant review of the merits of the class? Please explain.

I do agree that certification of inappropriate classes in state court can be a significant problem, particularly when a state court certifies a class that binds many people outside its borders who may have their rights affected without notice or other safeguards. I do not know how frequently this actually occurs, but some of the specific examples that have been brought to my attention during the hearings are very troubling.

2. Mr. Elliott, some argue that mandatory Rule 11 sanctions such as those in the Class Action Fairness Act would stunt the natural process for developing and extending legal doctrine. Do you agree, or do you believe that Rule 11 sanctions are important to combat frivolous lawsuits?

Rule 11 sanction can be appropriate in some cases. I am not worried that the threat of Rule 11 sanctions will "stunt" the development of new legal doctrine. On the contrary, lawyers can often escape sanctions by arguing that their position was based on a "good faith argument for an extension of existing law." As I have indicated in my writings, my primary concern is that Rule 11 sanctions are often ineffective because judges often lack the ability or inclination to invoke them. See E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U.CHI. L. REV. 306 (1986). Therefore, unfortunately, I am somewhat skeptical that changing the language of the rule will do much to change these fundamental judicial attitudes that make it difficult to get Rule 11 sanctions.

Moreover, the worst abuses of class actions tend to come in situations where the courts themselves are favorable to broad, uncritical use of the class action device, and are willing to certify classes in situations where I believe they are not appropriate; making the language of Rule 11 mandatory will not address this aspect of the problem.

3. Mr. Elliott, in previous hearings, we have discussed the problem that there is a unreasonably disparity between the amount of recovery plaintiffs receive from a class action compared to the recovery that their attorneys receive. Do you believe this disparity is a growing problem, and that it is appropriate that this legislation link attorneys fees to the plaintiffs' actual recovery?

Yes, I do. I support legislation linking the attorney's fees to the amount that the class actually benefits. In most other areas of the law where courts award attorneys fees, success and size of the recovery are important factors to be weighed in setting a fee, and I think that they should be here also.

Questions from Senator Kohl

1. You testified that state courts "overwhelmingly" follow federal case law with respect to class action procedural issues. Please explain in more detail the basis for this testimony.

Perhaps my choice of the word "overwhelmingly" was an overstatement. What I had in mind was simply this: it is my understanding that over 30 states have adopted the Federal Rules of Civil Procedure essentially verbatim. I am also aware of a number of states such as New York and Connecticut in which the standards for class actions are even more stringent than in the federal system. In these states, while they do not follow the federal rules, it is more difficult (at least in theory) to get a class certified than in the federal system.

My point was merely my belief that the problem of inappropriate class action certifications is one that is limited to a few states in terms of the numbers of states that do not, at least in theory, follow the federal rules for class actions. There are only a few states that do not either follow the federal model already or have their own, even more restrictive standards for class actions -- but as I indicated in my testimony, the problem is potentially serious because litigation may tend to flow preferentially into those states that have the lowest standards for class actions.

In addition, even in those states where the standards for class actions are nominally similar to federal standards, individual judges may certify inappropriate class actions, and put great pressure on defendants to settle, despite what the formal rules say. This is because interlocutory appellate review of class action certification is often difficult or impossible to obtain.

To me, this is classic example of the problem of the "race to the bottom" that we frequently confront in our federal system. In most areas of law (such as the environment), this type of problem is seen as calling for federal minimum standards — which is, in a sense, exactly what an option to remove to federal court provides.

2. Furthermore, do you disagree with critics of this legislation who complain that this bill could lead to a "federalizing" of federal action standards? Are class action standards even in state courts already to a large degree "federalized?"

Yes, I do disagree with the critics. As I indicated in my previous answer, many states have already chosen to follow the federal model. I believe

that the option to remove to federal court — where the long-standing standards for federal jurisdiction are satisfied — does not "federalize" state law in any way, but merely restores a reasonable balance between the interests of plaintiffs and defendants in a federal system. As I indicated in my testimony, the core purposes that led the Framers to include diversity jurisdiction in the Constitution are implicated by these class action cases that affect parties from multiple states. Our federal system involves a delicate balance between state and federal interests. Far from "federalizing" state law, I believe that removal to federal court in such cases merely restores the legitimate federal interest to where it properly belongs. The removal option insures that individual states cannot go too far in subjecting out-of-state defendants to inappropriate class action standards.

3. Do you believe that something is amiss when a state court certifies a class, while a federal court says the same class should not be certified?

Not always. But certainly if the rules are the same on their face, the disparity certainly merits looking into to determine the reasons for the difference.

4. Do you believe that as a general matter federal courts have better resources than state courts for managing class actions?

Yes, as a general matter.

5. Our bill would require that class notices, including notices of proposed settlements, be in plain, clearly understood English, and that settlement notices include certain details, like the amount and source of attorneys' fees. Do you believe that class notices are sometimes too confusing for class members to understand, and do you believe our provision is a step in the right direction?

Yes and yes. I am concerned, however, that the plain English provisions as written may stimulate satellite litigation, and that such litigation may not be the best way to improve the drafting of notices. I would suggest instead that the Committee consider having the Federal Judicial Center develop model class notices in plain English as part of the Manual for Complex Litigation.

6. On a scale of one to 10, how would you rate the following kinds of cases, in terms of whether there is a strong argument for federal jurisdiction? (10 being a strong argument for federal jurisdiction, down to one as a weak argument) Please explain your responses.

a) Multiple class actions in several state courts, each involving same class members from all 50 states, same claims, millions of dollars sought in damages, same multiple defendants, governed by primarily state law outside of state where cases filed ("Overlapping class actions against multiple defendants")

10. Because the hypothetical case involves the interests of multiple states, and the interests of citizens of multiple states, I believe that the reasons for federal jurisdiction are very strong.

b) Multiple class actions in several state courts, each involving same class members from all 50 states, same claims, millions of dollars sought in damages, and same single defendant, governed by primarily state law outside of state where cases filed ("Overlapping class actions against single defendant")

10. Because the hypothetical case involves the interests of multiple states, and the interests of citizens of multiple states, I believe that the reasons for federal jurisdiction are still very strong. To me, it is of little importance that there is a single defendant. Where the interests of citizens of multiple states are involved (plaintiff or defendant), I think that there is a strong case for a federal forum.

c) Single class action, class members from all 50 states, millions of dollars sought in damages, multiple defendants all from outside of state where case is filed, governed by primarily out-of-state law ("Nationwide class action, multiple out-of-state defendants, out-of-state law)

Again a 10, in my view. Same reasoning as in 6(b) above.

d) same as (c), except governed by law from state where case filed

(Nationwide class, multiple out-of-state defendants, in-state law)

9. Perhaps a little weaker (because the forum state's law applies), but still very strong because of the presence of many out-of-state parties, both plaintiffs and defendants.

e) Single class action, class members from all 50 states, millions of dollars sought in damages, multiple defendants all from same state where case is filed, governed by primarily out-of-state law ("Nationwide class action, multiple in-state defendants, out-of-state law)

8. Perhaps a little weaker still (because the defendants are all in-state), but still a strong rationale for federal jurisdiction because of the presence of many out-of-state plaintiffs. If any of them are concerned about having their rights litigated in the defendants "home court," I think that the traditional rationale for diversity jurisdiction and an alternative federal forum applies.

f) same as (e), but governed by law from state where case filed (Nationwide class, multiple in-state defendants, in-state law)

7. Essentially the same answer as 6(e). A single state law, as opposed to multiple state laws, makes only a little difference in my view. Both are strong cases for federal jurisdiction, but where multiple state laws are involved, perhaps that it a small additional factor arguing for a federal forum. (This is not part of traditional diversity analysis, but I would agree that where construing multiple state laws is involved, perhaps that should be an additional policy argument for a federal forum — or for national product liability legislation setting a single federal standard for products that move in interstate commerce.)

g) Single class action, class members from all 50 states, millions of dollars sought in damages, single defendant from outside of state where case is filed, governed by primarily out-of-state law ("Nationwide class action, single out-of-state defendant, out-of-state law")

10. Same case for me as 6(c).

h) Same as (g), except governed by law of state where case filed ("Nationwide class action, single out-of-state defendant, in-state law")

9. Same case for me as 6(d)

i) Single class action, class members from all 50 states, millions of dollars sought in damages, single defendant from same state where case is filed, governed by primarily out-of-state law ("Nationwide class action, single in-state defendant, out-of-state law)

8. Same case for me as 6(e).

j) Same as (i) except governed by law of state where case filed ("Nationwide class action, single in-state defendant, in-state law")

7. Same case for me as 6(f).

k) Single class action, class members from same state where case is filed, millions of dollars sought in damages, multiple out-of-state defendants, governed by primarily law from outside of state where case filed ("In-state class action, out-of-state defendants, out-of-state law")

7. Same case for me as 6(f). It does not matter to me whether the out-of-state parties are plaintiffs or defendants.

l) Single class action, class members from same state where case is filed, millions of dollars sought in damages, single out-of-state defendant, governed by law from outside of state where case filed ("In-state class action, out-of-state single defendant, out-of-state law")

8. Same case for me as 6(e).

m) Single class action, class members from same state where case is filed, millions of dollars sought in damages, multiple out-of-state defendants, governed by law from state where case filed ("In-state class action, out-of-state defendants, in-state law")

7. Same case for me as 6(f). It does not matter to me whether the out-of-state parties are plaintiffs or defendants.

n) Single class action, class members from same state where case is filed, millions of dollars sought in damages, single out-of-state defendant, governed by law from state where case filed ("In-state class action, single out-of-state defendant, in-state law")

5 or 6. While this case meets the traditional requirements for complete diversity, I believe the federal interest is becoming more attenuated — essentially now limited to insuring the single out-of-state defendant that he/she/it received a fair outcome in an out-of-state forum.

o) Single class action, class members from same state where case is filed, millions of dollars sought in damages, in-state defendants, governed by law from state where case filed ("All in-state class action")

1. I see little or no reason why this case should be in federal court.

p) Single case, in-state plaintiff sues out-of-state defendant for $75,0001, governed by law of state other than where filed ("Diversity case just above dollar limit, out-of-state law")

5 or 6. Same as 6(n) in my view. While this case meets the traditional requirements for complete diversity, I believe the federal interest is becoming more attenuated — essentially now limited to insuring the single out-of-state defendant that he/she/it received a fair outcome in an out-of-state forum.

q) Single case, in-state plaintiff sues out-of-state defendant for $75,000, governed by law of state where filed ("Diversity case just above dollar limit, state law where filed")

5 or 6. Same as 6(n) in my view. While this case meets the traditional requirements for complete diversity, I believe the federal interest is becoming more attenuated — essentially now limited to insuring the single

out-of-state defendant that he/she/it received a fair outcome in an out-of-state forum.

RESPONSES OF STEPHEN MORRISON

Questions from Senator Grassley

1. What do you see are the real problems associated with the class action device being utilized to achieve justice in litigation?

Response:

The primary problem with the class action device in its current form is the lax attitude of many state courts towards rules governing when a matter may be afforded class action treatment. State courts in a growing number of jurisdictions have exhibited a "laissez-faire" attitude towards class action lawsuits – meaning that many local courts have been and are willing to certify cases for class treatment that do not meet even the basic tenets of class certification. This slack approach has resulted in the exploitation of consumers and an abuse of defendants' due process rights. Increasingly, the lawyers who bring those lawsuits are the only beneficiaries.

S. 353 would diminish many of the problems associated with the adjudication of class actions today. It would do so by permitting removal of interstate class actions to federal court. There can be no doubt that as a general matter, our federal courts are better equipped to handle the majority of the type of class action lawsuits being filed today – multi-party, multi-state, high-dollar cases involving highly complex issues.

2. A. Do you agree with the Justice Department's interpretation, discussion and assessment of the diversity/removal provision in S.353? Do you believe that this provision would infringe on state courts' ability to offer redress to their citizens?

Response:

I do not agree with the Justice Department's interpretation, discussion and assessment of the diversity/removal provision contained in S.353. The Department's apparent opposition to S. 353 and to its diversity/removal provisions is misguided. The Department's arguments in that regard evidence a serious misunderstanding of the true purposes of the class action device and an unawareness of the severity and enormity of the state court class action abuse problem. For several reasons, the diversity/removal provision in S.353 is the proper redress for current class action removal obstacles and a vital component of the pending legislation:

First, contrary to what the Department suggests, the diversity/removal provision in S.353 would not change anyone's right to recovery; it would simply allow federal courts to hear certain substantial lawsuits that touch many people and implicate interstate issues. When the current statutes establishing the framework for diversity jurisdiction were enacted, the modern-day class action did not exist. Although the thrust of those statutes is to permit large interstate cases into federal courts, class actions (as we now know them) got left out. The diversity/removal provision in S.353 corrects that problem, recognizing that certain interstate class action suits should be heard in federal court.

Based on the content of its prepared statement, it appears that the Justice Department does not recognize the growing number of purported class actions with substantial interstate implications that are being denied the federal jurisdiction that they warrant. The Department apparently believes that adoption of the diversity/removal provision of S.353 would serve to curtail access to the courts. On this point, the Department is wrong. The bill would increase access to the courts by liberating both class members and defendants from the current impediments to securing federal jurisdiction over class actions. In that manner, the diversity/removal provisions of S. 353 would actually pave the way for more effective and just utilization of the class action mechanism. Every action which can currently be brought to court could still be brought to court after the passage of S. 353. No substantive right is affected.

The second respect in which the Justice Department has misconstrued the diversity/removal provision of S.353 is its claim that this provision effectively "federalizes" all class actions. Nothing could be further from the truth. The aim of this legislation is to ensure that each class action may be heard in the appropriate forum – in the court best suited and best equipped to handle that type of case.

Under current law, state courts have become the almost automatic forum for class actions because (as discussed above) the current federal diversity jurisdiction statutes do not take account of class actions and because certain lawyers manipulate the system to ensure that class actions which are truly interstate in nature cannot be removed to federal court. Thus, the problem is that interstate class actions – cases that really belong in federal court – are being trapped in state courts. S. 353 would simply rationalize that situation by applying current diversity jurisdiction policy to class actions – it would allow large cases with interstate implications into the federal courts. At the same time, the bill would ensure that cases inappropriate for federal court adjudication remain in the state court domain by carving out three categories of cases: (i) local cases – cases in which a "substantial majority" of the class members and defendants are local and the claims will be governed primarily by local law and (ii) state action cases – cases against states or state officials. With such exceptions in place, only class actions of a truly interstate reach would be adjudicated in federal court; truly local cases may remain in state court. It should also be remembered that the legislation does not deprive state courts from jurisdiction over interstate class actions. If the parties on all sides wish to have their claims heard in state court, nothing in the bill prevents them from doing so.

Thirdly, the Justice Department contends that removal to federal court does not solve the problems of class action abuse because such abuse has occurred at the federal level. I am sure that one could find a few examples of class action abuse in federal court proceedings. But the record amassed in the recent class action-related hearings before the Senate and House Judiciary Committees all strongly indicate that the current class action crisis is a state court phenomenon. In recent years, individual federal courts have taken significant steps toward cleaning up class action abuses; for the most part, state courts have not emulated these steps. Adoption of the jurisdictional removal provisions of S. 353 would not reflect an assessment that federal judges as a group are

necessarily superior to state court judges. What it would signal is a recognition that federal courts are by their nature and their funding better equipped and better situated to deal with interstate class actions.

Finally, the Justice Department appears to suggest that S.353 should not be adopted because the diversity/removal provisions of the bill "could be subject to constitutional challenge on federalism grounds." At the same time, however, the Department states its belief that the provisions are in fact "constitutional and that such a challenge should not succeed under current doctrine." The likelihood of groundless constitutional litigation should not deter Congress from enacting much needed legislation like S. 353.

B. At the hearing, the Justice Department indicated that even if there is a problem in the state courts regarding class actions, because the federal courts have class action problems of their own, removal does not solve anything. Additionally, the Justice Department took the position that "federalizing" class actions does not necessarily address class action abuses in the state courts. How do you respond?

Response:

As noted above, federal courts have moved in recent years to get a better handle on the use of the class action device and to thereby diminish abuses. For the most part, state courts have not followed suit. Why are we seeing an explosion in the number of class actions being filed in state courts, an explosion not being replicated in our federal courts? It is not because there has been a burst of corporate misbehavior that has given rise to a flood of new claims. If that were the case, we presumably would be seeing equally dramatic increases in federal court class action filings, which we are not. The exponential growth of state court class action filings is attributable to the recognition by some attorneys that certain state courts have an "anything goes" attitude toward class actions that can be used to the attorneys' personal benefit. Thus, many of the class actions filed in state court in recent years would not have been brought five years ago.

I am astounded that against the record developed in the four hearings that the Senate and House Judiciary Committees have held on class action abuses over the past 18 months, the Justice Department appears to be contending that federal and state courts are experiencing the same sorts and the same degrees of class action abuses. In those congressional hearings, there was little or no mention of any problems in the federal court system. The victims – both unnamed class members and defendants – were complaining almost exclusively about what they had experienced in state courts.

C. The Justice Department also argued that because the state courts have remedied, or are remedying concerns about ex parte certifications, legislation is not necessary. How do you respond?

Response:

In my prepared statement and oral testimony at the May 4 hearing, I enumerated a long list of the sorts of class action-related abuses that are occurring in state courts. Ex parte certifications – when classes are certified before the defendant is even served with a complaint and given a chance to defend itself – are but one example. The Justice Department notes that courts of one state – Alabama – have now outlawed this practice. But the examples of this practice that I gave in my testimony occurred in Tennessee state courts, which have not moved to halt this practice. Moreover, multiple other abuses of the class action device that are occurring in derogation of both class members' and defendants' due process rights and other interests are occurring. The Justice Department's suggestion that one state's action to address one abuse – while numerous other abuses continue unabated in many other states – is basically an endorsement of the status quo. I am troubled that our Justice Department would take such a position when the rights of both consumers and corporations nationwide are being trampled, as so clearly documented in the congressional hearings.

3. The Justice Department's written testimony expresses concern about the potential impact of S.353 on the caseload of the federal courts. Do you believe that the federal courts have the resources to deal with interstate calls action cases? Do the federal courts have mechanisms by which they can handle class action cases better than state courts?

Response:

In my view, S. 353 would not overload the federal court system. Over time, the proposed changes would lead only to a minimal (if any) increase in the federal caseload because (1) attorneys will be less inclined to file frivolous lawsuits, (2) non-meritorious cases will be weeded out more rapidly, and (3) duplicative and overlapping cases will be consolidated under the federal multidistrict litigation process.

As a general matter, our federal court system clearly is better equipped to handle complex litigation matters involving highly technical legal issues and interstate implications. Under current law, state court adjudication of interstate class actions often results in one state playing God and declaring the meaning of the laws of multiple other states. That role of refereeing state law interpretations in disputes among citizens of different states is more appropriately played by our federal courts. Further, only federal courts have the authority to consolidate before a single judge the duplicative class actions that now proceed in state courts on a "competing" basis.

Moreover, federal courts (generally speaking) have better resources to manage class actions, especially interstate ones. Federal courts have larger staffs. Federal courts have law clerks. Federal courts have the ability to delegate certain aspects of a case to magistrates or special masters. State courts typically do not have these resources. Federal courts clearly provide the more appropriate fora for adjudicating interstate class actions.

4. A. Do you agree with the Justice Department's comments regarding a defendant corporation's operations within a state and the opportunity for removal to the federal courts? Do you believe that there is a due process problem if non-citizen defendant corporations with substantial operations in the state do not have an opportunity to remove from the state court to the federal courts? Why or why not?

Response:

I do not agree with the Justice Department's statement that class actions involving defendant corporations will always end up in federal court if the proposed legislation is adopted. The exceptions to federal court adjudication of interstate class actions reflected in the bill will keep truly local class actions in state courts. Under the bill, federal judges may (and presumably will) decline to exercise jurisdiction over cases in which a "substantial majority" of the class members and defendants are local and the claims involved will be governed primarily by local law. The same applies to "state action" cases – matters in which states or state officials are named as defendants.

B. What would you think of a practice of a plaintiffs' lawyer who names a local retailer or distributor in a class action simply to divest federal courts of jurisdiction so that a defendant cannot receive equal justice under law? Do you believe that plaintiffs' lawyers are "gaming" the civil justice system?

Response:

Unfortunately, this type of manipulation of the system is not uncommon. Without question, considerable "gaming" of the civil justice system is occurring in the context of interstate class action litigation. I touched upon a number of the tactics in the course of my testimony, explaining how they were used to keep class actions out of federal court:

(1) Attorneys mask or omit claims that are in reality federal in nature in order to hinder removal of the case to federal court under a federal question jurisdiction theory. In some instances, lawyers who employ this tactic deprive their clients of potential avenues for recovery and thereby violate their duties as advocates for the class;

(2) Lawyers who want to keep their cases in state court will draft the complaint to include a defendant from the same state as one of the plaintiffs in order to destroy "complete diversity," the requirement that the state of citizenship of all named plaintiffs is completely different than the state of citizenship of all named defendants. Once the jurisdictional battle is over, these "additional" defendants often fall by the wayside. Plaintiffs' lawyers accomplish the same thing by manipulating the plaintiffs' side of the case; they search for and name a plaintiff who lives in the same state as the defendant (even though the case is filed in a different jurisdiction);

(3) Many attorneys also play fast and loose with the "amount-in-controversy" prong of the federal diversity jurisdiction requirement. In most instances, a class action may be heard in federal court under a diversity jurisdiction theory only if each class member

claims over $75,000 in damages. Solely to frustrate any removal attempts, attorneys often plead damages below the "jurisdictional amount," sometimes $74,999. In addition, they frequently waive punitive damages.

Through such tactics, these attorneys frequently cheat their own clients as well as the system. It is wrong for a class action lawyer to unilaterally "waive" otherwise available claims that class members might wish to assert simply in the name of forum-shopping. Nevertheless, it happens every day --- class counsel sacrifice the claims of unnamed class members in order to keep their cases in state courts. .

C. What do you believe to be the purpose of federal diversity of citizenship jurisdiction? Isn't it to provide out-of-state defendants with a "fair forum" so that all defendants can receive equal justice under the law?

Response:

Diversity jurisdiction is a tool that allows federal courts to hear cases that are brought under state law because the parties are from different states and because there is a certain amount at stake. In developing the diversity jurisdiction concept, the framers of the Constitution intended to eliminate the risk out-of-state defendants would be forced to defend themselves against state law-based claims in local courts that might be biased in favor of local citizens. Fairness and equal treatment under the law is the guiding principle behind diversity jurisdiction. In an interstate class action context, diversity jurisdiction provides other bonuses as well. Federal courts, unlike their state court counterparts, have the ability to consolidate a hodge-podge of cases from different federal courts into one deciding case rather than suffering the inefficiency and lack of resolution that characterizes overlapping state court class actions.

5. A. Professor Daynard contends that S. 353 would be better entitled the "Tobacco Industry Relief Act of 1999" because it would allow for removal of all class actions involving tobacco companies and, consequently, result in tobacco cases being less likely to be certified as class actions. Do you agree?

Response:

Prof. Daynard's statement appears to be premised on a misperception of pending tobacco litigation. The tobacco-related lawsuits that have been most in the news -- those concerned with smoking-related health care expenses that were brought by state attorney-generals – are not class actions and therefore are outside the purview of S. 353.

It is also premised on an unsupported assumption that state courts will certify tobacco class actions, while federal courts will not. Prof. Daynard lost the federal court tobacco class action that he brought. But that does not mean that others who carefully craft a purported class would not succeed. Indeed, the record on class certification in tobacco-related class actions has been decidedly mixed in both federal and state courts.

Interestingly, I am not aware of any evidence that any class members in state court tobacco class actions have actually benefited therefrom. For example, the highly publicized Florida state court action against tobacco companies by a purported class of flight attendants was settled with the attorneys being paid $49 million, while the class members "received" only the right to sue. When asked to comment about that outcome, one law professor said: "Is the system just, when it allows the plaintiffs' lawyers to make $49 million for making their client worse off?" (The Sun, February 20, 1998) It is only fair to note that a medical research foundation also received a significant payment.

B. Do you believe that a legislative "carve out" would be consistent with the principle that all persons – including corporate entities – are entitled to equal justice and fair treatment under the law?

Response:

I do not. Jurisdictional rules should apply to all litigants equally. Neither tobacco company defendants or any other citizen should be excluded from our federal courts, particularly when such a "carve out" would appear to be motivated by the momentary public view of the excluded parties.

Questions from Senator Kohl

1. Do you believe that something is amiss when a state court certifies a class, while a federal court says the same class should not be certified?

Response:

Generally speaking, there is a problem any time that our judicial system produces contradictory results in identical cases. Consistency in interpreting and applying the law is a noble objective for all jurists. Thus, something is definitely amiss when a state court certifies a class that a federal court has found uncertifiable.

In its testimony, the Justice Department seems to dismiss this problem, noting that "State courts are as subject to the requirements of due process as the Federal courts." But the Department misses the point that the parameters of what claims a federal court may certify for class adjudication are guided largely by due process principles. Thus, when a state court grants class status to a case that a federal court has determine cannot proceed as a class action, the state court likely is sacrificing (at least to some extent) the due process and trial fairness rights of the class member(s) and/ or the defendants.

2. Do you believe that as a general matter federal courts have better resources than state courts for managing class actions?

Response:

As a general matter, federal courts have better resources than state courts for managing class actions. Typically, federal courts have larger support staffs to aid with the burden of managing the various complex issues that invariably arise within class action litigation. State court judges usually operate without the assistance of clerks. Federal court judges, unlike many of their state court counterparts, also have the ability to delegate certain aspects of a given case (such as discovery issues), to magistrates or special masters.

Because complex litigation matters tend to be adjudicated in federal courts, the judges of those courts usually have more experience in addressing highly intricate or technical issues. They are also particularly well equipped to adjudicate matters with interstate commerce dimensions, particularly where the laws of multiple states are involved. Indeed, working under the constitutional concept of diversity has allowed federal courts to develop greater expertise in interpreting the laws of other jurisdictions (a skill that more frequently is needed in class action adjudication due to the 50-state member scope of the classes).

3. Our bill would require that class notices, including notices of proposed settlements, be in plain, clearly understood English, and that settlement notices include certain details, like the amount and source attorneys' fees. Do you believe that class notices are sometimes too confusing for class members to understand, and do you believe our provision is a step in the right direction?

Response:

The notices that many class members receive are written with complicated and technical "legalese" that would challenge most members of the bar. Unfortunately, such notices are a class member's only basis for deciding whether and how to exercise his/her rights with respect to the claims at issue.

Currently, notices are often written in such a way that frustrates the claimant into a state of inertia. In many instances, class members cannot comprehend the nature and scope of the class action about which they are learning for the first time (through the notice), nor can they understand the ramifications of their participation as a member of a class. Thus, many if not most claimants who receive notice that they are members of a class do nothing upon receipt of such notice (other than perhaps to throw the notice in the garbage). This inaction by class members benefits plaintiffs' counsel by increasing the size of the class while giving full control of the matter to counsel (regardless of whether they are acting the best interests of the class).

Justice can be achieved through the class action device only if the key

constituency – the class itself – is able to knowingly participate in the entire process. That participation can be achieved only if class members receive proper notification and explanation of the litigation in plain English. S. 353 is a healthy step in that direction.

4. On a scale of one to 10, how would you rate the following kinds of cases, in terms of whether there is a strong argument for federal jurisdiction? (10 being a strong argument for federal jurisdiction, down to one as a weak argument) Please explain your responses.

a) Multiple class actions in several state courts, each involving same class members from all 50 states, same claims, millions of dollars sought in damages, same multiple defendants, governed by primarily state law outside of state where cases filed ("Overlapping class actions against multiple defendants")

b) Multiple class actions in several state courts, each involving same class members from all 50 states, same claims, millions of dollars sought in damages, and same single defendant, governed by primarily state law outside of state where cases filed ("Overlapping class actions against single defendant")

c) Single class action, class members from all 50 states, millions of dollars sought in damages, multiple defendants all from outside of state where case is filed, governed by primarily out-of-state law ("Nationwide class action, multiple out-of-state defendants, out-of-state law)

d) Same as (c), except governed by law from state where case filed (Nationwide class, multiple out-of-state defendants, in-state law)

e) Single class action, class members from all 50 states, millions of dollars sought in damages, multiple defendants all from same state where case is filed, governed by primarily out-of-state law ("Nationwide class action, multiple in-state defendants, out-of-state law")

f) Same as (e), but governed by law from state where case filed ("Nationwide class, multiple in-state defendants, in-state law")

g) Single class action, class members from all 50 states, millions of dollars sought in damages, single defendant from outside of state where case is filed, governed by primarily out-of-state law ("Nationwide class action, single out-of-state defendant, out-of-state law")

h) Same as (g), except governed by law of state where case filed ("Nationwide class action, single out-of-state defendant, in-state law")

i) Single class action, class members from all 50 states, millions of dollars sought in damages, single defendant from same state where case is filed, governed by primarily out-of-state law ("Nationwide class action, single in-state defendant, out-of-

state law")

j) Same as (i) except governed by law of state where case filed ("Nationwide class action, single in-state defendant, in-state law")

k) Single class action, class members from same state where case is filed, millions of dollars sought in damages, multiple out-of-state defendants, governed by primarily law from outside of state where case filed ("In-state class action, out-of-state defendants, out-of-state law")

l) Single class action, class members from same state where case is filed, millions of dollars sought in damages, single out-of-state defendant, governed by law from outside of state where case is filed ("In-state class action, out-of-state single defendant, out-of-state law")

m) Single class action, class members from same state where case is filed, millions of dollars sought in damages, multiple out-of-state defendants, governed by law from outside of state where case filed ("In-state class action, out-of-state single defendant, out-of-state law")

n) Single class action, class members from same state where case is filed, millions of dollars sought in damages, single out-of-state defendant, governed by law from sate where case filed ("In-state class action, single out-of-state defendant, in-state law")

o) Single class action, class members from same state where case is filed, millions of dollars sought in damages, in-state defendants, governed by law from state where case filed ("All in-state class action")

p) Single case, in-state plaintiff sues out-of-state defendant for $75,001, governed by law of state other than where filed ("Diversity case just above dollar limit, out-of-state law")

Single case, in-state plaintiff sues out-of-state defendant for $75,001, governed by law of state where filed ("Diversity case just above dollar limit, state law where filed")

Response:

In addressing these scenarios, one should be guided by what the framers of the Constitution had in mind when crafting the concept of diversity jurisdiction. We need to look to their goals and accept that the current law, when applied to certain types of class action, fails to meet those goals. Further, we need to look at where the practicalities of current practice suggest that a federal court could be a more effective manager of such litigation.

With that in mind, I believe that all of the scenarios (except for (o)) present

compelling cases for federal jurisdiction (in the 8-10 point range). Except for scenario (o), all of the cases present disputes among citizens of different states and therefore fit the mold of the sort of case for which federal diversity jurisdiction was created.

Some of the scenarios present additional compelling reasons for the exercise of federal jurisdiction. For example:

Many of the scenarios (such as (a) and (b)) involve multiple overlapping class actions pending in different state courts across the country. That fact favors federal jurisdiction because federal courts are uniquely able to consolidate those cases for more consistent and efficient handling.

In many of the scenarios (such as in (a) (b), (c), (e), (g), (i), (k), (l)), the forum court(s) would be required to interpret the laws of other fora. That is a task more appropriately handled by a federal court, and that is therefore a factor favoring federal jurisdiction.

Even where the scenario assumes that the forum state law would apply to all claims (such as in scenarios (d), (f), (h), (j), and (n),) the involvement of a federal court would be preferable because that choice-of-law determination (that is, determining that the law of one state applies to the claims of persons residing in all 50 states) is unlikely. That call should made by a federal court, which would be less prone to select automatically the law of the forum.

Most of the scenarios involve class actions (all of the scenarios except (p) and (q)), which thus presumably would be relatively complex matters. As discussed previously, federal courts are typically better equipped to deal with such matters.

All of the scenarios (except (p) and (q)) involve disputes over large sums of money. In tandem with the other indicia of proper federal diversity jurisdiction, that is a factor favoring access to federal court.

Only scenario (o) does not seem to present a very compelling case for federal jurisdiction, since it appears to be an entirely in-state matter.

RESPONSES OF RICHARD A. DAYNARD

May 17, 1999

Senator Charles Grassley,
Chairman
Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Grassley,

I appreciated the opportunity to testify on May 4, 1999 before your subcommittee on the subject of S.353, "The Class Action Fairness Act." Furthermore, I appreciate the present opportunity to respond to the follow-up questions posed by Senators Torricelli and Kohl. I will set out each of the questions posed to me, followed by my responses.

Questions from Senator Torricelli:

1. In your judgment as an attorney and as an academic who has been deeply involved with tobacco class actions, how would the removal of tobacco cases to federal court resulting from this bill impact on the likelihood of success of class action suits filed by tobacco victims? Conversely, would the bill's removal provisions have a positive impact on the ability of tobacco companies to defend themselves in class action suits?

Response: Removing tobacco class actions to federal court would drastically reduce their chances of success. Since Judge Posner's much-cited and much-followed decision in *In Re Rhone-Poulenc Rorer Inc.* 51 F.3d 1293 (7th Cir. 1995), federal appellate courts have uniformly rejected contested toxic tort class actions. These courts have been particularly concerned about the difficulties they would have in managing the cases. These management problems include the complication and confusion of dealing with the laws of a variety of states, the docket congestion posed by the possibility of thousands of individualized proceedings following the trial of common questions, and the problems posed by the Seventh Amendment (which is not binding on the states) for structuring the different phases of the cases. None of these problems go to the fairness to the defendants of a class action proceeding, but only to the federal courts' own interest in not getting entangled in complex and extended procedures. It is entirely within the discretion of state courts whether they wish to involve themselves in such procedures. At this point it seems that some do, and some do not.

As to the defendants' ability to defend themselves in state court, the tobacco companies are presently in the midst of a three-month-long defense presentation in the first phase of the *Engle* case in state court in Dade County, Florida. Defense counsel had also engaged in extensive cross-examination of the plaintiffs' witnesses. Whether or not the defendants prevail in this phase (thereby concluding the case), no one can doubt that they have received – and taken full advantage of – a full opportunity to present whatever legal and factual defenses they have. Indeed, their real objection to state court is that they are sometimes forced to present their defenses to juries of their peers, rather than being certain of getting the cases dismissed on preliminary procedural grounds, as is true in federal court.

2. This bill provides for mandatory Rule 11 sanctions for filing what a judge determines to be a frivolous case. And I would note that this provision applies to all federal cases, not just class actions. You express in your testimony concern that this rule change will have a chilling effect on attorneys bringing important and meritorious, yet novel cases. Could you give us some examples of recent cases that may never have been brought if this rule were in place?

Response: Just in the tobacco litigation arena, the first few state Medicaid reimbursement cases (those filed from 1994 –1996) were considered highly speculative when they were filed. The defendants argued, plausibly, that legal doctrines dating back more than a hundred years required the states to use subrogation procedures (an impractical suggestion) or not proceed at all. One of these early cases was filed in Texas federal court. Plaintiffs' attorneys considered these early cases very risky, and might well not have taken them had they faced the additional risk of having to pay the defendants' legal costs if a judge found their claims "frivolous". Had these early cases not been brought, the others would not have filed, and last fall's multi-state agreement with the tobacco companies would never have occurred.

Similarly, I found it impossible for find an attorney willing to take the case of Norma Broin, a non-smoking flight attendant who contracted lung cancer after several years of exposure to smoky airplane cabins. Finally in 1991 Stanley and Susan Rosenblatt brought a class action against the tobacco companies on behalf of her and others similarly situated. Though the Florida appellate courts have since upheld the propriety of such a class action, most knowledgeable observers considered it a "long shot" when it was filed. Had S.353 been in force in 1992, the Rosenblatts would have been forced into federal court by the removal provisions, which would doubtless have decided that the class action was unmanageable, and might well have sanctioned them for having brought such a "frivolous" class action complaint in the first place! The prospect of such sanctions would probably have deterred even such courageous attorneys.

Furthermore, cases brought in federal court under the Americans with Disabilities Act, by individuals with medical problems that prevent their working or frequenting places of public accommodation where they will be exposed to environmental tobacco smoke, were originally thrown out as outside the Act. While the claims were reinstated by the U.S. Courts of Appeals for the Second Circuit, Staron v. McDonald's Corp., 51 F.3d 353

(2d. Cir. 1995), and the Ninth Circuit, Homeyer v. Stanley Tulchin Assoc., Inc., 91 F.3d 959 (7th Cir. 1996), the plaintiffs' attorneys might never have dared bring the cases were Rule 11 sanctions mandatory.

I am also very doubtful that any of the gun liability cases, including the successful *Hamilton* case recently tried in Brooklyn federal district court, would have been brought under a mandatory Rule 11 sanctions regime. I am sure that my colleagues at Northeastern University School of Law working in other areas of the law could provide dozens, if not hundreds, of additional examples, and I would be happy to request that of them if you would find it helpful.

Questions from Senator Kohl:

1. In your written testimony, you cited a few class action cases – I believe four total – that have been certified in state courts and probably would not have been certified in federal court. Aren't these few cases just a small number of the total number of tobacco cases that have been brought? What are your estimates of the total number of tobacco cases that have been brought over the last decade, and the total number still pending? What do you estimate is the percentage of class actions among these totals?

Response: I agree that these class actions are relatively few in number. Indeed, they *should* be few in number – that is the point of class actions. But in terms of the number of plaintiffs included in the classes, even the three pending certified state class actions – for smokers, ex-smokers and their families in Florida, Louisiana, and Maryland -- represent perhaps a thousand times more plaintiffs than the 1,000 to 2,000 individual cases that have been filed since 1954. Thus, in terms of their potential for delivering justice to afflicted smokers (which I take to be the thrust of your question), and considering just these three certified class actions, they represent perhaps 99.9% of the tobacco victims with cases presently before the courts.

2. Isn't it true that the cases that have had the biggest impact – the state-brought cases that were settled last year for billions of dollars – weren't class actions at all?

Response: Yes.

3. Do you agree with Professor Elliot's testimony that state courts "overwhelmingly" follow federal case law with respect to class action procedural issues? If so, given your testimony that federal courts have so far rejected allowing tobacco cases to proceed as class actions (due to the differing circumstances of individual plaintiffs), isn't it unlikely that class actions will ever be that important in litigation involving tobacco?

Response: I disagree with Professor Elliot. While state courts certainly pay substantial respect to federal court decisions interpreting similar procedural rules, they follow their own policies on issues like "manageability" (involving the allocation of the state court system's own resources). Appellate courts in Florida and Louisiana, and a trial court in

Maryland, have concluded that tobacco class actions may proceed in their courts. The great majority of state court systems have not yet ruled on this issue. State court class actions may well turn out to be the instrument by which afflicted smokers obtain the sort of justice for themselves that the states were able to obtain in the recently-settled Medicaid reimbursement actions.

4. You testified that, under our bill, most tobacco class actions involving only in-state class members would still be removable to federal court, due to out-of-state defendants. While there are very strong arguments for federalizing such cases (i.e. state court bias against out-of-state defendants, and the ability to consolidate related cases for more efficient discovery), do you have any recommendations about how to amend this bill to avoid such an impact?

Response: One possibility would be to limit the removal provisions to multi-state plaintiff class actions, i.e. those in which the plaintiff class includes members who are not residents of the forum state. That would eliminate the "outrages" that were brought up at the hearing, such as the state court class action that "benefited" out-of-state class members by debiting their bank accounts for a share of the plaintiff counsel's fees. It would also protect the Florida, Louisiana, and Maryland certified smoker class actions, and any similar residents-of-one-state-only class actions that might be certified in the future.

My hesitation about recommending such a removal jurisdiction centers on the *Broin* case, which was a national class action of flight attendants suffering from diseases and conditions caused by exposure to environmental tobacco smoke. There may not be enough class members living in any one state to have made this difficult and expensive case worth bringing on any basis other than as a multi-state plaintiff class action. Yet I believe this class action has already achieved substantial benefits for the class members -- and so does Florida's Third District Court of Appeals. Ramos v. Philip Morris Companies, Inc., 1999 Fla. App. LEXIS 3422.

A more tailored approach might be to make multi-state plaintiff class actions removable only where they are also "settlement class actions" (i.e. those in which a settlement was agreed to before the class was certified). For the reasons suggested in the Supreme Court's recent *Amchem* case, Amchem Prods. v. Windsor, 521 U.S. 591 (1997), and in the article by Professor John Coffee which the Court cites, Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995), abuses of absent class members are most likely to occur in settlement class action cases.

Thus, in the tobacco context a group of plaintiffs' lawyers filed a class action against Brooke Group, Inc. in Mobile County, Alabama. Simultaneous, they filed an agreement with Brooke Group to release all of its Liggett & Myers tobacco subsidiary's actual and potential liability to any smoker or nonsmoker, anywhere in the country, who is or might become afflicted with tobacco-caused disease, all in exchange for 7.5% of its income! This case would probably never have been filed except as a settlement class action, and could probably not be certified (even in an Alabama state court) without the defendant's

consent. By contrast, while the *Broin* flight attendant class action was settled for substantial value, that did not happen until long after the case was certified, indeed well into the defendants' presentation of its case to the jury.

5. In your written testimony, you explained that tobacco companies used a "bankrupt the plaintiff's lawyers" strategy to beat back litigation for decades. My bill, "The Sunshine in Litigation Act of 1999," would make it more difficult for courts to issue blanket "gag" or "protective" orders, by requiring courts in cases involving public health and safety to conduct a balancing test before concealing documents obtained during discovery (and prohibiting any court order that would restrict disclosure of such documents to regulatory agencies). This bill earned the support of the Judiciary Committee in 1996. My question is this: Did the tobacco companies use protective orders to conceal incriminating information and drive up the cost of litigation? If yes, please explain how they did it, the extent of this practice (including examples), and why the courts went along.

Response: Yes, tobacco companies have indeed used protective orders to conceal incriminating information and drive up the cost of litigation. At least as early as 1970, see Thayer v. Liggett and Myers Tobacco Co., 1.2 TPLR 2.63 (W.D. Mich. 1970) [copy enclosed], tobacco companies regularly obtained so-called "umbrella" protective orders that kept plaintiffs' lawyers from discussing with each other the factual bases for legal claims against the industry. These orders did not focus on specific sensitive documents, but gave presumptive weight to the companies' classification of any or all documents produced in discovery as "confidential". By moving to the plaintiff's attorney the burden of moving the court to declassify each improperly classified document, these umbrella protective orders effectively guaranteed that improperly protected material stayed protected, and unavailable for inspection by other plaintiffs' attorneys or by the public. While it was theoretically possible for plaintiffs' attorneys to seek the declassification of individual documents, they had little incentive to do so and in fact never did, since declassifying documents that had been produced under a protective order would do nothing to advance the case at hand.

The result of these orders was to require each plaintiffs' attorney to "reinvent the wheel", helping to make what should be run-of-the-mill toxic tort cases into extraordinarily expensive and chancy propositions. See William E. Townsley & Dale K. Hanks, The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair, 25 Cal.W. L. Rev. 275, 4.5 TPLR 4.11 (1988) [copy enclosed]. The asserted basis for these orders was the companies' alleged fear that their trade secrets would be revealed to their competitors, despite the facts that the information in question was often decades-old and of no commercial value, that sharing the information among plaintiffs' attorneys would not increase the risk of leakage to competitors, and that the supposed competitors were often represented by the same attorneys anyway.

Many courts granted umbrella protective orders as a matter of course, since they saved the court the bother of having to consider whether a possible large number of individual documents were entitled to protection. Furthermore, plaintiffs' attorneys sometimes

agreed to protective orders, in the face of threats by defense counsel to hand nothing over in discovery until the protective order issue was finally decided. The credibility of these threats was strengthened by the industry's behavior in the *Cipollone* litigation, where the industry twice appealed the trial court's decision – granting only a limited protective order and refusing to protect non-designated documents – to the Third Circuit, and indeed sought certiorari on the issue from the United States Supreme Court! Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3rd Cir. 1986); Cipollone v. Liggett Group, Inc., 822 F.2d 335 (3rd Cir.), cert. denied, 484 U.S. 976 (1987).

6. Do you believe that something is amiss when a state court certifies a class, while a federal court says the same class should not be certified?

Response: Absolutely not. It is the genius of our federal system that state governments are not required to proceed lock-step with the federal government. Especially since "manageability" is such an important obstacle to federal court certification, there is no reason to even anticipate that state courts will make the same internal resource allocation decisions.

7. Do you believe that as a general matter federal courts have better resources than state courts for managing class actions?

Response: No. The Dade County state court in Florida has done a very good job managing the class actions in both *Broin* and *Engle*. Apparently, the higher salaries, law clerks, and state-of-the-art facilities that characterize the federal courts are neither necessary nor sufficient for managing class actions. A genuine desire to deliver justice seems to be a more important variable.

8. Our bill would require that class notices, including notices of proposed settlements, be in plain, clearly understood English, and that settlement notices include certain details, like the amount and source of attorneys' fees. Do you believe that class notices are sometimes too confusing for class members to understand, and do you believe our provision is a step in the right direction?

Response: Yes.

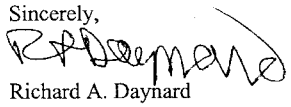
9. On a scale of one to 10, how would you rate the following kinds of cases, in terms of whether there is a strong argument for federal jurisdiction? (10 being a strong argument for federal jurisdiction, down to one as a weak argument) Please explain your responses. [There follows 17 hypotheticals, which vary according to the following dimensions: (A) whether multiple actions in courts of different states with overlapping plaintiff classes are pending, (B) whether plaintiffs all reside in the forum state, (C) whether there are single or multiple defendants, (D) whether defendants are out-of-state (E) whether or not the forum state law governs, and (F) whether or not the case is a class action.]

Response: I will respond to the importance I would give to each variable.

A. Overlapping actions can be dealt with under the "first in time, first in right" rule, without the need for federal jurisdiction. But see variable B, below.
B. For the reasons discussed in my response to question 4, class actions, and especially settlement class actions, including non-resident plaintiffs present a reasonable claim for federal jurisdiction, in terms of protecting absent class members. But, as my response to question 4 also indicates, there are also dangers in making all multi-state plaintiff class actions removable. The best rule may be one that protects against multi-state plaintiff, settlement, class actions.
C. I do not believe it should matter whether there is a single defendant or multiple defendants.
D. I see no reason why rules respecting removal based on the defendants' residence should be any different in class actions or non-class actions.
E. I see no reason why rules respecting removal based on choice-of-law issues should be any different in class actions or non-class actions. Courts of one state apply the law of another state on a regular basis – indeed, the rules for doing so form the core of Conflicts of Law courses, texts, and restatements. Ironically, the federal courts have recently articulated their own "manageability" concerns about trying cases with multiple governing legal rules in federal court.
F. From the point of view of the defendant, one possible difference between individual actions and contested class actions is the amount of exposure. But many individual cases involve huge sums of money – the Pennzoil v. Texaco case, a single-plaintiff case in Texas state court, produced a judgment for $10 billion, far larger than any judgment in any class action. It may make sense, however, to cumulate class members' injuries to test whether the amount-in-controversy requirement has been met.

Please let me know if I can be of further service.

Sincerely,



Richard A. Daynard
Professor of Law

Encl.

CURRENT OPINIONS 1.2 TPLR 2.63

GERALDINE THAYER, Administratrix of the Estate of Leslie Thayer, Deceased, Plaintiff

v.

LIGGETT & MYERS TOBACCO COMPANY, Defendant

No. 5314

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

February 19, 1970

Although not a current case, Thayer *is an unreported decision that may be useful in current litigation.*

Plaintiff sued defendant for damages for the wrongful death of her husband, who died of lung cancer. The jury returned a verdict of no cause of action. This opinion by the trial judge deals with some of his procedural and evidentiary rulings prior to and during trial.

The first section of this opinion addresses defendant's motion for mistrial prior to the conclusion of plaintiff's case, following the admission into evidence, over defendant's objections, of certain advertisements and letters. Defendant's attorney, in stating his reasons for seeking the mistrial, referred to allegedly prejudicial and biased statements by the judge.

The judge defended his ruling of admissibility of the evidence, as well as other rulings and statements made by him, stating that obvious disparity of resources between two parties in a lawsuit becomes a legitimate area of judicial comment when that disparity interferes with the requirements of due process and fairness. Of particular concern to the judge in this case was that defendant's size and wealth led to inequality in discovery and trial preparation. Plaintiff's case, the judge stated, was hampered by defendant's evasiveness during the discovery process and by a sweeping protective order conferred by the Circuit Court. The judge described a scenario in which plaintiff was hampered at every turn in her pursuit of a fair trial because of the inequity in resources between her and defendant. The judge stated that given these circumstances, he justifiably used his discretion to attempt to balance the inequity.

Section II concerns defendant's motion for a mistrial based on the judge's comments during the trial that the evidence might provide a basis for bringing defendant's actions within the area of willful tort. These comments were held to be within the judge's discretion to keep the trial moving expeditiously, and, therefore, the motion as directed to these remarks was denied.

Plaintiff sought to have defendant produce, prior to trial, letters from defendant's attorney to one of his expert witnesses. The judge denied plaintiff's motion on the grounds that plaintiff had not shown that such an exception to the "work product" rule was necessary for preparation of her case.

In Section III the judge explained his order that defendant answer supplemental interrogatories concerning compensation of defendant's experts by defendant, other tobacco companies, or the Tobacco Institute. The order to answer was given, within the judge's discretion, because of the relevancy of the information for impeachment purposes.

Section IV explains the court's admission into evidence of the 1964 Surgeon General's Report. It was admissible, as an exception to the hearsay rule, as an official report or government record, having satisfied the requirements of relevancy and reliability.

In conclusion the judge stated that the gross disparity in resources between the parties and the exploitation of its advantage by defendant approached a denial of due process that would compel a new trial, but that since the plaintiff could not afford to proceed with the case, the case was moot.

COUNSEL:
Kerry D. Alexander, Cicinelli, Mossner, Majoros, Harrigan and Alexander, 913 North Michigan Avenue, Saginaw, Michigan 46605, for plaintiff.

NOEL P. FOX, D.J.

OPINION

Plaintiff brought this products liability action to recover damages for the wrongful death of her husband, Leslie Thayer. She alleged that defendant Liggett & Myers manufactured and marketed cigarettes which, when consumed by plaintiff's decedent, caused the lung cancer that ultimately led to his death at age forty-nine.

The case was tried to a jury and consumed some five weeks of trial time. At the close of the proofs, the jury returned a verdict of no cause for action.

During the preparation and trial of this case the court made numerous procedural and evidentiary rulings. This opinion deals with a few of the most important of these rulings.

I. DEFENDANT'S MOTION FOR MISTRIAL

Before the conclusion of plaintiff's case, defendant moved for a mistrial. Liggett & Myers contended that comments made by the court, outside the presence of the jury, in ruling on various motions indicated a bias, with respect to both corporate defendant and the issues in this case, sufficient to deprive it of the opportunity for a fair trial. The motion was denied.[1]

It is entirely appropriate that defendant should focus on the element of fairness in the trial of this lawsuit. Fairness, and particularly procedural fairness, is also the primary concern of the court. Such fairness is nothing less than the very heart of due process and thus one of the primary guarantees of equality, in substance and appearance, before the law.

It is to this very subject -- the interrelationship of equality, fairness and due process -- that most of the court's remarks challenged by defendant were directed. Far from being prejudicial, these remarks represented an objective appraisal of the developing procedural posture of this particular case, an appraisal which was itself the core of the rulings involved.

Defendant's mistrial motion followed admission into evidence, over defendant's objection, of advertisements and letters relevant to certain aspects of the plaintiff's case. Some of these exhibits had not been marked at pretrial, and could have been excluded under *Leach v. C&O*, 35 FRD 9 (W.D. Mich. 1964.) Others were newly discovered evidence requiring a production order. The court, believing the interest of justice to be served thereby, exercised its discretion in favor of the plaintiff. The advertisements were admitted and the production of certain letters in defendant's possession was required.

When making these rulings the court made some observations which were intended to serve two functions. First, to emphasize that the court, in the exercise of its discretion and in the interest of justice, had considered the availability and use of resources by the parties in the development and presentation of their respective cases. Second, to clarify the court's position respecting the developing legal posture of this case.[2]

A. The Allocation and Use of Resources

Plaintiff, a fifty-year old widow, was represented by two members of a five-man law firm located in Saginaw, Michigan. Defendant, one of the major tobacco manufacturing firms, had the services of the largest law firm in Western Michigan, plus another large law firm in New York City. Such a disparity between parties in the resources that can be brought to bear in the trial of a lawsuit need not, in itself, be relevant to the resolution of any issue, substantive or procedural. Neither is the court usually concerned with the structure or size of either party. However, it cannot be seriously contested that wealth and size ought not themselves be determinative of the way justice is done. These elements are thus legally innocuous until it appears that their impact is to confer undue advantage in litigation and promote an inequality inconsistent with the requirements of due process and fairness.

In the instant case the court felt compelled to consider and comment upon the impact of defendant's size and wealth.

The court's comments stressed two interrelated themes: (1) the dangerous possibility of inequality of treatment by the law of a large

1. When articulating the reasons for his mistrial motion, counsel for defendant added: "I don't think the appearance to any defendant sitting in this court is such that the defendant could possibly...at this point feel that in any way under United States justice, if you will, that justice can be done with a presiding officer in this trial having formed the prejudgments and the opinions and biases that this court has evidenced in its statements."

2. See Appendix A. [All appendices are omitted from this report of this case.]

corporate institution and a single party, which often results from the wealth of the former, and (2) the duty of a court, in order to serve justice, pursuant to the mandate of Rule I of the Federal Rules of Civil Procedure, to use its discretionary powers to avoid magnifying any such inequality.

These remarks were supported, and indeed were compelled, by the evidence and proceedings before the court in this case. They were made outside the presence of the jury. For these reasons, there is no indication of prejudice and no basis for a mistrial.

(1) Effective Inequality in Discovery and Trial Preparation

One of the most effective weapons a complex and wealthy institution may use to hamper discovery is evasiveness. Facts may become "lost" or "unavailable" in a mass of corporate offices and files. One entity may claim that requested information is not under its control, but the control of another entity. Its affairs and lines of responsibility can be clouded and obscured.[3] Because of this potential, relevant information may remain concealed or its discovery delayed.

An individual with limited resources may thus be faced with an almost impossible situation. He needs the information; he has a right to discover facts reasonably calculated to lead to the discovery of admissible evidence. Yet he simply cannot afford protracted discovery. As a practical matter, adequate trial preparation may become too costly. This may contribute to a substantial inequality before the court.

In the instant case, certain aspects of defendant's conduct during the discovery process indicated an attempt to impede otherwise proper discovery. First, defendant answered an interrogatory as to whether it was a member of the Tobacco Institute as "not applicable." It was later revealed that Liggett & Myers was indeed a member of the Institute. Second, defendant denied the existence of any agency relationship between itself and the Institute. This denial was in the face of testimony that letters from a public health official addressed to the major tobacco companies had been answered by the Institute's president. Subsequent production of the letters confirmed this to be the case.

In addition to the capability to prevent expedient discovery, a party with virtually unlimited funds for litigation enjoys great advantages in other aspects of the preparation and trial of its case. It has at its disposal all the legal manpower it feels to be necessary, in many situations, specialists in the subject matter of the litigation. It has the resources to research, organize, and make available for instant use an incredible volume of factual material. It can locate and transfer files any place in the country. It has channels of communication and cooperation available to other interested parties. It can bring all of this potential to bear on the trial of a single lawsuit.

As we look to the future, the logistical gap between the wealthy litigant and one with modest resources is likely to widen. For example, computers are now commonplace throughout the nation's business community and they are already being used to aid in the prosecution and defense of lawsuits.

In large antitrust cases, a well-programmed computer is capable of simulating the relevant market or of providing the most minute data about pricing structures and sales, regardless of how numerous the transactions may be or what range of geography they may span. Most certainly industry groups faced with large numbers of similar actions against their members -- whether it be cancer cases against

3. For example, when asked about activities related to his field of supervision with Arthur D. Little & Co., Dr. Irwin Miller responded at page 1248:

"A. I don't know. The work that Arthur D. Little has done for Liggett & Myers that I have been associated with and that I know about has been either animal experimental work or work in looking at the statistics associated with the smoking and health area. I don't know what work A.D.L. has done. I'm personally surprised myself to see some of those earlier figures because I didn't come to Little till '65 and I know very little of what they did for Liggett & Myers prior to that time."

Later, when asked about the Little firm's activities relating to cigarette filters, Dr. Miller replied:

"No, I was only very loosely associated with this work. Little has so many different clients, I'm unaware of most of the things he does.... I was not close enough to that work. For a more lengthy example, see Appendix G.

cigarette manufacturers, environmental pollution cases against the oil, chemical, and airline industries, or negligence actions against the automobile companies for faulty design -- will bring the new computer technology to bear on those lawsuits in order to improve their chances of success.[4]

Unquestionably the result will be a further disparity between industrial giants and individual citizens.

In years to come it may even be possible for large corporations or industry associations, by studying in detail and computerizing every aspect of each case brought against them on a particular subject, to develop statistics relating to the significance of individual items of evidence, or, quite possibly, a personality profile of jurors who are likely to be sympathetic to their position.

Those of us who are charged by Rule 1 "to secure the just... determinination of every action" must be sensitive to these problems and bring our discretion to bear in order to make sure that the courts do not simply become an instrument for the wealthy.

Defendant in this case enjoyed all the advantages that wealth naturally produces. But this was not enough. It sought, in addition, to restrict plaintiff's own flexibility in trial preparation. The success of this effort magnified the existing inequality of these parties. The method defendant used to this end, and the reasons the court eventually reached the above conclusion about defendant's motive, should be set forth in some detail.

Early in the discovery process defendant moved to be allowed to depose plaintiff before submitting answers to interrogatories. The court agreed to grant priority if it appeared from such answers, filed with the court, that defendant had responded in good faith.

Upon initial examination of these answers it appeared that a good faith response had been made, and the court granted defendant's motion. The court later discovered that defendant had incorrectly answered interrogatories regarding defendant's connection with the Tobacco Institute and the Tobacco Industry Research Committee.[5]

Following the granting of the motion for priority, but before its incorrect answer was revealed, defendant succeeded in obtaining, on mandamus from the Circuit Court of Appeals, a sweeping protective order under Rule 30(b). The order prevented plaintiff's counsel from revealing any information acquired through discovery to any other persons, with the exception of five experts.

The reasons given by defendant for such an order were that, first, the material plaintiff would discover in this case "contained trade secrets and confidential information which should not be divulged beyond the confines of this

4. For some possible remedial ideas for this kind of situation, see infra, footnote 33.

5. It may have been that the incorrect and misleading answers given by defendant were accidentally inserted into the interrogatories. But if they were, it was a fortuitous series of accidents.

Respecting the Tobacco Industry Research Committee, plaintiff inquired as to whether defendant Liggett & Myers was a "member" of this institution. Defendant answered that from 1934-1964 it had not been a member. The court later discovered that defendant helped found and supported this Committee. The interrogatory answer supplied by defendant can only be supported on the basis of the difference between "membership" and "support." Such a fine distinction, when plaintiff's intention of discovering any relationship of defendant to the committee was obvious, is not in the spirit of the Federal Rules, is evasive, and is not in good faith. See, infra, footnote 8.

case,"[6] and second, that "since discovery in each case should depend on its particular facts and issues, if the information were given to attorneys for other plaintiffs bringing similar suits, this defendant would be deprived of its rights under the Federal Rules of Civil Procedure."

These reasons, in the proper circumstances, may each be sufficient to invoke the protection of Rule 30(b). In this particular case, when viewed at the time of defendant's Rule 30(b) motion, long before trial when the totality of circumstances was still obscure, they appeared persuasive. However, after the trial of this case began, certain factors, hidden at the pretrial stage, began to emerge and dilute this apparent persuasiveness. As the total picture developed during the trial, it appeared that the protective order was serving defendant well in areas unrelated to the protection of its trade secrets or legitimate procedural rights. These indirect benefits, which were unclear to all but defendant when the order was granted, may have been the most important reason for seeking 30(b) protection.

First, while defendant may properly be protected from disclosure of its trade secrets, the order it sought and obtained was much broader. It required that "material and information made available in discovery proceedings not be divulged or made available to any other person, directly or indirectly, including by copy or summary thereof, or by giving information pertaining thereto, except to the extent introduced as evidence at trial...."[7]

Plaintiff's attorneys were prohibited from disclosing, discussing or referring to, with any other person, any material, privileged or not, which was furnished by defendant. Fruitful consultation between plaintiff's attorneys with similar cases in other areas was thus effectively throttled. Counsel could not refer to or discuss any matters pertaining to facts revealed by Liggett & Myers. Without discussing particulars, any consultation would be largely fruitless. Defendant thus succeeded, to a very significant degree, in isolating plaintiff from outside assistance and advice.

Second, the court was somewhat puzzled by the failure of either the discovered material in the court's file or the evidence presented to reveal anything approaching a trade secret. The court could not reconcile this with defendant's assertion of irreparable harm when seeking its protective order. It inquired of defense counsel whether, in fact, any trade secrets had been involved in this case.

Counsel could only refer to the pleadings covering the protective order. The court could therefore only conclude that one of the substantial dangers alleged in support of defendant's protective order in reality did not exist.

Third, from the first day of the trial approximately a half dozen to a dozen defense attorneys, involved in similar cases around the country, were in constant attendance in the courtroom. These attorneys took notes, conferred with each other and conferred with defendant's counsel. By way of contrast, the breadth of defendant's protective order had effectively prohibited plaintiff from similar consultations.

Fourth, defendant made particular effort throughout the preparation and trial of this lawsuit to cultivate the image that it was standing alone and unaided in its effort to defeat the

6. In the original proceedings at the District Court level, the trade secret allegation appeared to be somewhat of an afterthought. Defendant first moved for a protective order on the ground that communication between plaintiff's counsel and attorneys in another similar case in Pennsylvania would violate a discovery limitation imposed in that case, and on the ground that discovered information should be confined to one case. After the court denied the blanket order requested because enforcement of discovery limitations in the Pennsylvania case should be sought in the Western District of Pennsylvania, not in this court, and because the order would unduly hamper this plaintiff's trial preparation and consultation, defendant added its allegation concerning trade secrets. The total package was then taken to the Court of Appeals.

In addition, when defendant's 30(b) motion was originally heard before this court, the interrogatory answers furnished the court by defendant did not contain the pages wherein a particularisation of trade secrets was allegedly presented.

7. Note that the order is broad enough to even prevent public health officials from obtaining any information disclosed by defendant in this case. This puts defendant in the interesting position of urging that fairness required its interest in the secrecy of this information to prevail even over any public interest which might be served by its disclosure.

plaintiff's claim. It took this position throughout discovery proceedings. The successful Rule 30(b) motion reflected such an assumption. The misinformation contained in its answers to interrogatories concerning association with the Tobacco Institute conveyed this impression. Counsel's in-court statements that there was no agency relationship between defendant and the Institute had the same effect. However, subsequent facts revealed at trial, especially the correct response to interrogatories and the letters to Dr. Levin, which revealed the interrelationship of defendant and the Tobacco Institute, and the daily courtroom consultation with other defense attorneys, belied defendant's carefully calculated image of nakedness before this court.[8]

To recapitulate, the court was witness to a spectacle wherein defendant, rich in resources, maintained complete freedom of association and consultation, including courtroom conferences with other attorneys experienced in the trial of similar cases, while plaintiff's counsel, already disadvantaged by the limited resources available to them, were prohibited from doing likewise by a blanket protective order obtained by defendant early in the case on grounds which later proved largely illusory.

Defendant thus benefitted greatly in a complex case involving masses of technical data from constraints imposed on plaintiff's freedom in trial preparation.

In addition, the order prevents discovery, in future cases, of documents which would normally be public records.[9] This, too, serves defendant well. It makes future discovery for other individual plaintiffs more difficult, more time consuming, and more expensive. It insulates data that could be used for impeachment or other evidentiary purposes.[10] In over-all effect, it magnifies the burden any plaintiff will face in the trial of a similar lawsuit. It is cal-

8. There was much more to reinforce the conclusion that the individual tobacco companies, which are would-be competitors, in fact cooperate extensively to defeat cigarette-cancer cases.

See footnotes 10 and 27 for some examples of this collective effort.

The Tobacco Institute is one vehicle for asserting collective interest. Another is the Council for Tobacco Research (Tobacco Industry Research Committee), whose function was outlined at hearing before the Senate Committee on Commerce, 89th Cong. 1st Session, part 1, March 22, 23, 24, 25, 29, 30, April 1 and 2, 1965, page 836. (Photocopy of text deleted.)

9. Again, it should be emphasized that not one of the documents filed in this case, and now immune from disclosure, contains trade secrets.

10. By way of contrast, the court observed, pursuant to Leach v. C & O, 35 FRD 9 (W.D. Mich. 1964), the massive amount of impeachment material available to defendant. This material contained transcript of all previous trials of tobacco cases plus complete dossiers on all experts who might be called to testify. The volume of material precluded detailed examination, but the court concluded that defendant had available all testimony and all information which had been discovered in all prior tobacco-cancer cases. Anything not immediately available could be flown in on request. Not being hampered by the kind of protective order facing the plaintiff, defendant could bring the aggregate of knowledge and experience in such cases possessed by the entire tobacco industry to bear on the lawsuit.

culated to do so. It has already been used for this purpose.[11]

Finally, there was one more obvious advantage which accrued to defendant by virtue of its overwhelming superiority in resources. It knew that plaintiff could not afford the luxury of a mistrial. With such knowledge defendant could confidently risk tactics that would normally be deterred by this sanction[12]. Plaintiff, on the other hand, knew both that she had to be cautious herself and that, as a practical matter, she would be unable to effectively police defendant's conduct. Defendant thus sought the best of two worlds -- a mistrial or a verdict of no cause for action.

Had these circumstances been clear at the time, it is doubtful that the protective order sought by defendant would have been granted.

It was thus the above situation, carefully measured against a concern for justice and effectual equality in the access to justice, and the hope of discouraging similar conduct in future cases, which prompted the court to exercise its discretion in plaintiff's favor and to make the remarks it made. There is more than adequate basis on the facts of this case to support such action. No prejudice to defendant was intended or resulted.

(2) The court's duty to promote justice.

Throughout this case defendant displayed an insatiable appetite for procedural advantage. It also had the resources to pursue any available opportunity to realize such advantage. The facts justify this observation. But the question remains whether the allocation and use of resources in a lawsuit is, as defendant maintains, entirely irrelevant to any issue posed in the case.

Defendant goes further. It claims that any consideration or suggestion of awareness of those factors by the court would be "an alarming abuse of judicial discretion," and would, impliedly, result in prejudice and an unfair trial. After using disparity in resources to procure the maximum weight of advantage, it then cries foul when the court raises its voice to help correct, ever so slightly, the resulting imbalance.

Defendant's view is consistent with neither justice nor the rules of procedure. If a party appears to be exploiting its position for the purpose of concealment, delay or other reasons calculated to unduly disadvantage another party in the preparation or presentation of its case, then the court may take such actions into consideration in its procedural and evidentiary rulings.[13]

The day is long past where lawsuits resemble trial by battle. Access to justice therefore cannot depend on weight of resources any more than upon strength of fists. It is the duty of the courts to insure that wealth and power alone do not determine the lawsuits, and that those elements do not hamper an expedient, inexpensive determination of the merits of each case.

The most compelling mandates for such an approach are contained in the Declaration of Independence, the Preamble to the Constitu-

11. Following the conclusion of this lawsuit, the court received the following letter from defendant's attorneys: (addressed to the Clerk of the United States District Court, Western Division, dated January 5, 1970)

"Dear Mr. Ziel:

I received a call from New York counsel on the above litigation today concerning a lung cancer case entitled Spillane V. Liggett & Myers Tobacco Company, which is presently pending in the U. S. District Court for Connecticut. I was informed that Mr. Francis McDonald, an attorney for the plaintiff in the Connecticut case, would probably be requesting your office to furnish copies of certain documents and papers filed in the Thayer v. L&M case. As I informed Art on the phone today, there is on file in the Thayer case an order dated October 18, 1968, which was made pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, which, in essence, prevents the disclosure of material and information furnished by defendant except to the extent introduced as evidence at the trial.

We understand that the plaintiff's counsel in the Connecticut case wants all of the answers to interrogatories filed by L&M. It is our position that only those questions and answers introduced as evidence in the case can be made available under the terms of that order. I thought I should bring this to your attention at this time. If you have any questions, please feel free to call me.

Very truly yours,

Wallson G. Knack

12. See Appendix B.

13. See Wigmore on Evidence (3rd Ed. 1940) §9.

tion[14] and the Fourteenth Amendment. These deal with rights of free individuals the protection of which has been the cornerstone of national policy since the birth of this nation. They reflect the basic theme that government and its organs, of which the courts are a part, are constituted to secure these rights to individual human beings.[15] This public interest in the protection of individual rights and the availability of justice to each individual citizen is the fundamental source of the policy reflected in the Federal Rules of Civil Procedure.

Rule 1 of the Federal Rules contains the mandate for administration of proceeding in federal court:

> "These rules...shall be construed to secure the just, speedy, and inexpensive determination of every action."[16]

"There is probably no provision in the federal rules that is more important than this mandate. It reflects the spirit in which the rules were conceived and written, and in which they should be, and by and large have been, interpreted. The primary purpose of procedural rules is to promote the ends of justice.... The mandate in the second sentence of Rule 1 is only one of a number of similar admonitions to the bench and bar scattered throughout the rules directing that the rules be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the ends of justice and facilitates decisions on the merits...." 4 Wright and Miller, Federal Practice and Procedure, Civil Sec. 1029. (Emphasis supplied.)

It is not inconsequential that in this case there is a substantial public, as well as private, interest in a just determination based solely on the merits of the case.[17]

Rule 1 therefore requires that rules of procedure are to be applied in a fashion that will promote the ends of justice, *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037 (1941), *Leedom v. International Brotherhood of Electrical Workers*, 278 F.2d 237, 244 (D.C. Cir. 1960), *Padovani v. Bruchhausen*, 293 F.2d 546 (2nd Cir. 1961).[18] The force of this first and greatest of the federal rules is felt in all of the remaining rules, and the spirit with which they have been applied by the federal courts for more than thirty years confirms this impression.

The emphasis Rule 83 places on an ad hoc determination of procedural issues is also designed to promote the ends of justice. It is a reminder to courts that difficult procedural issues must not be avoided through an overabundance of general rules, but instead must be resolved on a case-by-case basis and according to the particular facts at hand.[19] The emphasis on ad hoc consideration also demands that

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14. PREAMBLE

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. (Emphasis supplied.)

15. It is worth noting that the corporate institution was not within the contemplation of the authors of these basic documents. Their focus was upon the rights of individual human beings, not on the rights of institutions which might eventually be created by the government whose formation was the object of concern.

16. A similar mandate is contained in the Proposed Rules of Evidence:

Rule 1-02. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Advisory Committee's Note—

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code Sec. 2, and New Jersey Evidence Rule 6.

17. See, infra, discussion of the admissibility of the 1964 Surgeon General's Report, especially footnote 28.

18. In Padovani, the Second Circuit granted a writ of mandamus to plaintiff to compel the district judge to reverse a preclusion order issued under Rule 16 that would have had the effect of preventing plaintiff from presenting her case at trial. The order had been sought and obtained by defendant Liggett & Myers. The court held that such an order was unauthorized and at odds with the purpose and intent of the Federal Rules. It is an additional example of the appetite for undue advantage, over and above those conferred by size and wealth, which had been displayed by this defendant.

19. See "Rule 83 and the Local Federal Rules," 67 Colum. L.Rev. 1251 (1967).

courts apply principles of equity and fairness to the resolution of specific procedural questions.[20]

Rules 1 and 83 thus emphasize two important factors. First, that matters encompassed by the federal rules are to be administered, first and foremost, with the ends of justice in mind, and second, that under these rules the courts are vested with considerable discretion to regulate the proceedings before them in a manner consistent with equity and fairness.[21] This reservoir of a trial court's discretionary authority under Rule 30(b) should readily be available to prevent or correct any unjust or unfair effect of a pretrial protective order that has been issued early in the proceedings whenever such an effect becomes apparent during the course of the trial.

Federal courts are thus duty bound to use their discretion through the federal rules, as a balancing factor whenever justice and fairness so demand.

One element that may be considered in such a calculation is the impact of a disparity in resources. Contrary to defendant's assertions, consideration of inconvenience and hardship are by no means foreign to the law of procedure.

Rule 30(b) itself provides that, for good cause shown, a court may take certain steps to protect a party, "or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression."

In *Sullivan v. Southern Pacific. Co.*, 7 FRD 206 (S.D. N.Y. 1947), plaintiff railroad employee brought an action against defendant under the Federal Employer's Liability Act. Plaintiff had lost his legs in a railroad accident. He lived in Minnesota and filed his action in New York. Defendant noticed plaintiff's deposition in New York City. The court, in granting plaintiff's motion for a 30(b) protective order, stated at page 207:

> The plaintiff in this case is without funds. He selected New York as the forum, when he might have sued nearer home; but that was a privilege accorded him by the Federal Employers' Liability Act. *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, 136 A.L.R. 1222. Ordinarily a non-resident plaintiff who makes that choice should make himself available for examination in the forum in which he has brought his action. But here we have special circumstances which would lead a court to modify the notice of examination and to direct that plaintiff be examined either orally in Minneapolis, Minnesota, or by written interrogatories. To impose any conditions that plaintiff pay the expenses of defendant's counsel in taking the deposition, would be an added hardship. Plaintiff could not meet that condition. His right of action should not be jeopardized by subjecting it to a motion to dismiss if he failed to meet the condition.

Plaintiff's motion is therefore granted. If defendant wishes to take plaintiff's deposition by oral examination, the place of the examination must be in Minneapolis and defendant will have to pay its own expenses. Defendant may, of course,

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20. In a seminar given in 1962 for newly appointed district judges by the Committee on Pretrial Procedure of the Judicial Conference of the United States, Second Circuit Judge Irving R. Kaufman, in discussing the topic of discovery, stated that "[W]hen a case is thus brought before a judge there are numerous alternatives open to him. In essence, he functions as a Chancellor, dispensing relief in accordance with principles of equity and fair play, within the confines of the appropriate rules." (Emphasis supplied.) Proceedings of the Seminars for Newly Appointed District Judges, 196. Similarly, Edgar Toland, Secretary to the Advisory Committee on the Federal Rules, cautioned as early as 1938:

"The purpose of the rules is to put an end to that sort of thing [namely, the complicated system of the past with its extensive and detailed provisions]. Let justice be administered according to justice and common sense, not according to the necessity of complying with empty forms and ancient rituals." (Emphasis supplied.)

21. Wright and Miller, Federal Practice and Procedure, state in Civil Sec. 1029 that it "is not an exaggeration to say that the keystone to the effective functioning of the federal rules is discretion of the trial court. The rules grant considerable power to the judge and only provide general guidelines as to the manner in which it should be exercised.... The rules will remain a workable system only as long as trial court judges exercise their discretion intelligently on a case by case basis; application of arbitrary rules of law to particular situations only will have a debilitating effect on the overall system." (Emphasis supplied.)

examine plaintiff by way of written interrogatories. Settle order accordingly.

Similar consideration was given to the resources of the parties in *Schultz v. KLM Royal Dutch Airlines*, 21 FRD 20, (E.D.N.Y. 1957). Plaintiff brought a wrongful death action in New York following the crash of one of defendant's airplanes in Holland. Plaintiff noticed defendant's deposition in New York. Defendant moved for a protective order, alleging that key employees could not be spared for such a trip. The court denied their motion:

> The foregoing is less than convincing. In the first place, the depositions can be taken one by one and at convenient intervals, and the defendant corporation can supply the transportation to its own representatives at a minimum of cost.
>
> It is not too much to suppose that any one of the named persons is required to be absent from his post of duty from time to time by reasons of health or otherwise, and in such an organization as that maintained by the defendant, it is fair to assume that lieutenants have been trained to serve in a temporary capacity for the individuals named.

For additional examples of the use of discretion under the federal rules to balance inequality of resources of the parties, see *Endle v. Hermes Export Corp.*, 20 FRD 162 (S.D.N.Y. 1957), and *Timble v. Rhode Island Insurance Co.*, 16 FRD 563 (S.D.N.Y. 1954).

Considerations of the balance of inconvenience to the parties and impliedly the allocation of resources, have been given due process status in *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The issue there was whether an out-of-state corporation by its activities in the State of Washington had made itself subject to suit by a state agency. In holding that defendant had such minimum contacts within the state that compelling him to defend a suit there did not offend traditional notions of fair play and justice, the court added that "(a)n estimate of the inconveniences which would result to the corporation from a trial away from its principal place of business is relevant in this connection."

The due process and equal protection clauses of the Fourteenth Amendment have been used extensively in the criminal area to prevent miscarriage of justice due to an accused's lack of resources. *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

The holdings in these cases are limited to criminal actions. But the thrust of their language may indeed be more universal. There is little reason why similar concepts should not be applied in civil cases as well. Whenever disparity in resources results in unequal access to justice, there is an inequality of right and the danger of denial of due process.

The courts must be concerned with a just allocation of legal resources. They must be concerned that substantial individual and public interests are in fact and in law accorded fair procedural and substantive due process. In procedure as in other areas, they must strive to establish the equality of position between the parties from which equality of right begins.[22]

President Benjamin Harrison in his inaugural address on March 4, 1889, admonished:

> If our great corporations would more scrupulously observe their legal limitations and duties, they would have less cause to complain of the unlawful limitations of their rights or of violent interference with their operations. The community that by concert, open or secret, among its citizens denies to a portion of its members their plain rights under the law has severed the only safe bond of social order and prosperity. The evil works from a bad center both ways. It demoralizes those who practice it and destroys the faith of those

22. Mr. Justice Holmes, dissenting in Coppage v. Kansas, 236 U.S. 1, 28 (1915):

"I think the judgment should be affirmed. In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him.... If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins." (Emphasis supplied.)

> who suffer by it in the efficiency of the law as a safe protector. The man in whose breast that faith has been darkened is naturally the subject of dangerous and uncanny suggestions. Those who use unlawful methods, if moved by no higher motive than the selfishness that prompted them, may well stop and inquire what is to be the end of this.

Messages and Papers of the Presidents, Bureau of National Literature, New York, 1897, Vol. XII, p. 5444.

Justice must be made available to all, not only to the strong who can marshal the greatest resources, but to the weak and the disadvantaged. This goal has been sought for centuries,[23] and bears repetition today when so much of our energy is directed to the quest for social justice. Today, enmeshed in what John Kenneth Galbraith succinctly describes as "the unseemly economics of opulence,"[24] it is still largely a hope. The words of the late P. A. Sorokin are as forceful today as when written in 1941:

"Therefore, the contracting parties in all fields of social life, beginning with the economic and ending with the political, were not in equal positions to enter or not to enter into a contract. As always, in order merely to live and to satisfy elementary needs, the poor and the underdog had to accept contractual conditions much more advantageous to the rich and powerful contracting parties than to themselves. In both cases, in this sensate atmosphere, the contract tended to be a pseudo-contract entered into under factual duress. In a modified way it was an old form of dependence of one party and of domination of the other. The place of the feudal nobility and the lord of the manor was taken by a rich class, and the place of the monarch's aristocracy and court by a new political aristocracy. A high-sounding phraseology, including such phrases as 'equality of opportunity,' 'liberty,' and 'the rights of man,' was resorted to in the effort to conceal the discrepancy between the lofty ideal of a genuine contractual relationship and its actual perversion. But no ideology can forever hide the discrepancy and convince the hungry man that he is not hungry, the exploited that he is justly treated, or the subjugated that he is free. Thus the degeneration of the contractual relationship set in even while contractualism was on the upgrade -- because of the increasing host of 'cheated people.' The further the contractual process proceeded, the stronger grew the trends in question, increasing both the degeneration of the contracts and the number of those who failed to derive from the contract its alleged universal advantages. Placed in such a position, those who suffered composed an ever-growing army of deserters from contractual allegiance."

"Similar results were produced by the progressive impairment of other conditions of a fair and genuine contract. It is only human for a sensate man or group to seek to squeeze from a contract every possible advantage. Such a tendency often led to a conflict in the interpretation of its conditions. This conflict frequently had to be decided by the courts of law. In spite of the noble principle of equality of each party before the law, the factual situation was often quite a different one; for the vastly increased complexity of the law made necessary the employment of lawyers to defend one's interests in court. A rich and privileged party could hire the best lawyers, whereas a poor one could not. Consequently the court's decision was repeatedly in favor of the rich party, in spite of the superior merits of the claims of the poor party. Thus the parties were not equally protected, and the interests of many persons were unfairly sacrificed in favor of those of the rich and strong." P. A. Sorokin, "The Crisis of Our Age," E. P. Dutton & Co., N.Y. 1941. [24(a)] (Emphasis supplied.)

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23. "Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty; but in righteousness shalt thou judge thy neighbor." Leviticus, ch. 19, v. 15.

"It is up to friendship to put to work, in an equal manner, the equality which already exists among men. But it is up to justice to draw to equality those who are unequal; the work of justice is fulfilled when this equality has been achieved. Thus equality lies at the terminus of justice." St. Thomas Aquinas, Commentary on Aristotle's Ethics, Book VIII, Lesson 7. (Emphasis supplied.)

24. Galbraith, American Capitalism, ch. VIII.

24(a). For an analysis of such a problem in the area of the Federal Employers' Liability Act, see DeParcq & Wright, Damages Under the Federal Employers' Liability Act, 17 Ohio State L. J. 430 (1956).

To this "host of cheated people," or to those who share the current widespread belief that justice belongs only to those who can pay for it, it could not appear that justice was done in this case. This is not to say that the jury misperformed its function or that the decision on the merits necessarily should have been otherwise. But it does mean that if the merits in fact favored the plaintiff, the chance that she could get a just verdict litigating in these circumstances must have appeared to her to be pitifully small.

It was with this in mind and with the desire to realize a system which would minimize the obstacles on the pathway to justice that the court made the rulings and remarks it did in this case.

B. Comments on the Applicable Law

Part of the observations challenged by defendant's mistrial motion dealt with the court's discussion of legal theories which the facts indicated might well be applicable to this particular case.

The thrust of the court's comments was to the effect that the evidence, particularly the testimony and documentary material relating to research and analyses of the health hazards of smoking, plus the advertising record of the defendant, might very well provide a basis for bringing defendant's actions within the area of willful tort.[25] This theory as such was not pleaded by plaintiff, but an analogous concept was quite important with respect to defendant's affirmative defenses.

These remarks were not a part of nor necessarily related to any specific rulings. However, at a point in the proceedings when evidence relevant to affirmative defenses was being offered and challenged, the court felt some clarification might be helpful to both parties.[26]

The trial judge has a duty, again under Rule 1, to keep the parties informed of his appraisal of the law applicable to their case as soon as such appraisal is warranted by the developing evidentiary picture. Such an analysis will often change as additional evidence is received, and counsel should be accordingly informed. This practice is of great assistance in insuring a more expeditious and less confusing trial. The court customarily does this in all its cases. It does it most often when particularly serious or unusual problems are involved.

Remarks made by the court for such a purpose can be grounds for a mistrial only if they prejudice defendant. Since the challenged statements were made outside the presence of the jury, solely on the basis of available evidence and at a time designed to be helpful to the parties and to expedite the trial, there is simply no possibility of prejudice.

Defendant's motion as directed to these remarks was therefore completely groundless, and was denied.

II. PRETRIAL PRODUCTION OF LETTERS FROM DEFENDANT'S COUNSEL TO ITS EXPERT WITNESS

Plaintiff sought pretrial production of letters from defendant's counsel to one of defendant's experts, Dr. Basinger. Plaintiff contended that, to the extent these letters contained facts which might aid in forming an expert opinion, they were discoverable to adequately prepare for cross-examiniation.

Defendant sought the protection of the "work product" rule of *Hickman v. Taylor*, 329 U.S. 495 (1947). It alleged that the letters involved contained no facts considered by Dr. Basinger in forming an opinion and that, because all possible bases for Dr. Basinger's opinions were already available, plaintiff had not shown necessity for discovery.

The *Hickman* rule attempts to reconcile the desire for liberal discovery with the need to protect the integrity of the details of counsel's trial preparation. It insulates the attorney's "work product" from discovery unless data contained therein is relevant, non-privileged and necessary to the preparation of the adversary's case. Id. at page 511. See also 74 Harv. L. Rev. 942, 1033 (1961), Developments in the Law -- Discovery.

If the letters sought indeed contain facts that could be considered necessary for proper

25. See Appendix C.

26. See Appendix D.

preparation for cross-examination, and if such facts are otherwise unavailable, then *Hickman* permits discovery.

Plaintiff's cross-examination of Dr. Basinger would have to be directed to questions surrounded by considerable scientific controversy. The expert's testimony would be quite technical, and cross-examination could not be expected to perform its function unless proper preparation was made. Such preparation demands knowledge of all factors considered in the rendering of a complex scientific judgment by an expert witness. Discovery may properly aid this preparation, and the presence of such information in a letter from counsel to an expert, coupled with a showing of necessity, would likely provide adequate justification to override the restriction of the "work product" rule.

The court felt, however, that in the circumstances of this case the required necessity had not been shown.

All material upon which Dr. Basinger could conceivably have based his opinion had already been produced. More importantly, the doctor's deposition and his report to defendant, which were made available to plaintiff, both revealed the specific facts considered in forming his judgment. In this context, the mere chance that the requested letters might contain helpful factual information was not sufficient to require sacrifice of the protection afforded an attorney's confidential communications by the "work product" rule.

Therefore, the requisite necessity not having been shown, plaintiff's motion was denied.

III. DISCOVERY OF DEFENDANT'S EXPERTS' COMPENSATION FROM THE TOBACCO INSTITUTE AND ITS MEMBERS OTHER THAN DEFENDANT WITH RESPECT TO EVENTS INVOLVING THE RELATION OF CIGARETTE SMOKING TO HEALTH.

Plaintiff, through interrogatories, requested enumeration of payments made by defendant, other cigarette manufacturers, and the Tobacco Institute, or their agents, to medical or scientific experts which defendant was to call at trial. Defendant objected, on grounds of relevancy, to disclosure of payments it made to these same experts in other cases, and to disclosure of the relationship of its experts to anyone other than itself.

Discovery in a products liability case, where proofs of a defect in defendant's product and of causation are technical and complex, should be given the broadest possible range. Such is the policy of the Federal Rules. Defendant, with its large resources, is able to supply its experts with a deluge of medical and scientific material upon which to base their expert opinions. Faced with such testimony, an essential weapon at plaintiff's disposal is impeachment. The information requested by plaintiff was of potentially critical value in attacking the credibility of defendant's experts.

The compensation, in whatever form, received by defendant's experts to testify in the instant case, regardless of the source, was relevant to the credibility of their testimony. Even if defendant did not directly compensate its experts here, it may very well be the direct beneficiary of their services. The jury may be entitled to consider and decide whether any payments made by other manufacturers of cigarettes, or the Tobacco Institute (of which defendant is a member) reveal relationships which tend, because of pecuniary interest, to dilute the persuasiveness of defendant's experts.

The court concedes that the relevancy of compensation received by these experts with respect to past activities, such as for testimony in previous trials or government hearings, is not as obvious as the above. In the normal case, the likelihood that payments received on past occasions will reveal relationships and interests damaging to the credibility of a witness' present testimony is slight. In such situations, the possibility that the inquiry plaintiff proposed will tend to obscure more important issues, balanced against the likelihood that discovery will reveal damaging relationships, may demand, in the interest of judicial economy, that discovery be limited.

However, in this case the balance weighed in favor of further discovery. Defendant and each of the other cigarette manufacturers are members of the Tobacco Institute. They have a certain overriding collective interest in this type of litigation. The public is

aware that the tobacco industry has been under heavy fire in recent years respecting cigarettes and health. It has conducted a vigorous defense, which has extended to courts, legislatures and other public forums. In these somewhat unique circumstances, it is proper to inquire to what extent any of defendant's experts played a part in this industry effort, and to what extent they might have acquired a pecuniary interest therein. Such an inquiry could well produce evidence that a jury should consider in evaluating their testimony.[27]

Accordingly, and mindful of the broad discretion invested in the court with respect to matters of discovery, defendant was ordered to answer plaintiff's fourth supplemental interrogatories with respect to any transaction or event which involved the relationship of cigarette smoking to health.

IV. THE SURGEON GENERAL'S REPORT

At the beginning of plaintiff's case she offered into evidence the 1964 report of the Advisory Committee to the Surgeon General, entitled Smoking and Health.

Defendant objected, urging (1) the lack of any statutory authority for the report, and (2) that the report reflects merely a compilation of opinions, other than those of the authors, and therefore is not sufficiently credible to overcome the risk of untrustworthiness underlying the hearsay rule.

In dealing with reports of government agencies and committees, courts have taken varied approaches to insure that competent factual matter contained therein is brought to bear on issues in litigation. Some take judicial notice of publications issued pursuant to statutory authority and concerning matters within the agency's expertise. *Stasiukevich v. Nicolls*, 168 F.2d 474 (1st Cir. 1948). Others, where circumstances indicate trustworthiness, have recognized a public records exception to the hearsay rule. Wigmore on Evidence (3rd Ed. 1940) §1672.

The need of availability of reliable government data has spawned statutory as well as common law exceptions to the hearsay rule. One such federal statute is 28 USCA §1733.

Defendant claims that the offered report is not admissible either under an exception to the hearsay rule or by statute. The court cannot agree.

Both the statutory and the common law hearsay exceptions are rules of general application. Both provide only guidelines for application in a variety of factual situations. Each offer of evidence must be judged on its own facts.

Exceptions to the hearsay rule have developed where circumstances indicate that the risk of untrustworthiness of an out-of-court statement is so slight and the probative value potentially so great that the reasons for prohibiting admissibility and consideration by the trier of fact largely disappear.

In the area of official reports, the exception is broadly phrased as follows:

> The official report of a legislative or congressional committee is admissible in evidence in a judicial proceeding, as an exception to the hearsay rule, where the report, within the scope of the subject matter delegated to the committee for investigation, contains findings of fact on a matter which is at issue in the judicial proceeding.

Stasiukevich v. Nicolls, 168 F.2d 474, 479 (1st Cir. 1948).

> Petitioner's objections to receipt of this report in evidence are overruled. It has been consistently held that facts found in reports prepared by public officials in the course of their duty, in accordance with express statutory authority, are admissible as an exception to the hearsay rule where there is no motive for the official to be partial.

Petition for Naturalization of W____, 164 F. Supp. 659, 661 (W.D.Pa. 1958).

While the government records exception to the hearsay rule is well documented and well known, it is not an open ticket of admissibility for any official report. The rule must, in pru-

27. See Appendix E.

dence, be read to authorize admission only of those reports whose attributes of trustworthiness are so high that they serve, in effect, the function of cross-examination.

The circumstances surrounding the 1964 Surgeon General's Report indicate such a high probability of trustworthiness. Both the formation and operation of the committee compel this conclusion.

The committee was formed by then Surgeon General Luther L. Terry, with the approval of the Secretary of Health, Education and Welfare, pursuant to 42 USCA §217 (a):

> "The Surgeon General may, without regard to the civil service laws, and subject to the Secretary's approval in such cases as the Secretary may prescribe, from time to time appoint such advisory committees... for such periods of time, as he deems desirable for the purpose of advising him in connection with any of his functions."

The Surgeon General is the chief public health official of the United States, and is the head of the Public Health Service. He is charged with the responsibility of investigating and preventing potential public health hazards:

> The Surgeon General shall conduct in the Service, and encourage, cooperate with, and render assistance to other appropriate public authorities, scientific institutions, and scientists in the conduct of, and promote the coordination of, research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man, including water purification, sewage treatment, and pollution of lakes and streams.

42 USCA §241

It was in direct fulfillment of these duties that the Surgeon General's Advisory Committee was formed. Its activities and its conclusion were therefore clothed in the most compelling kind of public interest.[28]

28. See Appendix F.

The 1964 Report was therefore the product of an investigation authorized by the Surgeon General in fulfillment of his duties and pursuant to authority vested in him by Congress, authority conferred to fulfill the primary goal of government, to secure those rights which were central to the founders of this country, namely, the right to life, liberty, and the pursuit of happiness.[29]

The court took judicial notice of certain certified documents dealing with the formation and goals of the Advisory Committee on Smoking and Health. These documents, plus the sworn testimony of then Surgeon General Dr. Luther L. Terry, revealed the following facts.

Following efforts by the American Cancer Society, the American Heart Association, the American Public Health Association, and the American Tuberculosis Association, the Surgeon General recommended to the Secretary of Health, Education and Welfare that an Advisory

29. In President Richard M. Nixon's inaugural address of January 20, 1969, he reminded us that in the eight years thereafter America would be preparing to celebrate its 200th anniversary as a nation, which is a celebration of the Declaration of Independence on July 4, 1776, and that during these eight years, again and again, our attention will be directed to the fundamental principles announced in that Declaration, namely, man's unalienable rights of life, liberty and the pursuit of happiness.

(New York Times, January 21, 1969.)

These doctrines can express themselves only in practical application through cases and through human experience.

The Thayer v. Liggett & Myers case involves all three. The Surgeon General, who is an officer of the United States charged with the application of securing these unalienable rights, was discharging that duty when he adopted the Advisory Committee's Report.

Certainly if the data in the report is true, then the maximum use of cigarettes as urged in the advertising of the defendant and its associated companies results in an invasion of all three unalienable rights. If defendant's cancer-producing product results in the death of thousands of people each year, this certainly invades the unalienable right to life. If its advertising entraps millions of people, habituated and addicted to the use of cigarettes, then this invades their right to liberty. If cigarettes cause cancer, emphysema, and multiple and varied respiratory and other disabling diseases, this impedes the pursuit of happiness of these millions of people.

Committee be formed to study the problem of smoking and health, and report the results to the Public Health Service. In June of 1962, the Surgeon General announced the formation of such a committee. President Kennedy acknowledged and approved his actions.

The selection of the eleven committee members was done in the following manner. Representatives of all interested parties, including the Tobacco Institute,[30] were invited to submit names of potential committee members. In this manner, a list of 150 scientists and physicians felt to be qualified was compiled.

Each of the interested organizations, including the Tobacco Institute, then screened the list. Any organization could veto any name given without giving a reason. The Surgeon General took particular care to avoid selecting anyone who had taken a strong public stand on the subject at issue. Dr. Terry's reason for such caution was to obtain a committee of "not only the highest professional competence but also... impartial in appearance and in fact."

After the original list had been screened, the Surgeon General selected eleven men who represented the specialities most likely to be of assistance in the committee's work. Only one so chosen was unable to serve.

These ten eminent scientists and doctors then proceeded to their task of making an objective assessment of the nature and magnitude of the health hazards of smoking. The committee reviewed and evaluated all available data and reported its conclusions.

The committee had at its disposal the resources of the largest medical library in the world, the National Library of Medicine at Bethesda, Maryland. In addition, it solicited information and data from any interested organization. The Tobacco Institute was one such organization which contributed information to the committee.

Individual members of the committee made personal analyses of the data and conclusions contained in the more important studies in the area. They made numerous trips, domestically and abroad, to personally examine the basic data used in these studies. They applied their own expertise to this data in order to evaluate research conclusions. Their individual conclusions were based on professional experience and independent judgment.

Members then discussed their ideas in seminars and conferences. In the interest of the utmost in objectivity and in the interest of caution, any committee conclusions had to be unanimous.

This process produced the findings set forth in the 1964 Report.

The undisputed facts therefore indicate that this committee was chosen by a process designed to insure the utmost impartiality of the members, as objective an approach as possible, and to insure that the results would be as close to the truth as was obtainable through the exercise of scientific skill.

The facts also show that the decision-making process within the committee emphasized individual expertise, dialogue and collective judgment. All opinions on the subject received a hearing within the committee. The process itself insured that any conclusions would have been carefully reached only after thorough and rigorous inquiry. This cross-examination within the committee itself is an impressive indicator of the trustworthiness of its results.

Courts are usually free to give effect to a presumption that government officials, acting within the confines of their authority, will properly discharge their duty. Wigmore on Evidence, §1632. Such a presumption is available here, but is hardly needed in view of the above facts.

In addition to the trustworthiness of the Report, defendant possessed ample safeguards to avoid any prejudice from its admission.

Defendant was able to veto any member of the committee. It was free to submit all data it wished to the committee. It had the Surgeon General, Dr. Terry, and the committee's pathol-

30. Other participating organizations were the American Cancer Society, the American College of Chest Physicians, the American Heart Association, the American Medical Association, the Food and Drug Administration, the National Tuberculosis Association, the Federal Trade Commission, and the President's Office of Science and Technology.

ogist, Dr. Emanuel Farber, available for cross-examination. It was free to offer material to rebut anything appearing in the Report.

It is difficult to understand how, with these protections available, admission of a Report already shown to be highly trustworthy could have possibly prejudiced defendant. For this reason the Report was admitted in evidence. The entire Report was relevant to the issue of the defectiveness of defendant's product.

This court is not alone in accepting the trustworthiness of the 1964 Report. In affirming a ruling of the Federal Communications Commission that radio and television stations which carry cigarette advertising must devote a significant amount of broadcast time to the case against smoking, the Court of Appeals for the District of Columbia stated in *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968):

> The danger cigarettes may pose to health is, among others, a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence.
>
> Finally, the Commission expressly refused to rely on any scientific expertise of its own.[66] Instead, it took the word of the Surgeon General's Advisory Committee,[67] whose findings had already been adopted in substance by the Department of Health, Education and Welfare,[68] the Federal Trade Commission,[69] and the Senate Commerce Committee, [70] and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act.

Such widespread acceptance and use of the contents of this report by various organs of government is another indicator of trustworthiness which supports the admissibility of this report.[31]

V. CONCLUSION

The concept of primacy of the "greatest" laws, and the dependency of all other laws upon that primacy, is central to the Judeo-Christian philosophy of law. It is the philosophy of law governing the relationship between the Creator and man, man and his Creator, and between man and his fellowman. It is in the tablets God delivered to Moses on Mount Sinai. It is in the Declaration of Christ in his confrontation with a lawyer:

> "***a lawyer, put a question to try him: Master, which commandment in the law is the greatest? Jesus said to him, Thou shalt love the Lord thy God with thy whole heart and thy whole soul and thy whole mind. This is the greatest of the commandments, and the first. And the second, its like, is this, Thou shalt love thy neighbour as thyself. On these two

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31. In the instant case the report was admitted as evidence but the question of its weight and sufficiency was left to the jury. The court did take judicial notice of the regularity of the committee's formation but did not judically notice the Report's contents. The 1967 Public Health Service review, The Health Consequences of Smoking, and its 1968 and 1969 supplements, required to be submitted by the Cigarette Labeling and Advertising Act of 1964 (P.L. 89-92), were admitted on the same basis.

The Banzhaf language is strong enough, however, to suggest that courts could also take judicial notice of the contents of the Surgeon General's Report. It contains the kind of facts, namely, those with a high degree of indisputability, which some commentators have urged courts to judicially notice. See Davis, Judicial Notice, 55 Columbia L.R. 945 (1955); A System of Judicial Notice Based on Fairness and Convenience, Perspectives of Law 69 (1964).

The Proposed Rules of Evidence appear to promote such an approach. They deal only with so-called adjudicative facts, leaving the court free to notice those legislative facts which demonstrate a high degree of indisputability.

Had the court taken this approach, it could have directed a verdict on the issue of the defectiveness of defendant's product, leaving the issue of causation for jury determination.

However, in an abundance of caution, the court left the weighing of evidence in the area entirely to the jury. See also Footnote 25, supra.

commandments, all the law and the prophets depend." Matthew, ch. 22, v. 34.

An identical concept is also the backbone of American jurisprudence. It was the heart of the philosophy of the founding fathers, who brought to the Declaration of Independence, the Constitution, and the Bill of Rights their religious inspiration and wisdom, their well-grounded education in philosophy and the humanities, and their earthy practicality. Quoting from John C. H. Wu, former Professor of Law at Seton Hall University School of Law, a member of the Court of Arbitration at the Hague, and an eminent scholar of jurisprudence, in his work, *Fountain of Justice*:

> It does not take deep study to discover that the natural law has received a much warmer reception in America than in any other country in the world. The truth is that the vitality of the natural law tradition depends ultimately upon religion, and no one could ever take religion more seriously and earnestly than the Puritans and their compatriots who founded this nation. To them "the laws of nature and of nature's God" were no products of fancy, nor even mere ideals; they were absolutely *real*, infinitely more real than any human laws. Nor were Americans indulging in rhetoric when they declared, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." They meant exactly what they said. They were a generous, sincere, freedom-loving and God-fearing people. They saw these truths so clearly and felt so deeply about them that they were willing to stake their lives upon them.

The concept of the primacy of certain natural laws and the derivative nature of other laws was thus embedded in the Declaration of Independence, the Constitution, and the Bill of Rights. Our government was founded on the belief that man's paramount values are life, liberty, and the pursuit of happiness. It was created to secure these values, and derives its power from the consent of those governed. This principle was implanted in the Constitution, and is infused into every governmental function and every governmental action. It is likewise found in Rule 1 of the Federal Rules of Civil Procedure.

If there is anything that is basic to the interpretation and application of law in this country, if there is anything fundamental to our entire system of justice, it must be these principles. They are the great common denominator which the founders so strongly believe made their new government unique. If government ceases to follow that vision, and if those responsible for the conduct of its affairs do not fulfill this trust, then the goals contained in these documents will never be attained.

The man who values strict construction of the Constitution, and who therefore is impliedly dedicated to preservation of the values originally contained in that document, would do well to ponder this aspect of constitutional history.

This case is an appropriate one for discussion of the rights of life, liberty, and the pursuit of happiness. The courts, as are all branches of government, are charged with the protection of these rights and they, more than any other governmental institution, are given the ultimate responsibility for protection of the individual citizen.

The individual before this court was, in essence, asserting a claim for violation of the right to life and liberty. The central issue, namely the health hazards connected with the use of defendant's product, is of crucial public importance. It affects the lives of millions of Americans. When defendant manufacturer displays such colossal disregard for dangers to life as the evidence in this case indicated, the court cannot ignore such conduct.

This case further demonstrates that a single individual human being -- injured, aggrieved, and disadvantaged -- cannot afford the cost of protracted and multiple trials, petitions for writs of mandamus and prohibition, and appeals in complicated cases.

The facts themselves mock the mandatory jury instruction that individuals and corporate institutions are always equal before the law.

The court is convinced that the magnitude of the impact of the disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approach a denial of due process which would compel the granting of a new trial.

This question, unfortunately, is now moot because plaintiff cannot afford further proceedings.[32] Therefore, if a denial of due process has in fact occurred, it has at this point slipped past the safeguards existing within the system and cannot be corrected.[33]

The case of Thayer v. Liggett & Myers has ended. The observations made in this opinion, however, and the implications they contain for the development of justice, in fact and in appearance, transcend the facts of any single case. It is hoped that they may aid in furthering "a new world of law, where the strong are just and the weak secure...."[34]

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32. Lack of resources prevents any further action following the verdict in this case:

Letter addressed to: The Honorable Noel P. Fox, District Judge, 202 Federal Building, Grand Rapids, MI 49502

Re: Thayer vs. Liggett & Myers Tobacco Company

Dear Judge Fox:

Although we are convinced that the law would have entitled plaintiff to a new trial, the prohibitive costs already incurred have prevented further post trial options, and we are closing our file.

Very truly yours,

CICINELLI, MOSSNER, MAJOROS, HARRIGAN & ALEXANDER

33. One possible approach to more satisfactory litigation of cases like this one is suggested by Charles Alan Wright in an article, Class Actions, 47 F.R.D. 169 (1969):

> This device [Rule 23(b) (3)] has been especially useful in cases involving securities frauds, where individual investors allegedly injured are in a poor position to seek redress, either because they do not know enough or because the cost of suit is disproportionate to each individual claim.52 In drafting the amended rule the Advisory Committee observed that a class action is "ordinarily not appropriate" in cases of mass tort, because of the likelihood that significant questions of damages, liability and defenses to liability would affect the individuals in different ways.53 There has been no sign to date that class actions are being attempted in mass tort cases, although the need for more efficient methods of disposing of large numbers of cases arising out of a single disaster has a high priority in improving judicial administration.

Especially in situations where action in one court, such as the granting of a protective order, may depend upon or relate to actions taken in similar cases in other courts, satisfactory judicial administration may require a clearinghouse of information on the status and progress of such cases, and on any interrelated pleadings and orders issued therein. The same is true of so-called disaster or mass tort cases. For current suggested procedure in complex and multidistrict litigation, see Manual For Complex and Multidistrict Litigation, including Rules of Procedure of the Judicial Panel on Multidistrict Litigation, West Publishing Co., 1969.

Such a central clearinghouse, using computers for the storing and dissemination of such information, may well become essential in conforming to the mandate of Rule 1 "to secure the just, speedy, and inexpensive determination of every action."

34. Public Papers of the Presidents of the United States, John F. Kennedy, January 20 to December 31, 1961, U.S. Gov't. Printing Office, Washington, 1962, page 2.

CURRENT OPINIONS 1.2 TPLR 2.82

MEMORANDUM OF DECISION AND ORDER
ON
DEFENDANT'S MOTION TO DISMISS

MARIE T. LEE, Plaintiff

DEPARTMENT OF PUBLIC WELFARE & ANOTHER[1], Defendants

Civil Action No. 15385
Superior Court
Commonwealth of Massachusetts

March 31, 1983

In this decision, the trial judge denied the defendant employer's motion to dismiss the complaint of employee Marie Lee, who sought to enjoin her employer from permitting smoking in the open office area where she works. The employer sought dismissal on the grounds that 1) it owed employees no duty to protect them from foreseeable risks of harm in the workplace, and 2) as a state agency, it was protected from suit by sovereign immunity. The court rejected both arguments, holding that the plaintiff had the right to seek injunctive relief against allegedly hazardous conditions in the workplace. The parties subsequently settled the suit. This and other nonsmokers rights cases are discussed in the article "Duty of Employers to Provide a Smoke-free Workplace" at 1.2 TPLR 4.13.

COUNSEL:

Edward Greer, Esq., 133 Mt. Auburn St., Cambridge, MA 02138; and Edward L. Sweda, Esq., 172 Boston St., Boston, MA 02125, for Plaintiff

Ellen Janos, Esq., Assistant Attorney General, One Ashburton Place, 21st Floor
Boston, MA 02203, for Defendants

MULLIGAN, J.:

1. Thomas H. Spirito, Commission of the Department of Public Welfare of the Commonwealth of Massachusetts

FACTS

Plaintiff Marie T. Lee, an employee of defendant Department of Public Welfare (DPW), seeks to have this court enjoin the DPW from permitting the smoking of tobacco products in the common areas of the Attleboro Community Service Area Office where she works. The plaintiff states that in 1976 she first noticed respiratory discomfort caused by cigarette smoke in her workplace. Plaintiff brought her concerns to the attention of the Director of the Area Office who, in 1979, issued a staff memorandum prohibiting smoking except in a designated area of the lunchroom at the facility. This prohibition has never been enforced. She claims that continued smoking in the open office area where she works causes bloodshot and itchy eyes, sinus swelling, watery eyes, altered taste sensations, difficulty in breathing, nausea, lightheadedness, lethargy, emotional distress and presents an increased risk of contracting heart, lung, and other diseases.

DISCUSSION

Upon a Rule 12(b)(6) motion to test the legal sufficiency of a complaint, the motion should be allowed only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief [taking as true] the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor." *Nader v. Citron*, 372 Mass. 96, 98 (1977). The court therefore assumes for purposes of this motion that the plaintiff is in her workplace exposed to conditions which are damaging to her health and that those conditions are not inherent to the work performed and are in violation of regulations promulgated by the employer.

The DPW argues that it owes employees no duty to protect them from foreseeable risks of harm in the workplace. Admittedly our courts have frequently said that "[e]xcept in cases of hidden defects the employer owes no duty to alter the conditions where the work is to be done or to make them safe for the

employee." *Burr v. Massachusetts Electric Company*, 356 Mass. 144, 147 (1969). However, in *Poirier v. Plymouth*, 374 Mass. 206 (1978), the Supreme Judicial Court reconsidered this 'hidden defects' rule and explained that an employer is not liable for the ordinary risks of service, i.e., "those that are inherent in the job and of which the employee is fully aware." *Id.* at 226-27. Giving as an example a worker who is hired to repair a visibly decrepit monument, the *Poirier* court explained that in such circumstances the employee may demand that the monument be fortified or made safe. *Id.* at 227. It appears, therefore, that an employer has no duty to make the workplace safe if, and only if, the risks at issue are inherent in the work to be done. Otherwise the employer is required to "take steps to prevent injury that are reasonable and appropriate under the circumstances." See *Id.* at 228, *Longever v. Revere Copper & Brass*, 1980 Adv. Sh. 1767, 1769 (employer has duty to provide safe workplace). Accordingly, this court cannot say that plaintiff's claim fails to make out a legally cognizable basis for relief.

In addition to questioning the legal sufficiency of plaintiff's complaint, the DPW asserts that this court has no jurisdiction to entertain her claim by virtue of the Commonwealth's immunity from suit under the Doctrine of Sovereign Immunity. The court does not agree.

The original formulation of the Doctrine of Sovereign Immunity was that "the Commonwealth cannot be impleaded in its own courts, except by its own consent clearly manifested by act of the legislature." *Troy and Greenfield Ry. Co. v. Commonwealth*, 127 Mass. 43, 46 (1879). The Doctrine which had the effect of preventing the joinder of the Commonwealth as a party was based on the theory that the State can do no legally cognizable wrong. Consequently our courts, viewing this Doctrine as an absolute bar to actions brought against the Commonwealth as a defendant, struggled with the question of whether by enactment of a particular statute the Commonwealth had manifested consent to be sued. See e.g., *Murdoch Grate v. Commonwealth*, 152 Mass. 28 (1890) (St. of 1877, c. 246 giving Superior Court "jurisdiction of all claims against the Commonwealth whether at law or in equity" did not manifest legislative intent that the State might be sued in tort under theory of *respondeat superior* under same circumstances that natural person could be sued).

In 1973, the Supreme Judicial Court rejected the assumption that Sovereign Immunity could only be waived by an act of the legislature, *Morash & Sons v. Commonwealth*, 363 Mass. 612, 615 (1973), characterizing the Doctrine as merely "judicially created," *id.*, and "logically indefensible." *Id.* at 618, 619. Holding that the Commonwealth in its capacity as a property owner could be sued by an abutter for maintaining a private nuisance, *id.* at 614, the *Morash* Court noted that there has been an inversion of the law: where there is tortious injury by the Commonwealth, there may be recovery unless some exception applies. *Id.* at 621. Preferring to allow the legislature to abolish the doctrine by comprehensive enactment rather than by the piecemeal approach of decisional law, *id.* at 623-24, the court at that time refrained from total abrogation of this doctrine. Nevertheless, the *Morash* Court clearly sanctioned injunctive relief against the Commonwealth when sued in its capacity as a property owner. *Id.* at 613, 624.

In the face of continuing legislative inaction, the court in *Whitney v. Worcester*, 373 Mass. 208 (1977), indicated its intention to abrogate Sovereign Immunity if the legislature did not "act definitively" by the end of the 1978 session. *Id.* at 210. The *Whitney* Court went on to identify the only viable concern which gives the Doctrine of Sovereign Immunity any continuing legitimacy: that public officers, and hence the Commonwealth under the application of *respondeat superior*, should not be subject to the threat of constant judicial review of official acts which involve a high degree of discretion and judgment. *Id.* at 217.

The legislative response to *Whitney* was to enact G.L. c. 258, §2 (as amended through St. 1978, c. 512, §15, applicable to causes of action arising on or after August 16, 1977), which provides in pertinent part that "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his employment, in the same manner and to the same extent as a private individual under like circumstances." The legislation further

provided that the rule of "sovereign liability" should be subject only to limitation on the amount and types of recovery, G.L. c. 258, §1, and to an exception for intentional torts and "discretionary" acts by public officials. G.L. c. 258, §10. Although the legislature did not define "discretionary," this court is led inescapably to the conclusion that the purpose of the discretionary act exception is to abrogate Sovereign Immunity except where "the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning," *Whitney v. Worcester*, 373 Mass. 208, 210 (1977). There is no reason to suppose that affording the plaintiff the injunction she seeks would have the slightest impact upon the public policy and planning aspects of the DPW's function. Moreover, the court notes that G.L. c. 258, §2 retains a limited immunity with respect to damages, not injunctive relief, and is therefore by its own terms not applicable to the case at bar.

The plaintiff seeks only to compel her employer to remedy what she finds to be an unsafe working environment. Assuming that she prevails on the merits, this court finds no basis to distinguish her situation from that of an employee of a non-governmental entity in terms of her entitlement to a safe workplace. See *Morash & Sons v. Commonwealth*, 363 Mass. 612, 614 (1973) (Commonwealth as a landowner subject to same liability for tortious conduct as private person). "States... have always been parties to contracts for... the employment of labor; and the duties arising from such acts have always been fully recognized." *Murdoch Grate v. Commonwealth*, 152 Mass. 28, 31 (1890).

Accordingly, "consistent with the general principle that if there is tortious injury, there should be recovery, and [that] only strong arguments of public policy should justify a judicially created immunity for tortfeasors," *Nogueira v. Nogueira*, 388 Mass. 79, 81 (1983); the court rules that a plaintiff's action for injunctive relief against alleged hazardous conditions in the workplace is not barred by operation of G.L. c. 258 merely because her employer is the Commonwealth where the remedy sought does not infringe upon discretionary policy and planning functions of the State.

To the extent that paragraph 15 of plaintiff's claim alleges emotional distress caused by the apprehension of an increased risk of contracting heart, lung, or other diseases, it is clear that this Commonwealth does not recognize "a right of action for emotional distress and anxiety caused by the negligence of a defendant in the absence of... physical harm where such emotional distress and anxiety are the result of an increased statistical likelihood [that] the plaintiff will suffer." *Payton v. Abbott Labs*, 386 Mass. 540, 544 (1982). Moreover, plaintiff seeks injunctive relief and "[e]quity cannot by injunction restrain conduct which merely injures a person's feelings and causes mental anguish," *White v. Thomson*, 324 Mass. 140, 143 (1949).

Order

For reasons stated, it is Ordered that Defendant's Motion to Dismiss be Denied.

THE TRIAL COURT'S RESPONSIBILITY TO MAKE CIGARETTE DISEASE LITIGATION AFFORDABLE AND FAIR+

William E. Townsley*
Dale K. Hanks**

INTRODUCTION

Fundamental responsibilities of the civil justice system include: (1) making legal services available to victims of legal wrongs; (2) controlling litigation sufficiently to prevent a disparity of resources between the parties from significantly influencing the outcome; and (3) protecting litigants from harassment and undue invasion of privacy. In other words, it is the judiciary's responsibility to make litigation affordable and fair. The judiciary can meet this responsibility by exercising its statutory authority and inherent power.[1] The bar, as officers of the court, has a professionasl responsibility to be supportive, notwithstanding client opposition. The "Big-6" cigarette manufacturers,[2] in defending cigarette disease claims, have adopted strategies to undermine the civil justice system by making the litigation unaffordable and unfair.[3]

This Article is directed primarily to the trial court judge who is or may be presiding over a cigarette disease case. The authors will endeavor to alert the court to destructive defensive strategies, and offer suggestions for protecting the system against these deleterious practices. To focus attention on the trial judge's responsibility, the authors ask the trial judge to assume that a suit has been filed in his or her court by a lung cancer victim against the Big-6 cigarette manufacturers (and their trade and research organizations); and, as soon as answers are served by the defendants, a motion by plaintiff is filed entitled "Motion for Access to the Civil Justice System," which includes the following allegations:

> Plaintiff had great difficulty in securing the services of an attorney to represent him in this cigarette disease claim. When plaintiff's attorney finally consented to represent him, it was on the condition that the trial court would exercise the following controls: (1) That the court would take control of the case to ensure that trial expenses, including those for discovery and expert witnesses, would not exceed the sum of $50,000; (2) That unnecessary time demands on counsel would be eliminated; (3) That the trial on the merits would not take more than three weeks; and (4) That the case would be litigated in a way that the disparity in party resources would not significantly influence the outcome.
>
> Plaintiff would show that the above controls are reasonable and would promote fairness and justice. Plaintiff will honor his commitment to his attorney by allowing him to withdraw if such controls cannot be exercised by the court. In such event, plaintiff will be without counsel and in effect denied access to the civil justice system.
>
> Plaintiff prays that the court, or its appointed special master, undertake to devise a plan for pretrial discovery and the trial of this cause under which the above controls can be exercised, and to issue all necessary orders to implement such plan.

This Article will identify the problem created by the Big-6 cigarette manufacturerss in all cigarette disease litigation. It will then point out the trial court's responsibility and power to address and solve that problem. Finally, this Article will offer specific suggestions on how the court can meet its responsibility in making cigarette disease litigation affordable and fair.

I. THE PROBLEM

Every year more than 300,000 Americans die from smoking cigarettes,[4] and hundreds of thousands more become disease and disabled.

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* Partner, Townsley, Hanks & Townsley, Beaumont Texas. University of Texas (J.D., 1955); North Texas State University (B.A., 1952).

** Partner, Townsley, Hanks & Townsley, Beaumont Texas. University of Texas (J.D., 1984); Lamar University (B.S., 1981).

1. See infra §II.B.

2. Philip Morris, Inc.; R.J. Reynolds Tobacco Co.; The American Tobacco Co.; Brown and Williamson Tobacco Corp.; Lorillard Inc.; and Liggett Group, Inc.

3. See infra §I and Appendices A & B.

4. Public Health Servs., U.S. Dept. of Health and Human Servs, Smoking and Health: A National Status Report (1986).

Most of them began smoking long before the first warnings appeared on cigarette packages in 1966. And in most of these instances a prima facie liability case can be made against the manufacturers of the cigarettes smoked by the victims, as well as against the other major American cigarette manufacturers and their trade organizations for civil conspiracy.

With all these prima facie cases out there, each with significant damage potential, one would expect there would be droves of lawyers signing up these cases and filing them. One would be wrong. There are no droves of lawyers handling cigarette disease cases; there is only a nahdful across the entire United States. The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their cases, no matter how hard they look.

How can this be? People suffering from a cigarette disease often have viable claims with huge damages. Where are the lawyers? They are handling asbestos cases, DES cases, benzene cases, Agent Orange cases and Bendictin cases. They are not handling cigarette disease cases, and the reason why is simple: they cannot afford to. The cigarette manufacturers, through a national team of lawyers, have adopted a uniform strategy of defense designed to ensure that few lawyers can afford to take on a cigarette case, and that even fewer can see the case through to trial. In short, by making the cost of litigation so high, the cigarette manufacturers have closed the courthouse to most people who have gotten sick or died from using their products.

They have done this by resisting all discovery aimed at them, thus requiring a court hearing and order before plaintiffs can obtain even the most rudimentary discovery. They have done it by getting confidentiality orders attached to the discovery materials they finally produce, thus preventing plaintiffs' counsel from sharing the fruits of discovery and forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering, through written deposition, every scrap of paper ever generated about a plaintiff, from cradle to grave.[5] And they have done it by taking endless depositions of plaintiffs, expert witnesses,[6] and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the dilemma of taking numerous expensive depositions or else not knowing what the witness intends to testify to at trial.[7] And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.[8]

All of these tactics expend the resources of plaintiffs' counsel, both from a financial standpoint and from a time standpoint. Of course this costs the tobacco companies a great deal of money too, but clearly money is no object to them. The ordinary market forcs that generally put outer limits on the amount a defendant is willing to spend in defense of a claim do not apply in tobacco litigation. The tobacco companies have shown time and again they are willing to spend whatever it takes to throttle all claims against them. They often boast about never having paid a dime in the settlement of a claim, and their uniform tactics are designed to make good on that boast. Recently, a tobacco industry lawyer, in a confidential memorandum explaining why several California cigarette liability cases were dismissed, revealed the industry's strategy:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won those cases was not by spending all of [R.J.] Reynolds' money, but by making that other son-of-bitch spend all of his.[9]

5. In Duke v. R.J. Reynolds Tobacco, No. E-122,149 (136th Judicial District, Jefferson County, Tex), a case in which the authors are plaintiffs' counsel, the defendants have noticed and taken 93 written depositions to get all of the decedent's school records, employment records, insurance records, and even records from her deceased husband's retirement account. They also have obtained all of decedent's medical records ever generated, including those pertaining to the birth of her children. They have gone so far as to attempt to take possession of all the actual tissue sample slides kept by the hospitals in which she was treated.

6. In two New Jersey cases, Cipollone v. Liggett Group, No. 83-2864 (D.N.J.) and Dewey v. R.J. Reynolds Tobacco Co., No. L-071733-81 (Super. Ct. Bergen County, N.J.), the defendants deposed one of plaintiffs' experts, Dr. Jeffrey Harris, for 12 days and 10 days, respectively. Telephone conference with Cynthia Walters, Budd, Larner, Kent, Gross, Picillo, Rosenbaum, Greenberg & Sade, co-counsel for plaintiffs (Nov. 4, 1988).

7. See, e.g., infra Appendix A(c), Statement of Don Barrett.

8. Id.

9. 3.7 Tobacco Prod. Litigation Rep. 1.94, 3.621 (1968).

Every lawyer who has handled a claim for a tobacco disease victim has met the same uniform defense tactics dictated by the tobacco companies' national team of lawyers. These tactics are implemented by local lawyers, who are hired by that team and who merely follow orders.

Among the lawyers representing plaintiffs in these cases are Marc Edell and Alan Darnell of New Jersey; George Kilbourne and Paul Monzione of California; Dan Childs of Pennsylvania; and Don Barrett of Mississippi. Kilbourne, Monzione, Childs and Barrett have prepared statements outlining their experiences in litigation against the tobacco companies, which are in Appendix A to this Article. Edell and Darnell have furnished sample motions for a protective order and sample affidavits, which are in Appendix B.

The tobacco companies have perverted the judicial system in such a manner as to deny citizens their fundamental rights of access to the courts and trial by jury. It is up to the courts, particularly the trial courts, to regain control of the litigation and to provide a forum in which citizens' rights can be determined based on the merits of their claims, not on the financial resources of the litigants.

II. The Responsibility and Power of the Court to Make Litigation Affordable and Fair

A. The Responsibility

The responsibility of the trial court to ensure that litigation is affordable is set forth clearly and prominently in Rule 1 of the Federal Rules of Civil Procedure: "[These rules] shall be construed to secure the just, speedy and inexpensive determination of every action."[10]

Most states have a similar rule. Texas, for example, has its own Rule 1, which reads:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practible, these rules shall be given a liberal construction.[11]

The numerical position accorded Rule 1 is not coincidental. Rule 1 is not merely a place holder, containing well-meainig but naive aspirations that are to be forgotten in the heat of real world litigation. As Professor Wright has put it, "[t]here probably is no provision in the federal that is more important than this mandate."[12]

But to give life to this mandate in cigarette disease cases, the courts cannot adopt a purely passive role. They must become active participants and demonstrate their willingness to take control of the litigation, particularly in the discovery stage. For if they do not, it is almost certain the tobacc industry defendants will use their nationwide strategy to exhaust the resources of both the plaintiffs and their lawyers long before trial, denying them what Rule 1 promises, and leaving a whole class of plaintiffs without a remedy.

1. The Lessons of Thayer v. Liggett & Myers Tobacco Company-- In late 1969, a tobacco products liability trial was conducted in the U.S. District Court of the Western District of Michigan, Southern Division, Judge Noel P. Fox presiding.[13] The plaintiff was the widow, Leslie Thayer, who sued Liggett & Myers for the death of her husband from lung cancer at age forty-nine. She was represented by two lawyers from a five-member law firm. The defendant was represented by the largest firm in western Michigan, along with another large law firm from New York City. After five weeks of trial, the jury returned a verdict in favor of the tobacco company.

Thayer is significant not because of the jury verdict, but rather because of the remarkable and instructive opinion Judge Fox wrote at the conclusion of the case. In his opinion, Judge Fox characterized Liggett & Myers' pretrial and trial strategy -- including its "insatiable appetite for procedural advantage" -- as having been designed to exploit the great

10. Fed. R. Civ. P. 1.

11. Tex. R. Civ. P. 1.

12. 4 C. Wright & A. Miller, Federal Practice and Procedure §1029 (1987).

13. Thayer v. Liggett & Myers Tobacco Co., 1.2 Tobacco Prod. Litigation Rep. 2.63 (W.D. Mich. 1970).

disparity of resources between the defendant and the plaintiff.

Judge Fox noted that Liggett & Myers was able to isolate the plaintiff's counsel by obtaining a sweeping protective order -- on grounds that later proved illusory -- which prevented plaintiff's counsel from revealing any information acquired throught discovery to anyone other than five expert witnesses. Liggett & Myers, however, was under no such restraints. It had help from tobacco defense lawyers from around the country who were involved in similar cases. Judge Fox noted that the individual tobacco companies, who are in fact competitors in the marketplace, cooperate extensively to defeat cigarette-cancer cases, and therefore the "defendant could bring the aggregate of knowledge and experience in such cases possessed by the entire tobacco industry to bear on the lawsuit."[14]

Judg Fox, relying heavily on Rule 1 of the Federal Rules of Civil Procedure, recognized the court's duty to promote justice and to prevent the disparity of resources between the parties from unduly influencing the outcome of litigation:

> If a party appears to be exploiting its position for the purpose of concealment, delay or other reasons calculated to unduly disadvantage another party in the preparation or presentation of its case, then the court may take such actions into consideration in its procedural and evidentiary rulings.
>
> The day is long past where lawsuits resemble trial by battle. Access to justice therefore cannot depend on weight of resources anymore than upon strength of fists. It is the duty of the courts to insure that wealth and power alone do not determine the lawsuits, and that those elements do not hamper an expedient, inexpensive determination of the merits of each case.[15]

Judge Fox concluded that the vast disparity of resources and the defendant's sophisticated exploitation of the situation approached a denial of due process that would compel the granting of a new trial. He noted, however, that the point was moot, for the plaintiff could not afford further proceedings, her resources and those of her lawyers having been exhausted.

It has been said that "[t]hose who cannot remember the past are condemned to repeat it."[16] The lessons of *Thayer* should not be forgotten, nor the abuses repeated.

B. The Power

The trial court has substantial power to make litigation affordable and to ensure that the wealth of a party does not dictate the results of litigation. This power stems from the rules of procedure as well as from the judiciary's historic and inherent power to ensure access to the civil justice system.

By exercising wide discretion in the use of its power, the trial court may become actively involved in the management and scheduling of pretrial discovery and the actual trial of the case.

1. Pretrial Discovery

a. Exploitation by Wealthy Litigants -- Most would agree that the modern-day discovery rules are useful and necessary for the proper development of a case for trial. And yet, by their very nature, the rules pose an open invitation for overuse by even well-meaning lawyers who are fearful of overlooking something that may prove valuable to their case. But when unbridled and ruthless discovery is deliberately chosen as a strategy for exhausting the opponents' resources, the results are inimical to our sense of fair play and justice, and fly in the fact of Rule 1's admonition.

Supreme Court Justice Lewis F. Powell, joined by Justices Stewart and Rehnquist, recognized this potential for abuse of the discovery rules:

> We may assume that discovery usually is conducted in good faith. Yet all too ofter, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many acttual or prospective litigants. Persons or

14. Id. at 2.68 n.10.

15. Id. at 2.69.

16. 1 G. Santayana, The Life of Reason: Reason in Common Sense (1905).

> businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate.[17]

This is happening in tobacco litigation, and the courts must regain control. In the words of Chief Justice Burger, "[t]he responsibility for control [of pretrial process] rests on both judges and lawyers. Where existing rules and statutes permit abuse, they must be changed. Where the power lies with judges to prevent or correct abuse and misuse of the system, judges must act."[18]

b. The Rules of Civil Procedure-- The Federal Rules of Civil Procedure grant the trial court a variety of methods to control pretrial discovery.

Rule 1, again, is the cornerstone. "The discovery provisions... are subject to the injunction of Rule 1 that they be 'construed to secure the just, *speedy*, and *inexpensive* determination of every action.'"[19] Rule 1 has been relied upon to allow the courts to participate actively in the discovery phase in order to keep the litigation manageable and to minimize expense and inconvenience of the parties.[20]

Federal Rule of Civil Procedure 26(b)(1) allows the court, either on its own initiative or by motion of a party, to limit discovery because of its burdensomeness or cost, and the court may take into account the "limitations on the party's resources." As the advisory committee notes indicate, Rule 26(b)(1) "is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse."[21] Rule 26(b)(1) "contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis."[22]

Rule 26(c) allows the court to control, first, whether or not certain discovery will be allowed, and, if allowed, the method by which the discovery shall be obtained in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...."[23] The Supreme Court has said that under Rule 26(c), "judges should not hesitate to exercise appropriate control over the discovery process."[24]

Rule 26(f) allows the court to set a discovery conference during which the court may establish the ground rules for discovery and issue a scheduling order.[25]

Finally, Rule 37 sets forth a laundry list of sanctions the court may impose for abuse of discovery, ranging from the award of attorney fees to the striking of pleadings.[26]

The Texas Rules of Civil Procedure contain similar provisions.[27]

The rules of civil procedure do not leave a court powerless to prevent a wealthy litigant from abusing pretrial discovery to exhaust the opponents' resources. Far from it. They invest the trial judge with ample powers to control discovery and prevent abuse. Indeed, the advisory committee notes urge more involvement on the part of the trial judges. All that is needed is for trial judges to spend some time to become familar with the litigation tactics of the tobacco industry and to exercise the necessary power to end the abuses.

2. *Trial* -- In addition to controlling and managing pretrial discovery from the onset of a tobacco liability case, trial judges also must control and manage the trial itself. Needlessly long trials with manufactured complexity can sap the resources of a party and produce the same results as abusive pretrial discovery: citizens with valid claims cannot enforce them because lawyers cannot afford to take on such cases.

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17. Order Amending Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, Stewart, Rehnquist, J.J., dissenting) (amending Fed. R. Civ. P. 26, 33, 34, and 37, among others).

18. Address by Chief Justice Burger to American Bar Association Mid-Year Meeting, 6 (Feb. 3, 1980).

19. Herbert v. Lando, 441 U.S. 153, 177 (1979) (emphasis in original).

20. See Sonitrol Distrib. Corp. v. Security Controls, 113 F.R.D. 160 (E.D. Mich. 1986).

21. Fed. R. Civ. P. 26(b)(1) committee notes.

22. Id.

23. Fed. R. Civ. P.26(c).

24. Herbert, 441 U.S. at 177.

25. Fed. R. Civ. P.26(f).

26. Fed. R. Civ. P.37.

27. Tex. R. Civ. P.166, 166b(5), and 215.

The length of trials was the subject of a recent study by the National Center for State Courts which analyzed data from more than 1,500 trials in New Jersey, Colorado, and California courts.[28] Although finding much diversity among the courts, the study identified:

> [A] number of policies and techniques that appear to be used in courts with shorter trial times, including identifying and dispensing with matters not truly in dispute, preventing repetitive testimony, imposing time limits on the time allowed for certain segments of trial, and enhancing the continuity of trials in progress.[29]

The study concluded that trial length can be shortened without sacrificing fairness by increased judicial management of all phases of trial.

Trial courts can control the length and complexity of trials in several ways. They can limit the number of experts a party may use, particularly when the party proposes to use several experts in the same field of expertise, as the tobacco industry does with pathologists. They can impose a variety of time constraints, aimed at limiting the amount of time parties may use at trial.[30] And, courts can and should take judicial notice that cigarette smoking has the capacity to cause lung cancer and other diseases, and should prevent the abuse of the "other potential causes" defense.[31]

In addition to those powers conferred by statute or rule, courts possess "inherent" powers, "not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities."[32] These powers may be called upon the court "to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity. Inherent power of the courts has existed since the days of the Inns of Court in the common law English jurisprudence."[33]

The federal courts, too, recognize the existence of inherent powers on the part of trial courts.[34] Federal Rule of Civil Procedure 83 recognizes such residual power in its final sentence: "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."[35]

If the specific powers of the trial court set forth in the rules of civil procedure are not sufficient to prevent abuses that are calculated to deny citizens access to the civil justice system, then a court surely would be justified in relying on its inherent powers to stop the abuses. Otherwise the promise ofr our judicial system -- equal justice under law -- would be a hollow one indeed.

We will now suggest some specific steps the trial court can take toward meeting its responsibility to make cigarette disease litigation affordable and fair.

III. Improving Affordability and Fairness By Taking Judicial Notice That Certain Types of Harm Are Caused By Cigarette Smoking

It is absurd to litigate the issue of whether cigarette smoking can cause lung cancerr and certain other types of harm. The question was answered decisively long ago by the world's medical and scientific community. No professional group which has studied the issue has reached a contrary conclusion.

The official position of the United States Public Health Service, after exhaustive study, is unequivocal that cigarette smoking is a major cause of lung cancer, as well as several other types of harm.[36] Congress, in effect, has

28. National Center for State Courts, On Trial: The Length of Civil and Criminal Trials (1988).

29. Id. at 64.

30. For a good discussion of the use of time constraints to shorten trials, see Towers, Time Constraints, 6 Rev. Litigation 175 (1987).

31. See infra §§III & IV.

32. Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979).

33. Id. at 398-99.

34. See, e.g., Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 951 (9th Cir. 1976) ("The broad and inherent power of the District Court to regulate litigation before it is supported by abundant authority....").

35. Fed. R. Civ. P.83.

36. See infra Appendix C.

adopted this position.[37] The public health officials of all fifty states concur. So does the World Health Organization.

Why ask jurors to spend countless hours listening to a few experts and lawyers, and then make an independent determination of a fact issue long put to rest by an overwhelming consensus of the world's medical and scientific community? Placing such a burden on a jury, as well as the civil justice system, cannot be justified.

Our nation has made an official finding: Cigarette smoking can and does cause lung cancer. Such finding has persisted for twenty-five years and should, as a matter of law, be deemed as not subject to *reasonable* dispute. Judicial notice should be taken that cigarette smoking can and does cause lung cancer.

Moreover, judicial notice should be taken of the other types of harm caused by cigarette smoking where a strong consensus has been reached and unequivocally adopted by the U.S. Public Health Service.

Where a trial court insists, a plaintiff can follow the traditional procedure for taking judicial notice under the provisions of the applicable rule of evidence which would call for a motion, a hearing and an order by the court. To take judicial notice under the applicable rule, the court must find that disease causation is indisputable, (not subject to reasonable dispute) and that such finding is verifiable.[38]

Before the court begins its task of evaluating the medical and scientific evidence on diseases caused by cigarette smoking, a plaintiff should advise the court that the health effects of cigarette smoking have been the subject of more than 50,000 articles in professional journals; studied by many thousands of individual scientists; studied by many professsional organizations with special competence; and studied by many governments and their agencies.

Obviously, the court, or its special master, could not possibly interview or take the testimony of the thousands of persons who could qualify as causation experts. To make its task manageable and more reliable, the court must give great weight to the findings, opinions and positions of professional organizations with special competence; and the findings, opinions and positions of governments and their agencies which have studied the health effects of cigarette smoking.

The court would be fully justified in finding that the professional organizations with special competence and governments and government agencies, in aggregate, are sources whose accuracy (after their long, exhaustive studies on cigarette disease causation) cannot be reasonably questioned. The mere fact that the tobacco companies can produce a collection of individual experts to advance contrary views should not create enough evidentiary weight to make the dispute on causation a *reasonable* dispute.

Because the consequences of cigarette smoking have been studied so exhaustively and for so long, the court will need to take firm control of the hearing on plaintiff's motion to take judicial notice. In particular, the court will need to determine how much time is to be allotted to taking testimony and determine other methods of presenting evidence for the court's consideration. In fact, the court may wish to appoint a special master for assistance in evaluating the evidence to determine the types of harm as to which there is no reasonable doubt that cigarette smoking is a contributing cause.

If the court feels uncertainty as to whether or not judicial notice on causation is appropriate, then such uncertainty should be resolved in favor of the plaintiff in jurisdictions where appellate review is quickly available. In Texas, the taking of judicial notice on causation would influence discovery rulings, on which there is prompt appellate review by mandamus.[39]

The taking of judicial notice on the capacity of cigarette smoking to cause lung cancer and other specific types of harm will be a significant step toward making cigarette disease litigation affordable as to time and expense.

37. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 (1982 & Supp. IV 1986).

38. Fed. R. Evid. 201(b) and Tex. R. Evid. 201(b).

39. See, e.g., Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984); Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959).

IV. Controlling Big-6 Abuse of the "Other Potential Causes" Defense

A major contention of the Big-6 defendants in tobacco litigation is that plaintiff's cigarette disease could have been caused by agents or factors independent of cigarette smoke. The defense of "other potential causes," if properly pursued, is appropriate. However, the Big-6 have improperly used the defense as a discovery weapon to make cigarette disease litigation expensive, time consuming and oppressive.

The Big-6 contend the "other potential causes" defense in a lung cancer case justifies discovery of the victim's lifetime stress experiences, all personality traits, all genetic factors, all environmental exposures during the victim's lifetime, as well as discovering everything ever taken into his body.

This discovery strategy (if allowed by the trial court, or not challenged by plaintiff) enables a cigarette manufacturer to scrutinize every minute of a person's life, as well as that of his immediate family, ancestors and siblings. They claim this defense confers the right to scrutinize every school record from kindergarten through graduate school; every medical record ever made, whether with hospitals, mental institutions, physicians, pharmacists, insurance companies, or employers; and every scrap of paper that was ever generated by any employer beginning with any part-time work as a teenager. As claimed, this defense would allow the Big-6 to interrogate everyone the smoker ever knew or who ever observed him.

Obviously, allowing such an abusive practice would make any litigation too expensive and unbearably oppressive.

The trial court can effectively prevent the Big-6 abuse of the "other potential causes" defense. To properly use this defense in a lung cancer case, defendants should first present adequate proof (a reasonable probability) that the other agents or factors in fact have the capacity to cause lung cancer independent of cigarette smoke; otherwise, any such agent or factor has no relevance, or such little relevance as to be excludable under Rule 403.[40]

Actually, other probable causes for lung cancer, independent of cigarette smoke, are few in number. To raise a fact issue that a certain agent or factor is a probable cause of lung cancer, independent of cigarette smoke, requires that there be in existence sufficient data to support an expert opinion of causation.[41]

The court should adopt a procedure to identify all of those agents and factors which have the potential to cause the specific cigarette disease in question independent of cigarette smoke. Such other potential causes should be identified before a Big-6 defendant is permitted to engage in any discovery in furtherance of its "other potential causes" defense. Following such a procedure should pose little difficulty for the court, particularly if the court appoints a special master as its scientific advisor.[42]

V. Controlling Discovery by the Trial Court

To prevent Big-6 discovery abuse, it is absolutely necessary for the trial court to take control from the beginning, requiring that all discovery be approved in advance.

The court should decide: (1) whether a particular subject is discoverable, and if so, to what extent; (2) the specific persons who are to supply such discoverable information; and (3) the method of discovering the information, giving preference to the least expensive method that is adequate.

The following discussion will identify some particular subjects of discovery, and suggest appropriate controls by the trial court. The discussion will assume plaintiff is the cigarette disease victime.

A. Plaintiff's Smoking History

Defendants are entitled to discover the brands of cigarettes smoked; the dates each brand was smoked; the quantity of cigarettes smoked at various times; and perhaps other aspects of smoking behavior. The plaintiff smoker, of course, will be the best source of information for his smoking history. Only a few close family members will likely have significant information on his smoking history. The least expensive method of discovering such history is by interrogatories to plaintiff.

40. Fed. R. Civ. P.403 and Tex. R. Civ. P.403.

41. Viterbo v. Dow Chemical, 826 F.2d 420 (5th Cir. 1987).

42. See infra Appendix D which contains a motion and an order which sets out a procedure for defusing Big-6 abuse of the "other potential causes" defense.

Information from a nonparty can be obtained by written deposition. All interrogatories and questions should be approved by the court before being propounded.

B. Plaintiff's Addiction and Efforts to Quit Smoking

Defendants are entitled to discover appropriate information on plaintiff's addiction, if alleged; his attitudes at various times about quitting smoking; and his efforts, if any, to quit smoking. Again, the plaintiff smoker would be the best person to supply this information. Other persons having any significant information would likely be limited to close family members. This information could be obtained through approved interrogatories and supplemented by plaintiff's oral deposition. Information from others can best be obtained by approved questions in written depositions.

C. Plaintiff's Knowledge and Perception of the Risks Posed by Cigarette Smoking

Defendants are entitled to discover planitiff's knowledge (and sources where known), at various times, as to the types of harm that could be caused by cigarette smoking, and his perception of the risk of harm. Plaintiff's beliefs about cigarette disease dangers, as well as the strength of such beliefs, would likely have changed considerably over a period of time. Plaintiff's relevant beliefs would inclulde the probability of being disabled or killed by a cigarette disease, and the extent that probability could be reduced by quitting smoking.

Plaintiff's sources of information influencing his beliefs would be discoverable to the limited extent known. Importantly, our beliefs are often molded or influenced without our awareness.

The plaintiff smoker, of course, is by far the best source of information about his beliefs on given subjects at various times. Other may furnish information on such beliefs if they have been expressed or indicated by the plaintiff smoker.

Reviewing one's beliefs that have been held over a long period of time on various subjects is a time consuming exercise. Oral depositions would not be suitable to secure the best information available on this subject. Interrogatories and written questions would be more suitable, as well as less expensive, both in terms of time and money.

D. Discovery of Other Potential Causes of Plaintiff's Cigarette Disease

Earlier we pointed out Big-6 abuse of the "other potential causes" defense, and suggested appropriate trial court controls.[43] Once the court has identified other causes which have the potential to cause the cigarette disease in question, independent of cigarette smoke, defendants would be entitled to find out if the plaintiff smoker was ever exposed to such other potential causes. This information can best be secured from plaintiff through interrogatories. Discoverable information held by nonparties coule be obtained by court-approved questions in written depositions.

E. Background Information on Plaintiff

Defendants should be allowed to obtain very general information on plaintiff's background such as his family history, formal education and empoloyment history. This information can be obtained through interrogatories.

Plaintiff's employment records should not be discovered except as to exposure data, when available, that pertains to other potential causes of the disease in question. Answers to interrogatories can supply generral information about plaintiff's employment history. Defendants should be prohibited from taking deposition, either written or oral, of the employers, or even contacting such employers without prior approval of the court.

Defendants should be prohibited from discovering any of plaintiff's school records. Defendants can simply be furnished with background information as to schools attended, together with certificates and degrees.

F. Medical Information

Defendants can discover medical information pertaining to the cigarette disease in question, and other medical information reasonably related to plaintiff's claim. All other medical records and information should remain privileged and not subject to any kind of discovery. Discoverable medical information

43. See supra §IV and Appendix D.

can be set out in a discovery order, and plaintiff ordered to furnish same.

The trial court should keep in mind that very little of plaintiff's medical history will have any relevance to his claim based on the cigarette disease.

G. Damages Information

Defendants would be entitled to discover information pertaining to plaintiff's contentions on the various elements of damages such as loss of earnings and earning capacity; medical bills; physical pain and mental suffering; impairment and disfigurement; loss of consortium; and, where applicable, wrongful death damages. This information can be obtained through interrogatories and by the production of medical bills and records on earnings, and supplemented by oral depositions to the extent allowed.

H. Limiting the Use of Oral and Written Depositions

Cigarette disease litigation can never be made affordable and fair unless the trial court severely limits the use of oral and sritten depositions by Big-6 defendants. Limitations must be placed on the number of depositions, their duration, and the subjects of inquiry. The discovery controls already discussed will greatly diminish the need for deposition discovery.

While controlling discovery on permissible subjects, the trial court should identify those subject as to which discovery is forbidden. Defendants should be expressly prohibited from engaging in discovery of stress experienced by plaintiff during his lifetime, except that caused by the cigarette disease in question; from gathering information for a personality profile on the plaintiff smoker; from gathering information from insurance companies; and from conducting any type of private investigation of plaintiff or others without timely apprising the court of same.

VI. Controlling the Use of Expert Witnesses

The trial court, in making cigarette disease litigation affordable and fair, must exercise considerable control over the use of expert witnesses. It will be necessary for the court to limit the number and kinds of experts; to determine what informatioin each testifying expert must furnish to the opposing party; and to determine when oral or written depositions are to be allowed, and if allowed, to determine appropriate limitations as to scope and duration. Many potential experts needed by cigarette disease victims will be unavailable unless reasonable time restriants are imposed by the court.

Potential medical experts will include those involved in the examination, diagnosis, and treatment of the cigarette disease victim. The records pertaining to such examinations, diagnosis and treatment should be furnished by plaintiff to defendants at cost.

Potential medical experts will include those involved in the examination, diagnosis, and treatment of the cigarette disease victim. The records pertaining to such examinations, diagnosis and treatment should be furnished by plaintiff to defendants at cost.

If a treating physician is to be called as a witness, Texas courts, pursuant to Texas Rule of Civil Procedure 166b(2)(e)(1).[44] No further discovery should be made of treating physicians except by court order.

Each party will be using, subject to court approval, a number of testifying experts who have not provided health care services to the plaintiff. While varying from case to case, such experts may include a pulmonary specialist; a radiologist; a pathologist; an addiction expert; a public relations expert; a behavioralist; an economist; and a state-of-the-art expert, or medical historian, on matters relevant to the civil conspiracy and fraud causes of action, and claims of gross negligence. With such a large variety of potential experts, the court must restrict the parties to only one expert in each field; prohibit or severely limit depositions of experts; and carefully limit the duration of each expert's testimony.

Assuming the court has taken judicial notice that cigarette smoking causes the cigarette disease in question, the court should prohibit any testifying expert from suggesting, directly or indirectly, that cigarette smoking is not an established cause of such disease. In other words, defendants would not be permitted to present experts who would contradict in any way judicially noticed facts.

44. Tex. R. Civ. P.166b(2)(e)(4) and Tex. R. Civ. P. 166b(2)(e)(1).

The court should require that a major portion of the expert testimony be furnished by video deposition. Requiring expert testimony by video deposition will decrease the time demands on experts and shorten the trial. In time, video depositions taken in other cases can be utilized, thereby making the litigation even more affordable as to time and expense.

The jury is entitled to receive expert testimony that is understandable in content, and presented with as much brevity as clarity will permit.

The busy trial court judge may find it helpful to appoint a special master to prepare a proposal for controlling the use of experts in a manner to make the litigation affordable and fair.

VII. In Camera Monitoring of Litigation Activities

In making cigarette disease litigation affordable, the trial court will have taken a major step toward preventing a disparity in party resources from substantially influencing the outcome of the litigation. But even more needs to be done.

In resisting cigarette disease claims, the Big-6 have engaged in certain activities offensive to the civil justice system.[45] In a Mississippi case, the American Tobacco Company hired local citizens as "jury consultants." This practice points out the need for the trial court to be alert to any efforts to improperly influence the jury, or to contaminate the jury panel.

Private investigations by the Big-6 into the personal lives of litigants appear to be a routine practice. The trial court has a duty to protect litigants from tactics that offend ordinary sensibilities. When one avails himself of the civil justice system, he does not consent to an unreasonable invasion of privacy.

Community surveys, with their potential for abuse, have reportedly been conducted by tobacco defendants. Such behind-the-scene activities, as conducted in the past by members of the Big-6, constitute good cause for close *in camera* monitoring by the trial court. Full disclosure of such activities can be required of Big-6 attorneys of record, as officers of the court. The trial court can require periodic affidavits by Big-6 executives to uncover any activitites not made known to their attorneys of record.[46]

The trial court, when appropriate, can take whatever action is reasonable and necessary to protect the integrity of the civil justice system.[47]

Conclusion

The trial court is responsible for making litigation affordable and fair. To meet this responsibility in cigarette disease cases, the trial court must take firm action to counter oppressive litigation tactics that are routinely employed by the Big-6 cigarette manufacturers. Liberal use should be made of special masters.

Suggested action by the trial court includes taking judicial notice of the types of harm caused by cigarette smoking; defusing the Big-6 abuse of the "other potential causes" defense; controlling the scheduling, methods, and breadths of discovery; controlling the use of expert witnesses; and conducting an *in camera* monitoring of litigation activities in order to detect and correct any deleterious practices.

Unless deterred, the Big-6 tobacco companies will continue their abuse of the civil justice system until all of their adversaries are crushed. The only possible deterrent is a courageous and resourceful judiciary. The ball is, indeed, in its court.

Appendix A

A. Statement of Daniel G. Childs

Daniel G. Childs, being duly sworn according to law, testifies as follows:

1. I, Daniel G. Childs, am an attorney at the law firm of Joseph D. Shein, P.C. in Philadelphia, Pennsylvania, located at 235 S. 17th Street, Philadelphia, PA.

2. I became involved in tobacco litigation in December 1985, with the filing of two cases against various tobacco manufacturing companies, including American Tobacco, Philip

45. See infra Appendix A.

46. See infra Appendix A.

47. See infra Appendix A.

Morris, and R.J. Reynolds. These defendants were represented by Baskin, Flaherty, Elliott & Mannino of Philadelphia and Chadbourne & Parke of New York (American Tobacco); Shook, Hardy & Bacon of Kansas City, Arnold & Porter of Washington, D.C., and Dechert Price & Rhoads of Philadelphia (Philip Morris); and Womble, Carlyle, Sandridge & Rice of Winston-Salem and Rawle & Henderson of Philadelphia (R.J. Reynolds).

3. In June 1988 we went to trial against American Tobacco on one of our cases. During trial, lawyers from American contacted at least one of plaintiff's experts the evening before he was to testify, without notifying plaintiff's counsel or the court.

4. For nearly three years I have been engaged in preparing these cases for trial, and have been amazed at the discovery tactics used by opposing counsel. For example:

a. Depositions last for days. A widow/plaintiff was questioned about dating men subsequent to her spouse's death. Her daughter was asked what she told her psychiatrist, and what her psychiatrist told her.

b. Numerous irrelevant depositions are noticed and taken in every possible jurisdiction. A classmate is deposed in Florida to testify what a football coach told the varsity team. The decedent was never on that team. Neighbors are questioned about the decedent's skeet shooting and what he made skeet out of. Next door neighbors are deposed. Records from all corners of the country are gathered.

c. Numerous expert witnesses were listed in defendant American Tobacco's pretrial for a case which went to trial in June, 1988. Only four were called as witnesses.

d. Defendants make it extremely difficult to take any depositions of corporate personnel. Depositions noticed by plaintiff are unilaterally postponed.

e. Every effort is made by the defendants to uncover every "piece of dirt" on the client. Fights with children, run-ins with the law, etc. are all looked for. However, with regard to discovery, defendants' position is that "what's mine is mine, what's yours is negotiable."

f. Every effort is made to ensure that the plaintiff's counsel around the country do not communicate about discovered materials. Even if counsel are given identical materials, the defendants take the position that these counsel should not be able to discuss such materials.

g. Materials produced are often totally irrelevant, and sometimes border on the absurd. E.g., trade journals on bovine lactation.

5. The defendants in these cases have spared no expense. Numerous out of town attorneys show up for routine hearings. Pleadings are voluminous. Every issue brought to the court's attention is revisited over and over. Costs to plaintiff's counsel are staggering.

6. From my experience, the best possible pretrial course which could be effected by a court would be to set firm pretrial deadlines with blocks of time set out for either side to do discovery. Courts should actively be involved with scheduling discovery. Protective orders should be discouraged, as they prolong discovery by prohibiting sharing of information. Experts should be limited by the court; depositions should be limited by the court; and out of town depositions should be discouraged absent a showing of good cause and offer of proof.

B. Statement of Paul M. Monzione, Esq.

Paul M. Monzione, Esq., being duly sworn according to law, testifies as follows:

1. That I am an attorney at law duly licensed to practice before the courts of the State of California and the Commonwealth of Massachusetts and am a member of the Law Offices of Melvin M. Belli, Sr., 722 Montgomery Street, San Francisco, California 94111.

2. As a member of the Law Offices of Melvin M. Belli, Sr., I have been involved in tobacco litigation representing various plaintiffs since approximately 1981. Although I have filed several cases on behalf of plaintiffs against various tobacco companies, only one has made it to a jury verdict conclusion, namely, *Galbraith v. R.J. Reynolds Tobacco Company*, tried in

Santa Barbara, California, in 1985. The *Galbraith* case was the first cigarette product liability case to come to trial in over twenty-five years, and until very recently, was the only cigarette case to reach a jury verdict since the cases of the early 1960s.

3. The *Galbraith* case was brought as a personal injury case on behalf of Mr. John Galbraith with a claim for loss of consortium on behalf of his wife, Elaine Galbraith. While the litigation was pending, Mr. Galbraith died, and the action was amended to include his heirs in a wrongful deatth action. Mr. Galbraith's estate was probated to bring a survivorship action under appropriate California law.

4. There were approximately six law offices representing the Defendant, R.J. Reynolds Tobacco Company in the *Galbraith* case. The principle attorneys were the Law Offices of Lawler, Felix & Hall in Los Angeles, California, with Thomas Workman and John Nyhan as the trial attorneys. The Law Firm of Archibald & Spray, in Santa Barbara, California, acted as local counsel. There was also a New York law firm, an outside law firm which was corporate counsel for R.J. Reynolds Tobacco Company, and the law Offices of Jones, Day, Reavis & Pogue, a member of which was admitted *pro hac vice* and acted as co-trial counsel. During the actual trial, R.J. Reynolds had three trial attorneys at counsel table, and at any given time, it was reported that there were approximately thirty-two attorneys actively involved in the preparation and/or actual trial.

5. The tactics of defense counsel in the *Galbraith* case were typical of those I observed in previous cases. Initially, subpoenas were sent out to any and all institutions of any kind with which Plaintiff and/or his family had any conneetion, such as, all of Mr. Galbraith's former employers dating back to the time that Mr. Galbraith was a very young man and all of the financial records pertaining to any and all businesses in which Mr. Galbraith had any interest. Any and all of his medical records, or psychiatric records, and school records were also subpoenaed. Through demands for production of documents, Defendants also obtained Christmas cards, family diaries, phone logs, lists of members who attended family weddings and/or birthdays, and several other such items.

6. Once Defendant had obtained all of this documentary discovery, the Defendants then began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States. Defendants deposed anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived. These depositions would last for hours, and very little, if any relevant or admissible evidence would be obtained. In one instance, counsel for the parties flew to Arizona to depose the invalid, former and elderly spouse of Mr. Galbraith. This deposition was taken in her living room. Mrs. Galbraith, John Galbraith's widow, was deposed for approximately ten days. Mrs. Galbraith's mother was deposed for several days. In all, thousands of hours were spent in depositions, at tremendous costs and inconvenience to counsel for Plaintiff.

7. Defendants justified these depositions by arguing that the nature of cancer as a disease required that they obtain any and all information possible regarding whether Mr. Galbraith ate red meat, or used pesticides in his garden and other such remote subjects. Such discovery is obviously designed to harass plaintiffs and make these cases more costly than they need to be.

8. At the same time that Defendants were conducting burdensome and unreasonable discovery, they were objecting to the vast majority of interrogatories propounded by Plaintiff, and causing Plaintiff to file motions to compel discovery responses. Most of Plaintiff's motions to compel discovery were granted by the trial judge, but only after great time, inconvenience, and expense.

9. Tobacco litigation cases can be brought cost effectively, but not if defendants and their counsel are allowed to engage in what is obviously an approach designed to dissuade and deter plaintiffs from bringing other cases and to force plaintiffs to dismiss these cases rather than try them. From my experience in these cases, it would be in the interest of all parties if trial judges would require status conferences shortly after responses to complaints are filed and work with the attorneys in setting up manageable discovery schedules under the inherent powers of the court to manage their own calendars and to supervise the litigation. An orderly process of discovery should be imposed whereby defendants are limited to obtaining only that information which bears directly on the issues in the case, and if remote

depositions or other remote discovery is requested by defendants, the trial court should require a showing of good cause before plaintiffs are put through the time, inconvenience and expense of such discovery.

C. Statement of Don Barrett

Don Barrett, being duly sworn according to law, testifies as follows:

1. My name is Don Barrett. I am one of the attorneys who tried the *Horton v. American Tobacco Company* case (Holmes County, Mississippi, Circuit No. 9050), which resulted in a hung jury in January of 1988.

2. I am also lead counsel in *Wilkes v. American Tobacco Company*, (Holmes County, Mississippi, Circuit No. 9383), which was filed in December 1987, and which has not yet come to trial.

3. I am well aware of the openly abusive tactics employed by the cigarette industry. In the *Horton* case, the cigarette company defendants took 107 depositions, many of out-of-state persons, and used only two of them at trial. They asked endless questions purportedly to establish some occupational or environmental causation of Mr. Horton's cancer, even though their own medical experts had already told them that there was no medical basis for such a defense.

4. In the ongoing *Wilkes* case, defense counsel has advised me that they presently plan to take between 45 and 135 fact witness depositions.

5. As far as expert witnesses are concerned, the defendants listed approximately twenty expert witnesses of their own, and only used four of them at trial.

6. The various tobacco companies work in concert on these cases. For example, one of the defense lawyers in *Horton* told me that R.J. Reynolds took a very active role in the *Horton* defense, even though R.J. Reynolds was not even a named defendant, and that R.J. Reynolds spend more money on the *Horton* case than did the real defendants.

7. The *Horton* defendants never voluntarily answered any discovery. Each time the plaintiff's lawyers had to force the answers from the defendants with motions to compel. On one occasion the American Tobacco Company (ATC) was ordered by the court to produce its list of ingredients in Pall Mall cigarettes. ATC filed an emergency appeal to the Mississippi Supreme Court, rather desperately complaining that this list was a priceless "trade secret," the disclosure of which would be devastating to the company. The Mississippi Supreme Court ordered the list produced, under a tight protective order. Then, at the trial, ATC's corporate representative himself produced the list for the jury and testified that there was nothing secret about any of the ingredients, and they were glad to share this list with the public.

8. I strongly believe that the only effective and efficient way to stop these discovery abuses is for the trial court to condition the discovery depositions demanded by the tobacco company upon the payment by the tobacco company of all of the plaintiff's expenses, including attorneys' fees. Rule 1 of the Federal Rules of Civil Procedure says the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 26 of the Federal Rules of Civil Procedure is identical to Rule 26 of the Mississippi Rules of Civil Procedure in that both provide for "allocation of (discovery) expenses" by the trial court. The official comment to the Mississippi Rule 26 states:

> This provision would permit the court, as justice dictates, to re-assign the usual financial burdens of discovery. For example, a court might condition discovery damended by party A upon the payment by A of all or part of party B's expenses, including attorneys' fees.

9. Requiring the tobacco company to pay a plaintiff's expenses and legal fees foir the discovery demanded by the tobacco company will act as an automatic governor to prevent abusive discovery and make more temperate the use of discovery depositions by the defendants. The knowledge of the tobacco company that it cannot run a plaintiff out of the litigation with oppressive discovery will keep much of the useless discovery from taking place.

D. Statement of George W. Kilbourne

1. Declarant-- George W. Kilbourne being duly sworn according to law, testifies as follows: I am a solo practicioner with an office located at 3755 Alhambra Avenue, Martinez, California 94553. I make this Declaration in such capacity and in support of an article detailing the tactics of tobacco companies in furtherance of their objective in attempting to make tobacco litigation too expensive for the ordinary plaintiff and the small office.

2. History of Involvement-- I first became involved in tobacco litigation in 1980, in representing the widow of Harold Browner, who died of lung cancer caused by the synergistic effect of inhalation of asbestos fibers and tobacco smoke. Since then, I have had up to fifteen cases on file involving the same problem. At the present time, I have fourteen cases on file in Contra Costa County, California, all syergism cases. The cases are all stayed by the California Court of Appeals, First District (San Francisco) until it rules on a Petition for Writ of Mandate brought by tobacco companies under Section 1714.45 of the California Civil Code (A section enacted in 1987, on the last day of the legislative session purporting to do away with tobacco products liability suits. Two attorneys from Covington & Burling, Washington, D.C., representing The Tobacco Institute, assisted in drafting the statute).

3. Case Types-- All of the cases I have, except one, are asbestos/smoking synergism cases, filed in Alameda County, California or Contra Costa County, California. The lone Alameda County case (*Root*) was dismissed at the direction of the client after the discovery practices invaded her privacy so much that she could not take it. (The intensive questioning on the reason for her son's suicide was too much.) The other case was filed in San Diego County. It is on hold pending determination of the Petition for a Writ of Mandate, referred to above. The cases have involved six major cigarette manufacturers, two cigar manufacturers (Culbro and Swisher) and one pipe tobacco case (Culbro). Each of the defendants has both local counsel, and out-of-state counsel. Shook, Hardy & Bacon of Kansas City, Missouri appear on cases involving Philip Morris, represented locally by two firms, Brown & Williamson and Lorillard. R.J. Reynolds (RJR) was originally represented by the Brobeck office in San Francisco and Jacob, Menninger & Finnegan of New York. In quick succession, RJR fired Brobeck when it lost a motion to remand from federal court, hired Morrison & Forrester (San Francisco), then fired that firm for the same reason, hired Lawler, Felix & Hall (Los Angeles), then hired Pillsbury, Madison & Sutro (who represented American) when the three Lawler attorneys went to Pillsbury, Madison & Sutro. Currently RJR is represented by Howard, Rice (San Francisco) and the Womble firm of Winston-Salem, (N.C.). Philip Morris always appears at deposition with local counsel and a lawyer from Washington. American appears by Pillsbury, Madison & Sutro and New York counsel. Liggett appears with local counsel (Lillick) and New York counsel. Swisher appears with local counsel and New York counsel. Culbro appears with local counsel and New York counsel (Jacob).

4. Discovery-- Discovery practices of all defendants follow the same pattern. A deep investigation is made of the plaintiff, the entire family and relatives. This is done by using an investigative firm from Los Angeles with local connections. Inquiries are made up and down the street, of all known friends (e.g., such as who attended decedent's funeral, ex-wives, fishing buddies). Typically, plaintiffs are kept under surveillance from a van, and their activities monitored (e.g., contacting their minister or place of employment).

Oral depositions of plaintiffs are searching and in depth. Reasons are given in discovery motions which show that each area has been well thought out. A check list is used, which is thirty to forty pages long. Each attorney deposing a plaintiff has a dossier on the plaintiff, complete with family tree, work history, psychological profile, and such other material as is available.

After the plaintiff's deposition, the defendants then depose every person whose name comes up, either in-state or out-of-state. In *Browner*, twenty-eight such depositions were taken; in *Sahli*, twenty-three; in *Page*, eighteen; in other cases, a lesser number, but the cases are not as far along. (In *Sahli*, a person was contacted in Alaska who had not seen the parties for over ten years. In *Browner*, a deposition was taken of a man who had seen Browner on only two occasions in twenty years outside his job at Juvenile Hall. The witness said he had never seen Browner smoke. There is a rule against smoking at Juvenile Hall. One of the two times he visited Browner [was] when Browner was in an oxygen tent dying. The only

other time was when he ran into Browner at Safeway, where they chatted for about five minutes.)

Typically, all records are obtained regarding the decedent or plaintiff. Elementary school records from the 1930s from a small town in Kentucky were obtained. When an objection was made, the explanation was that he might have had a health course in the elementary grades. All elementary records of every job ever held are obtained.

The entire residence history is obtained, on the ground that the plaintiff/decedent may have lived near an industrial complex, inhaled smog, used pesticides, lived in a house with a coal stove, or with chemicals in it, etc., *ad nauseam*.

The entire medical history is sought, on the ground that the victims condition could have been caused by something else. This includes juvenile shot records and the history of juvenile and adult diseases, including any that could have been sexually transmitted.

Expert depositions are brutal and long. Dr. Bordow, for instance, who testified in *Galbraith* for Belli was deposed for four days, three of which failed to mention the decedent, and covered the exact same area as his deposition in *Galbraith* and his trial testimony. The psychologist was deposed for three days covering sentence by sentence the statements in his written report. (In one four-hour session, Grady Barnhill of the Womble firm consumed three cigars, not by smoking them, but by eating them!) The defendants themselves have a long list of experts and typically will ask one doctor, such as an oncologist, if he relies on the cell-type determination of a pathologist in structuring his treatment. This has the effect of increasing the necessity to call the pathologist, and increase the cost of litigation.

One the other hand, no tobacco company will answer even simple questions such as its structure, corporate history, or insurance coverage. More information can be obtained by getting an annual report than what the lawyers will give up in discovery. When discovery is tendered, it is always done so with the proviso that the information be given under a protective order, and only for use in the instant case. This, of course, requires motions in every attempt at discovery and increases the cost enormously.

5. *Tactics*-- No cases have been taken to trial. However, as trial approached, several motions for summary judgment were filed. The present stay is the result of one such motion for judgment on the pleadings. (In *Sahli* three attempts were made, resulting in inconsistent rulings by the trial judge.) One strange tactic has emerged in cancer cases. The cancer type is always accused of being some strange, nonsmoking type. This has been the position of the tobgacco companies successively in *Browner v. R.J. Reynolds Tobacco Co.*,[48] *Sahli v. Manville Corp.*,[49] *McCuan v. Fibreboard, Inc.*,[50] *Galbraith v. R.J. Reynolds Tobacco Co.*,[51] (Belli), *Cipollone v. Liggett Group*,[52] (Edell) and *Marsee v. United States Tobacco Co.*[53] (smokeless tobacco). It has now been learned that several consultants are hired until a spurious diagnosis is found which differs from all others, and it then becomes the diagnosis of the named "expert." In every cancer case that has gone to trial or approached trial, this clearly illegal, immoral and unethical manufacturing of evidence has occurred. (This should be compared to the tactics of defendants in *Galbraith* and *Horton* where jury tampering was charged against them, but never proved.)

6. *Cost of litigation*-- The cost of tobacco litigation is excessive. The tactics result in running up the cost astronomically on every case. I was sent an in-house memorandum from the Womble firm -- it came in a blank envelope -- acknowledging the practice of running up the cost to make the litigation too expensive, especially for solo practitioners. I have been in other complex litigation -- asbestos, welding fume and friction asbestos. They are expensive, but only the welding litigation has even approached what defendants do to run up the cost of litigation.

7. *Recommendations*-- If the civil justice system is to survive, it is recommended that direct and immediate steps be taken to preserve it, including the following:

48. No. 186-692 (Contra Costa City, Cal. Super Ct. 1981).

49. No. 230512 (Cal. Super. Ct. filed May 14, 1987).

50. No. 288330 (Contra Costa City, Cal. Super. Ct. July 3, 1986).

51. No. 144417 (Cal. Super. Ct. Dec. 18, 1985).

52. No. 83-2864 (D.N.J.).

53. No. 84-2777 (W.D. Okla. Nov. 13, 1984).

a. Designate the litigation as complex, such as under Rule 19, California Judicial Council Guidelines;

b. Place the cost of delay and increase in complexity on the perpetrator and enforce it;

c. Set out, when a case is filed:

1) Pleading standardizations;

2) Limits on the number of depositions;

3) Limits on the length and content of depositions;

4) Standardize and limit interrogatories;

5) Limit experts in number, designation and content of depositions;

6) Limit law and motion;

7) Provide limitations on investigative work;

8) Provide sanctions for harassment.

d. Investigate the manufacturing of evidence, such as dealing with the cell-type manufacture as a fraud on the court;

e. Limit *pro hac vice* admission of out-of-state counsel;

f. Limit issuance of commissions for out-of-state depositions;

g. Adopt a realistic attitude on issuance of protective orders;

h. Deal with refusals to produce reasonable discovery with sanctions including contempt;

i. Limit lawyer participation (twenty-five lawyers for the defense, ten from out-of-state, showed up at the trial court level on the argument on the judgment on the pleadings. Twenty-seven appeared at argument on the petition for writ of mandate before the Court of Appeal.)

j. Severely limit use of trade secret arguments on additives. The defendants' attorneys switch law firms representing different brands at the drop of a hat, but then argue that each brand has its own trade secrets.[54] This seriously hampers discovery, and showing causation, not to mention the effect on research.

APPENDIX B

A. Sample Affidavit in Support of Plaintiff's Motion for Protective Order and Setting Forth Compliance with Local Rule 15(c)[55]

Alan M. Darnell, of full age, being duly sworn according to law, deposes and says:

1. I am an attorney-at-law of the State of New Jersey, am a shareholder in the firm of Wilentz, Goldman and Spitzer, a Professional Corporation, and have been responsible for the handling of the within matter since its inception.

2. In this case, plaintiff, Ann Marie Barnes, the widow of Raymond Barnes, alleges that her husband's death from lung cancer was caused by many years of cigarette smoking. To date, defendant, R.J. Reynolds has taken twenty-five depositions of various members of Mr. Barnes' immediate family, his relatives, and his acquaintances.

3. Plaintiff and her counsel did not seek relief from this court during the long ordeal imposed by the above depositions. However, plaintiff's counsel received notices to depose ten additional people.

4. In an effort to satisfy the requirements of local rule 15(C), on September 17, 1986, I spoke to Alan Kraus, an attorney with the firm of Riker, Danzig, Scherer, Hyland & Perretti, counsel for R.J. Reynolds in this matter. I requested that R.J. Reynolds not take the additional depositions for the reasons that they were cumulative. I also represented to Mr. Kraus that plaintiff has no present intention of calling these persons to be witnesses at the time of trial; moreover, the persons set forth were not named by plaintiff in her answers to interrogatories as persons with relevant knowledge of the within matter. I also

54. In California, Evidence Code Section 1060 extends a trade secret privilege only if it "will not tend to conceal fraud or otherwise work injustice." It is submitted that it is being used both ways. Cal. Evid. Code §1060 (Deering 1986).

55. This sample affidavit was taken from Barnes v. R.J. Reynolds Tobacco Co., No. 84-56 (AET) (D.N.J. filed Sept. 22, 1986).

requested Mr. Kraus to adjourn any depositions scheduled prior to the return of this motion (October 20, 1986) and informed him that I would be making this motion. Mr. Kraus informed me that R.J. Reynolds would adjourn the depositions scheduled prior to October 20, 1986, but would not withdraw the deposition notices and subpoenas issued regarding the additional persons.

5. Because "enough is enough," and because R.J. Reynolds is not precluded from interviewing the persons in question, and obtaining signed statements from them, and indeed, subpoenaing those persons to testify at time of trial, and will thus suffer no prejudice if the depositions in question are barred, plaintiff respectfully requests this court to order that the depositions in question not be taken.

B. Sample Motion for a Protective Order[56]

Legal Argument-- The requested discovery is unreasonably cumulative and unduly burdensome. Therefore, a protective order should issue that discovery not be had.

The general rule is that parties may obtain discovery regarding any matter relevant to pending litigation.[57] However, the district court has historically had broad power to prevent discovery abuse.[58] District courts have traditionally balanced the merits of the discovery request against the burden of the request to the aggrieved party.[59] A protective order for the aggrieved party is the appropriate judicial response to prevent unduly burdensome requests.[60]

As discovery abuses became more frequent, the balancing test was codified in a 1983 amendment to the Federal Rules of Civil Procedure. F.R.C.P. 26(b)(1) now provides a caveat to the general scope of discovery:

> The frequency or extent of use of the discovery methods... shall be limited by the court if it determines that: (i) *the discovery sought is unreasonably cumulative or duplicative*, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) *the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought*; or (iii) the *discovery is unduly burdensome or expensive.*[61]

The 1983 amendment was intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.[62] To withstand judicial scrutiny, the information sought through discovery must not only be relevant, but also must be of "sufficient potential significance" to justify the time and expense involved.[63]

Defendant's most recent discovery requests do not meet this standard. Defendant has conducted exhaustive depositions of several individuals associated with Mr. Barnes. Defendant has deposed Mr. Barnes' wife; his seven children; his two brothers; his sister; his two sisters-in-law; two brothers-in-law; a daughter-in-law; his wife's two aunts; and his aunt and an uncle by marriage. Moreover, defendant has conducted long and searching depositions of at least five other acquaintances of Mr. Barnes. These individuals were politically, professionally or socially associated with Mr. Barnes. All deponents testified at length regarding Mr. Barnes' involvement with his family; his church-related activities; his involvment in local politics; his professional life; and his social activities.

Dissatisfied with the testimony presented, defendant has now noticed ten more individuals to be deposed in this case. These individuals are also asserted to be political, social and professional acquaintances of Mr. Barnes. Although these persons no doubt have some knowledge concerning the life of Raymond Barnes, plaintiff seriously doubts that these witnesses will provide any useful information that has not already been

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56. This is a sample motion for a protective order taken from Barnes v. R.J. Reynolds Tobacco Co., No. 84-56 (AET) (D.N.J. filed Sept. 22, 1986).

57. Fed. R. Civ. P.26(b)(1).

58. Jones v. Pennsylvania Greyhound Lines, 10 F.R.D. 153, 154 (E.D. Pa. 1950); Essex Wire Corp. v. Eastern Elec. Sales, 48 F.R.D. 308, 310 (E.D. Pa. 1969).

59. Roesberg v. Johns-Manville Corp., 85 F.R.D. 292 (E.D. Pa. 1980); Superior Coal Co. V. Ruhrokohle, A.G., 83 F.R.D. 414, 422 (E.D. Pa. 1979).

60. Fed. R. Civ. P.26(c).

61. Fed. R. Civ. P.26(b)(1) (emphasis added).

62. Id. comment.

63. In re Convergent Technologies Sec. Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985).

established again and again by prior deponents. Mr. Barnes was actively involved in community affairs throughout his lifetime. He had many professional, political and social acquaintances. Undoubtedly, all these persons would be competent to provide relevant testimony to defendants.

However, common sense dictates that there is a point at which such a discovery procedure lacks merit. Defendants have volumes of testimony regarding all aspects of Mr. Barnes' life. Defendants are of course free to interview any individual regarding his or her contacts with Mr. Barnes. However, there is no good reason to depose more individuals on these issues. Plaintiff has no present intention to call any of the ten individuals noticed as witnesses at trial. Therefore, any information gained at further depositions will be cumulative and unnecessary, adding nothing to the disposition of this case.

Finally, the requested discovery unduly burdens plaintiff and demonstrates defendant's desire to use its superior financial resources as a tool to thwart the litigation process. Discovery is expensive, in terms of time and money. While defendantss may have the attorneys and support staff to accommodate its discovery desires, plaintiff certainly does not. It is patently unfair to requrie plaintiff's attorney to spend the time and money preparing for and participating inten more depositions that will only yield cumulative information that defendant has had ample opportunity to previously procure. Plaintiff, therefore, urges this Court to say, "enough is enough," and issue an Order preventing the requested recovery.

C. Sample Affidavit in Opposition to Motion to Take Depositions Out of State[64]

Alan M. Darnell, of full age, being duly sworn according to law, deposes and says:

1. I am an attorney-at-law of the State of New Jersey, am a shareholder in the firm of Wilentz, Goldman & Spitzer, a Professional Corporation, and am one of the attorneys responsible for the handling of the above matter.

2. There comes a point in all human endeavors, including litigation, that fundamental fairness demands that one say "enough already." Accordingly, plaintiff's counsel submits this Affidavit in opposition to defendant, Brown & Williamson Tobacco Corporation's motion, returnable on December 20, 1985, for an order directing that the following depositions be taken out of state:

a. Paul McHugh, an alleged employee of Merrill, Lynch, Pierce, Fenner & Smith, Inc. Defendant's Notice of Motion indicates that Mr. McHugh presently lives in New York and was a co-worker of Wilfred E. Dewey.

b. Philip Colon, another employee of Merrill, Lynch, Pierce, Fenner & Smith, Inc.

c. Jacob Weissman, M.D., identified in defendant's moving papers as Chief Medical Officer of Merrill Lynch. According to the Notice of Motion submitted by defendant, the alleged purpose of this deposition is to explain the medical records of Mr. Dewey generated at Merrill Lynch.

d. David Marshall, M.D., identified in defendant's moving papers as Medical Director of Sanders Associates, Inc., a former employer of Wilfred E. Dewey. Presumably, the purpose of this deposition is to similarly explain any medical and health records of Wilfred Dewey generated while Mr. Dewey was employed at Sanders Associates, Inc.

e. Defendant seeks to depose the Custodian of Records for Varo, Inc., a Texas corporation which is identified as a former employer of Mr. Dewey. Apparently, defendant requires that such employment records be identified.

f. Defendant seeks to depose Frederick Corbett, a California resident, who presumably was a friend of Mr. Dewey.

g. The defendant seeks to depose Terry Corbett (presumably Frederick Corbett's wife), also a resident of California and apparently another friend of Mr. Dewey.

3. Plaintiff's counsel received the Notice of Motion to direct the taking of

64. This sample was taken from Dewey v. R.J. Reynolds Tobacco Co., No. L-071733-81 (Super. Ct., Bergen County, N.J.).

depositions out-of-state on December 5, 1985. On December 6, 1985, plaintiff's counsel received a Notice to take the depositions of three additional persons who reside in the State of New Jersey, namely, Joseph Rubacky, Grace Rubacky and Ruth Gallo. Presumably, these persons met Wilfred Dewey some time before his death from cancer.

4. In addition to all of the above depositions that have just been noticed, several days ago, plaintiff's counsel received a Notice to continue the deposition of Claire Dewey (the wife of the decedent). Claire had already been deposed on February 21, 1983 -- almost three years ago.

5. Thus far in this litigation, defendants have scheduled or deposed twenty-three witnesses. If one adds to that number the seven persons that are the subject of the within application by the defendant to this court, we have a total of thirty witnesses to be deposed in this litigation. However, as demonstrated by past history, there is absolutely no indication that these thirty persons will be all the persons that defendants will depose. Presumably, if defendants choose, they could depose the acquaintances of the acquaintances of Mr. Dewey; they could depose the children of the acquaintances of Mr. Dewey, and so forth and so on *ad infinitum*. Presumably, during the course of Mr. Dewey's short tenure on this earth, he met hundreds of people who presumably could be deposed by the defendants.

6. It appears that defendants' strategy of deposing everyone on this earth who knew the plaintiff is not confined to this litigation. In this case of *Galbraith v. R.J. Reynolds Tobacco Co.*,[65] the case currently being tried to a jury in California, a newspaper notes that:

> The *Galbraith* case also shows how a corporation using its legal resources can overwhelm a private plaintiff. The Reynolds' legal team has filed thousands of pages of motions and briefs in the case, far more than the Galbraiths. Reynolds' lawyers took several dozen lengthy and expensive depositions, or court-ordered sworn statements, from every person they could find who had any contact with Galbraith, including a woman he divorced more than 40 years ago, distant relatives and former supervisors.[66]

7. This court has previously issued a Solomon-like decision on a similar applicattion previously made by defendants in this litigation. After lengthy argument of counsel in a previous motion, the court required defendants to pay the travel and hotel expenses of plaintiff's attorney. Although the court permitted the Defendants to take the depositions of Sam and Evelyn Bender in Texas, defendants chose not to schedule that deposition to date; although this court permitted the defendants to go the New Hampshire to depose the friends and supervisor of Mr. Dewey while Mr. Dewey worked at Sanders Associates, Inc., defendants in this application seek to return to New Hampshire to depose the Medical Director at Sanders Associates, Inc. There is no reason set forth why that deposition could not have been taken in July of 1985 when the other New Hampshire depositions took place.

8. Moreover, if the purpose of the depositions of the Medical Directors of Merrill Lynch, Sanders Associates, and Varo, Inc. (three former employers of the decedent) is to authenticate those companies' medical records that may pertain to Mr. Dewey, a more apporpriate procedure would be to submit those medical records to plaintiff's counsel to determine whether the authenticity of those records can be stipulated. If there is a dispute over the interpretation of portions of those medical records that are relevant to this case (presumably, whether Mr. Dewey stubbed his toe or sprained his back is not germane to this case although defendants may so argue), then, and only then, might a deposition of these Medical Directors be appropriate. Moreover, there is no showing in the moving papers of defendant that the current Medical Directors of these companies had any person knowledge whatsoever of Mr. Dewey.

9. Thus, plaintiff repeats what was said initially in this Affidavit: "Enough already." The time has come for this court to forcefully demonstrate to the defendants that their superior financial resources cannot be used as a tool to thwart fundamental fairness. If this court allows the depositions sought by the defendants to go forward, there is no doubt whatsoever in plaintiff's mind that they will be back to the well on another occasion to take still more depositions.

65. No. 144417 (Cal. Super. Ct. Dec. 18, 1985).

66. Newark Star-Ledger, Nov. 29, 1985.

10. Accordingly, plaintiff requests that the defendant's motion to take out-of-state depositions be denied or, if allowed, that the court establish conditions to make sure that defendant's superior financial resources not be allowed to pervert the fundamental proposition that all persons should have equal access to the courts of this state.

APPENDIX C

A. Judicial Notice

1. Plaintiff's Motion to Take Judicial Notice-- Plaintiff askes the court to take judicial notice of the various types of harm caused by cigarette smoking, and would show the court the following:

a. Plaintiff would show that this is a products liability case in which plaintiff contends that his lung cancer was caused by cigarette smoking, and further contends that cigarette smoking causes many types of harm, and the risk from smoking cigarettes outweighs the benefits from smoking cigarettes, thereby rendering them unreasonably dangerous and therefore defective.

b. Plaintiff would show that the health effects of cigarette smoking pose a major public health problem that has been studied extensively for more than thirty-five years. The major public health agency of this nation is the United States Public Health Service, headed by the U.S. Surgeon General. The U.S. Public Health Service has made express findings that cigarette smoking is a cause of death; lung cancer (including epidermoid carcinoma, small cell carcinoma, adenocarcinoma and large cell carcinoma); cancer of the larynx; cancers of the oral cavity which include malignant tumors of the lip, tongue, salivary gland, floor of the mouth, mesopharynx, and hypopharynx; cancer of the esophagus; cancer of the bladder; cancer of the kidney; cancer of the pancreas; coronary heart disease; chronic obstructive lung disease, including chronic bronchitis, emphysema, and chronic obstructive pulmonary disease and allied conditions, without mention of asthma, bronchitis or emphysema; complications of pregnancy, including spontaneous abortion, premature delivery, fetal death and perinatal death; and addiction.

Such cause and effect relationships between cigarette smoking and the above types of harm are generally known throughout the United States, as well as being generally known by public health authorities throughout the world. Such cause and effect relationships, with the benefit of the vast amount of human data whose accuracy cannot reasonably be questioned, are capable of accurate and ready determinations. Such accurate and ready determinations have been made by the U.S. Public Health Service on behalf of this nation and such determinations can be identified in official public reports of the U.S. Public Health Service made pursuant to law.

Plaintiff moves that the court review the findings of the U.S. Public Health Service from its official reports made pursuant to law and determine the various types of harm that have been found to be caused by cigarette smoking. The plaintiff further moves that the court take judicial notice that such cause and effect relationships will be deemed to existt for all purposes in this cause.

WHEREFORE, plaintiff prays that a hearing be set on this motion and that after such hearing the court take judicial notice of the various types of harm caused by cigarette smoking, as found by the U.S. Public Health Service, and for such other orders as the court deems appropriate.

2. Order Taking Judicial Notice-- The court, having considered such motion and the opposition thereto, is of the opinion that such motion, to the extent stated herein, should be granted.

Where the U.S. Public Health Service has made an express finding that a certain agent or factor is a cause of death or other type of serious harm, the trial court should find, subject to the defenses stated herein, that such cause and effect relationship is not subject to reasonable dispute, requiring the trial court to take judicial notice of such cause and effect relationship.

However, the court should permit an opposing party to defeat the taking of judicial notice by producing evidence from which the judge of the trial court makes one or more of the following findings:

a. That such express finding of the U.S. Public Health Service has been withdrawn;

b. That the existence of such cause and effect relationship has not been adequately studied; or

c. That a significant segment of the relevent medical and scientific community is of the opinion, based on reasonable medical or scientific probability, that such cause and effect relationship does not exist.

The taking of judicial notice, under such circumstances, that a certain agent or factor can cause death or other types of serious harm, serves societal values, as well as the proper functioning of the civil justice system. Our society regards life as sacred. Where our most responsible public health officials expressly find that a certain agent is causing death, or serious harm, it is appropriate that the judicial system accept such finding, unless the judge of the trial court finds one of the above disqualifying factors.

The taking of judicial notice, under such circumstances, provides sufficient safeguards for an aggrieved party having a vested interest in the accused agent of death or serious harm. In the trial court, such aggrieved party can defeat the taking of judicial notice by obtaining a fact-finding by the trial judge on at least one of the above qualifying factors.

Another avenue for an aggrieved party who in good faith believes his product, or other agent, is not a cause of death or serious harm, is to present appropriate evidence to persuade public health officials and the relevant medical and scientific community. Truth and justice, in such instances, will best be served by requiring any such aggrieved party to persuade a significant segment of the relevant medical and scientific community rather than judges and jurors.

Applying the foregoing criteria for taking judicial notice under such circumstances, the court hereby finds that the U.S. Public Health Service has made an express finding, contained in official public reports, that cigarette smoking is a cause of each of the following types of seriuos harm, including death:

Death; lung cancer (including epidermoid carcinoma, small cell carcinoma, adenocarcinoma and large cell carcinoma); cancer of the larynx; cancers of the oral cavity which include malignant tumors of the lip, tongue, salivary gland, floor of the mouth, mesopharynx, and hypopharynx; cancer of the esophagus; cancer of the bladder; cancer of the kidney; cancer of the pancreas; coronary heart disease; chronic obstuctive lung disease, including chronic bronchitis, emphysema, and chronic obstructive pulmonary disease and allied conditions, without mention of asthma, bronchitis or emphysema; complications of pregnancy, including spontaneous abortion, premature delivery, fetal death and perinatal death; and addiction.

In respect to the above types of harm as being caused by cigarette smoking, the U.S. Public Health Service has made its findings in various Annual Reports prepared by the Surgeon General on the health consequences of cigarette smoking. These reports were prepared and submitted to Congress pursuant to law. Such findings include the following:

a. "Cigarette smoking is the chief, single, avoidable cause of death in our society and the most important public health issue of our time." 1984 Report of the Surgeon General at p. vii.

b. "Cigarette smoking is the major single cause of cancer mortality in the United States." 1982 Report of the Surgeon General at p. v.

c. "Cigarette smoking is the major cause of lung cancer in the United States." 1982 Report of the Surgeon General at pp. 5, 62, 145.

d. "Cigarette smoking is the major cause of laryngeal cancer in the United States." 1982 Report of the Surgeon General at pp. 77, 145.

e. "Cigarette smoking is a major cause of cancers of the oral cavity in the United States." 1982 Report of the Surgeon General at pp. 6, 89, 146.

"Cancers of the oral cavity include malignant tumors of the lip, tongue, salivary gland, floor of the mouth, mesopharynx, and hypopharynx." 1982 Report of the Surgeon General at p. 78.

f. "Cigarette smoking is a major cause of esophageal cancer in the United States." 1982 Report of the Surgeon General at pp. 7, 101, 146.

g. "Cigarette smoking is a contributory factor in the development of bladder cancer in the United States." 1982 Report of the Surgeon General at pp. 7, 113.

h. "Cigarette smoking is a contributory factor in the development of kidney cancer in the United States." 1982 Report of the Surgeon General at pp. 7, 122.

i. "Cigarette smoking is a contributory factor in the development of pancreatic cancer in the United States." 1982 Report of the Surgeon General at pp. 7, 132.

j. "Cigarette smoking is a contributory factor in the development of bladder, kidney, and pancreatic cancer in the United States." 1982 Report of the Surgeon General at p. 146.

k. "Cigarette smoking is a major cause of coronary heart disease in the United States for both men and women."

l. "Cigarette smoking is the major cause of chronic obstructive lung disease in the United States for both men and women. The contribution of cigarette smoking to chronic obstructive lung disease morbidity and mortality far outweighs all other factors." 1984 Report of the Surgeon General at p. 8.

m. "The chronic obstructive lung diseases (COLD) that are causally related to cigarette smoking include chronic bronchitis, emphysema, and chronic obstructive pulmonary disease and allied conditions, without mention of asthma, bronchitis, or emphysema." 1984 Report of the Surgeon General at p. 185.

n. "Cigarette smoking is the major cause of COLD morbidity in the United States, and 80-90% of the COLD in the United States is attributable to cigarette smoking." 1984 Report of the Surgeon General at pp. 9, 136.

o. "Cigarette smoking is the major cause of COLD mortality for both men and women in the United States." 1984 Report at pp. 10, 210.

p. "Smoking by pregnant women increases the risk of spontaneous abortion, premature delivery, fetal death, and perinatal death." 1981 Annual Report of the Surgeon General at p. 170.

q. "Increasing levels of maternal smoking result in a highly significant increase in the risk of abruptio placentae, placenta pervia, bleeding early or late in pregnancy, premature and prolonged rupture of the membranes, and preterm delivery -- all of which carry high risks of perinatal loss." 1980 Annual Report of the Surgeon General at p. 11.

r. "Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers." 1986 Annual Report of the Surgeon General at p. 7.

s. "Involuntary smoking can cause lung cancer in nonsmokers." 1986 Annual Report of the Surgeon General at p. 107.

t. "Cigarettes and other forms of tobacco are addicting.... Nicotine is the drug in tobacco that causes addiction." 1987 Report of the Surgeon General at p. 9.

As a further basis for taking judicial notice the court finds that cause and effect relationships between cigarette smoking and the above types of harm are generally known throughout the United States, as well as being generally known by public health authorities throughout the world; that such cause and effect relationships, with the benefit of the vast amount of human data whose accuracy cannot reasonably be questioned, are capable of accurate and ready determination; that such accurate and ready determination had been made by the U.S. Public Health Service made pursuant to law.

Having announced the court's holding on the taking of judicial notice of various types of harm caused by cigarette smoking, the court will give defendants an opportunity, as to each such type of harm, to present evidence for the court's consideration on any of the following stated disqualifying factors:

a. That such express finding of the U.S. Public Health Service has been withdrawn;

b. That the existence of such cause and effect relationship has not been adequately studied; or

c. That a significant segment of the relevant medical and scientific community is of the opinion, based on reasonable medical or

scientific probability, that such cause and effect relationship does not exist.

If, after the presentation by defendants of evidence on any of the above disqualifying factors, the court finds for the defendants as to any of the enumerated types of harm, will be overruled. However, as to those types of harm to which the court fails to make a finding of one or more of such disqualifying factors, plaintiff's motion will be granted, and an appropriate order taking judicial notice will be entered.

In addition to finding the taking of judicial notice appropriate under Tex. Evid. Code section 201, the court finds that it would be unfair to require a plaintiff in a products liability case to engage in a contest with the cigarette manufacturers on the issues of causation that have been studiously and exhaustively considered for over thirty-five years, and definitely resolved by the U.S. Public Health Service, with no disagreement by any significant segment of the relevant medical and scientific community. Moreover, the litigation of such causation issues, when the herein criteria have been met, would place an unreasonable burden on our civil justice system.

The court will set a hearing, not less than sixty days from date, to give defendants an opportunity to present evidence on the above stated disqualifying factors.

APPENDIX D

A. "Other Potential Causes" Defense

1. Plaintiff's Motion for a Discovery Order on "Other Potential Causes"

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff moves for an order whereby the court will control all discovery pertaining to defendants' use of the "other potential causes" defense, and would show the following:

In this cause the defendants will endeavor to show that plaintiff's lung cancer could have been caused by agents and factors, independent of cigarette smoke. While such defense of "other potential causes" can be appropriately asserted, the defendants have in the past claimed such defense as their justification for conducting abusive discovery practices which make cigarette disease litigation unaffordable and unfair.

Such discovery abuse can be stopped only if the trial court takes charge of all disvovery pertaining to the "other potential causes" defense, including the ordering of procedures for identifying those other causes which may be properly asserted.

WHEREFORE, plaintiff moves that the court enter an order setting out procedures for identifying other potential causes of plaintiff's lung cancer, independent of cigarette smoke; and then controlling all discovery as to the identified other potential causes; and for such further orders as the court may deem appropriate to make this litigation affordable and fair.

2. Order on "Other Potential Causes" Defense

The court held a hearing on plaitiff's motion for an order to control defendants' discovery efforts to support their contention that plaintiff's lung cancer could have been caused by agents and factors, independent of cigarette smoke. After considering such motion, the court is of the opinion that the motion, to the extent provided herein, should be GRANTED.

The court finds that defendants are entitled to assert as a defense that plaintiff's lung cancer could have been caused by agents or factors, independent of cigarette smoke.

The court finds that no agent or factor can be considered as a potential cause of lung cancer unless there is sufficient expert opinion evidence that such agent or factor has the capacity to cause, or contribute to cause lung cancer, independent of cigarette smoke.

It is ORDERED that no discovery of other potential causes of plaintiff's lung cancer be conducted except as allowed by written order after the other potential causes have been identified through the procedure set forth herein.

To identify other potential causes of lung cancer, as to which defendants want to make discovery, the court hereby ORDERS the following procedure be followed:

(a) On or before ninety days from the date of this order each defendant is

ORDERED to identify each agent and factor which it contends has the potential to cause, or contribute to cause lung cancer, independent of cigarette smoke;

(b) No agent or factor shall be listed by a defendant under the above paragraph (a) unless such defendant presents expert opinion evidence supported by either credible epidemiologic data or credible data on long-term animal studies;

(c) That such expert opinion evidence shall be presented by affidavit of a qualified expert with the supporting epidemiologic and toxicologic data attached; or by expert opinion contained in a learned treatise with such opinion supported by the epidemiologic or toxilogic cata required under (b) above;

(d) Within thirty days after being served the information produced by a defendant under the above (a), (b), and (c), plaintiff shall serve on each such defendant his objections, if any, and thereafter the court will make its ruling by written order on such contentions and objections.

It is further ORDERED that the procedure set forth in the above (a), (b), (c), and (d) shall be followed as to each agent and factor which a defendant contends involves contributory negligence by plaintiff and further contends has the potential to contribute to cause lung cancer, whether or not independent of cigarette smoke.

It is further ORDERED that on the trial of this cause no suggestion be made, either directly or indirectly, that plaintiff's lung cancer could have been caused by any agent or factor other than those agents and factors identified pursuant to this order, and to which plaintiff was subjected as shown by proof offered at trial.

APPENDIX E

A. Order on In Camera *Monitoring of Litigation Activities of Defendants*

The court finds good cause to believe that defendants, in their defense against plaintiff's claim in this case, may engage in activities which may include an undue intrusion into plaintiff's personal life; or which may have the potential for exerting an improper influence on prospective jurors; or which may give defendants an unfair advantage because of a disparity in party resources.

Therefore, it is ORDERED that each attorney of record for the various defendants file with the court, under seal on the first day of February, May, August, and November of each year a report disclosing the following information:

a. name and address of each person (or entity) providing any services, or engaging in any activities pertaining to this litigation;

b. name and address of the employer of each person or entity;

c. a description of such services and activities, including the dates and places performed;

d. the amount and purpose of each charge for such services and activities; and

e. a description of any written material, film, tape or computer input generated by reason of such services and activities.

It is further ORDERED that the chief executive officer of each defendant file with the court, under seal, an affidavit on the first day of February, May, August and November of each year stating:

a. whether or not the above reports filed by the attorney of record make a full disclosure of all services and activities pertaining to this litigation known to such defendant or its agents; and

b. that a careful inquiry has been made to determine the accuracy of the contents of the affidavit.

APPENDIX F

A. Order on Plaintiff's Motion for Access to the Civil Justice System

The court held a hearing on Plaintiff's Motion For Access To The Civil Justice System. After duly considering such motion, the court is of the opinion that the motion, to the extent provided herein, should be GRANTED.

The court finds there is good cause to believ this cigarette disease cannot be litigated on the merits unless the court devises a plan to make the litigationa ffordable and fair. The court further finds that it is under a duty to devise and implement such a plan.

It is therefore ORDERED that defendants refrain from conducting any discovery in this case except as may be authorized by written order after a discovery and trial plan has been prepared by the court, or on its behalf by a special master.

RESPONSES OF JOHN H. BEISNER

May 28, 1999

Hon. Charles E. Grassley
Chairman, Subcommittee on Administrative Oversight and
the Courts
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510-6275

Re: ***Response to Follow-Up Questions – Hearing on S. 353***

Dear Senator Grassley:

I offer the following responses to the questions posed in your May 11, 1999 letter concerning the May 4 hearing on S. 353, "The Class Action Fairness Act:"

Questions from Senator Grassley

1. What do you see are the real problems associated with the class action device being used to achieve justice in litigation?

I see several generic problems with current usage of the class action device. They include:

(1) Class actions are being used in circumstances never contemplated by the creators of the current version of the device. As John Frank (who was one of those creators) so eloquently stated in his May 4 statement to the Subcommittee, the framers of Fed. R. Civ. P. 23 simply did not envision that the class device would be used as broadly as it is now, especially in our state courts. The core problem is that Rule 23 was intended to be – and should be – a mechanism for aiding resolution of claims that people have actually brought or genuinely wish to assert. Instead, the rule is now most commonly used as a device by which attorneys create lawsuits. No one should entertain the myth that class actions typically originate when an injured party seeks out an attorney and asks for assistance in obtaining a remedy. As is often reflected in case records, attorneys "develop" a claim and then search for a plaintiff to fit the prototype.

(2) Most purported class actions are overly broad. As noted in my written testimony, it is not surprising that class action counsel try to define their cases to encompass as

many claims and claimants as possible. The entrepreneurial motivations that underlie most class actions encourage such behavior. Why would an attorney sue on behalf of a 1,000-person class when he/she could sue for a class of 20 million people? The bigger class gives an attorney far more leverage against the defendant and creates the potential for substantially greater attorneys' fees (without need for a larger investment). Unfortunately, lawsuits brought on behalf of bigger classes inevitably proceed on a "lowest common denominator" basis. The "average" claim becomes the claim by which the entire action is judged; class members with larger, more serious claims are simply blended into the group and deprived of the individual attention they deserve. Further, to make the litigation work as a class action, class counsel frequently "shave" (that is, waive) claims that may hinder efforts to prosecute the matter on a class basis. For example, certain claims requiring individual proof (*e.g.*, fraud claims requiring reliance proof) may be thrown overboard. Likewise, claims for certain types of injuries (*e.g.*, personal injury, property damage) may be discarded. Such shortcuts can be devastating for some class members (since under "claims splitting" prohibitions that exist in many states, those persons would be barred from asserting the waived aspects of their claims in a later, separate proceeding). In short, unless they are alert enough to take affirmative steps to get themselves out of a class action, they may lose forever their most significant claims without compensation. It is this concern that has driven federal courts to examine more carefully whether proposed classes are as homogeneous as counsel represent. Unfortunately, many state courts are not following this model.

(3) Attorneys' fees pose a major problem. Class action proponents often urge that the *raison d'être* for such lawsuits is efficiency – that class actions allow wholesale resolution of claims in a single proceeding. When the time comes to determine fees, however, those proponents are unwilling to accept a fee that actually reflects the "wholesale" nature of the action. They demand percentages of the class recovery bearing no rational relationship to the value that they have actually obtained for the unnamed class members. They often succeed in walking off with millions in fees (thousands of dollars for each hour of work), while their class member clients get little or nothing. This problem exists most acutely in state court class actions. The attorneys' fees provisions of S. 353 are a good step toward resolving this serious problem.

2. A. Do you agree with the Justice Department's interpretation, discussion and assessment of the diversity/removal provision in S. 353? Do you believe that this provision would infringe on state courts' ability to offer redress to their citizens?

No. I disagree with the Justice Department's position in multiple respects.

First, the Justice Department's prepared testimony basically says: "We don't see a problem." In fairness, Assistant Attorney General Acheson's oral responses to the Subcommittee's questions during the May 4 hearing appeared to temper that position substantially and to acknowledge that something is amiss. But if the Department has any residual doubts about the existence of a serious state court class action problem, it should be encouraged to review the record that has now been amassed by Congress in this regard. In just the last eighteen months, your Subcommittee and its House counterpart have held four hearings on the subject of class action abuse. As summarized in my written statement for the May 4

hearing, those earlier sessions created a mountain of evidence – including studies, case analyses, hard data, and numerous anecdotes – showing that there has been an explosion in the number of class actions being filed in our state courts and that serious class action abuses are occurring in many of those proceedings. Unfortunately, the Justice Department did not participate in any of the earlier hearings.

Second, I am deeply troubled by the Justice Department's apparent attitude toward the concept of federal diversity jurisdiction. The Justice Department's prepared statement (p. 2, 5) suggests that when a state law-based lawsuit is removed to federal court, the state where the lawsuit was originally filed is somehow denied its right to address the controversy. The Department's statement (p. 6) seems adamantly opposed to the idea that a lawsuit "brought under State law concerning a corporation's operations within the State would be removable to Federal court." But that's precisely what federal diversity jurisdiction is! It is a mechanism by which state-law based claims may be moved from local courts to federal courts to ensure that all parties (including a non-citizen corporation with substantial business activity in the state) will be able to litigate on level playing field and to ensure that interstate commerce interests are protected.[1] This concept is not a judicial invention. And it is not something that Congress created. The concept was established by our framers in ***Article III of the Constitution***. As Prof. Elliott testified at the hearing, that concept is particularly applicable to the sort of interstate class action that S. 353 seeks to allow into federal court. It is disturbing to hear the Justice Department cast aspersions on this core constitutional principle.[2]

Third, what the Justice Department suggests as an alternative to S. 353 would ***really*** be an affront to states' rights. The Department's prepared statement suggests that instead of considering S. 353, Congress should be talking about legislation "focusing on the appropriate limits on state authority to bind out-of-state plaintiffs." (P. 5.) If Congress took that approach, it actually would be ***extinguishing*** state court authority in the class action arena, something that S. 353 does not do. What the Justice Department appears to suggest is that Congress should declare that in state court class actions, class members residing outside the forum state would have the option of simply ignoring any class action judgments that they do not like. Besides raising serious constitutional concerns, this proposal is decidedly unfair. What the Justice Department

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1 *See Pease v. Peck*, 59 U.S. (18 How.) 518, 520 (1856) ("The theory upon which jurisdiction is conferred on the court of the United States, in controversies between citizens of different states, has its foundation in the supposition that, possibly, the state tribunal might not be impartial between their own citizens and foreigners.")

2 I am also concerned that the Justice Department's prepared statement repeatedly refers to class actions as "remedies" (in arguing that S. 353 would prevent states from "creating remedies" for their citizens). (Pp. 2, 5.) Class actions are supposed to be procedural devices, not "remedies." Indeed, to any extent that they actually serve as "remedies," they are invalid. At the federal level, the Rules Enabling Act forbids the federal courts from adopting "rules of practice and procedure" (like Fed. R. Civ. P. 23, which authorizes the use of class actions) that may "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Many states have adopted similar principles. *See, e.g.*, Tex. Gov't Code Ann. § 22.004(a) (Vernon 1998). If the Justice Department is correct in suggesting that class actions are "remedies" (as opposed to merely being procedural devices), the class device violates this principle because they "enlarge" a "substantive right."

proposes is ***restricting*** state court authority to bind out-of-state ***plaintiff class members*** with class action judgments, while ***encouraging*** state courts to issue judgments binding out-of-state ***defendants***.

B. At the hearing, the Justice Department indicated that even if there is a problem in the state courts regarding class actions, because the federal courts have class action problems of their own, removal does not solve anything. Additionally, the Justice Department took the position that "federalizing" class actions does not necessarily address class action abuses in the state courts. How do you respond?

Although federal courts may not have a perfect record in administering class action litigation, their collective performance has been far superior to that of state courts. The record amassed by this Subcommittee and its House counterpart is very clear – class action abuses are occurring, and the vast majority of those abuses are occurring in state courts. At the four recent congressional hearings on class action abuses referenced above, very few (if any) complaints were raised about federal court performance in the class action context. The criticisms and outrageous anecdotes usually concerned state courts.

The Justice Department's position that S. 353 would "federalize" all class actions ignores the current class action landscape. Class actions ***already*** have been federalized. And quite perversely, they have been federalized by ***state courts***. What I reference is not the kind of federalizing where the federal government tells states what they are supposed to do. What is occurring every day is "false federalism" – one state court telling the other 49 state judiciaries what their laws should be. When state courts preside over class actions involving claims of residents of more than one state (as they increasingly are inclined to do), they end up dictating the ***substantive*** laws of other states, sometimes over the protests of those other jurisdictions.[3] When that happens, there is little those other jurisdictions can do, since the judgment of a court in one state is not reviewable by the state court of another jurisdiction.

Procedural class action law is also being federalized in the same perverse way. Although it is only a minority of state courts that are routinely failing to exercise sound judgment on class action issues, those courts have become magnets for a disproportionate share of interstate class actions. In short, there is a "race to the bottom." Not surprisingly, attorneys file their class action lawsuits in the minority of state courts that are most likely to manifest a "laissez-faire" attitude toward the class device. That distinct minority of state courts essentially sets the national norm; those courts are effectively dictating national class action policy.[4]

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[3] This point is discussed in more detail at pages 13-15 of my written statement to the Subcommittee.

[4] Some analyses supporting these points are set forth in my written statement to the Subcommittee (pp. 15-16).

C. The Justice Department also argued that because the state courts have remedied, or are remedying concerns about ex parte certifications, legislation is not necessary. How do you respond?

The Justice Department's testimony (at page 5) suggests that the state court class action crisis has evaporated because the judiciary of one State -- Alabama -- has issued two decisions declaring *ex parte* class certifications to be improper. Had the Justice Department participated in the prior Senate and House hearings on state court class action abuses, I doubt that such a statement would have been made. As was detailed in Mr. Morrison's prepared testimony at the hearing, Alabama was not the only state whose courts engaged in that practice.[5] Moreover, as Mr. Morrison discussed in his statement and as I summarized in mine (pp. 4-7), *ex parte* class certification is just one example of the many egregious ways in which some state courts deny due process rights (or offend fundamental fairness principles) in dealing with the interests of both unnamed class members and defendants in class actions. The fact that one state has addressed one class action abuse does not alleviate this crisis.

3. The Justice Department's written testimony expresses concern about the potential impact of S. 353 on the caseload of the federal courts. Do you believe that the federal courts have the resources to deal with interstate class action cases? Do the federal courts have mechanisms by which they can handle class action cases better than state courts?

The burdens that class actions and other forms of complex litigation place on our courts pose a difficult problem. But that problem must be examined from the perspective of the ***entire*** judicial system. Without question, parts of our federal judiciary are seriously overburdened. But many state courts have crushing caseloads as well. Indeed, as a group, state courts have experienced a more rapid growth in civil case filings. Civil filings in state trial courts of general jurisdiction reportedly have increased 28% since 1984 (versus a 4% increase in the federal courts).[6] The question is which of these two overburdened systems can better handle class actions.

For several reasons, I respectfully submit that federal courts usually are better positioned to handle the challenges presented by these uniquely complex cases:

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[5] The Justice Department's statement erroneously states that "the complaints about *ex parte* class certification have focused on one county in a particular state." (P. 5.) The record at the March 1998 hearing on "Mass Torts and Class Actions" before the Subcommittee on Intellectual Property and the Courts of the House Judiciary Committee contains complaints about *ex parte* class certification occurring in a number of counties in Alabama and elsewhere.

[6] *See* B. Ostrom & N. Kauder, Examining the Work of State Courts, 1997, at 15 (Court Statistics Project 1998). It also should be noted that the number of diversity jurisdiction cases being filed in federal courts appears to be falling. During the 12-month period ending March 31, 1998, "diversity of citizenship filings fell 6 percent to 54,547 cases," accounting for less than 20% of the civil cases filed in federal court during that period. Administrative Office of the U.S. Courts, Federal Judicial Caseload Studies 9-10 (1998). For the 12-month period ending December 31, 1998, the downward trend is even more significant (according to unpublished data of the Administrative Office of the U.S. Courts).

- Virtually all federal court judges have two (and sometimes three) attorney law clerks on their staffs; state court judges often have none (or at best, a part-time clerk). Other resources available to federal courts are also usually more plentiful.

- If they so choose, federal court judges usually are able to delegate some aspects of their cases (*e.g.*, discovery matters) to magistrate judges or special masters (at least for initial consideration). That option typically is not available to state court judges.

- Federal court judges typically have more experience with complex litigation matters (like class actions) than do many state court judges (particularly state court judges with general jurisdiction dockets in smaller communities, where many of the interstate class actions are filed). Further, the federal courts' multidistrict litigation process (described below) allows the transfer and consolidation of overlapping class actions to judges experienced with such matters. That transfer option is not available to state courts.

- In the interest of efficiency and consistency, federal courts are authorized to consolidate before a single judge any similar class actions that are filed around the country (including the increasingly frequent "copy cat" class actions asserting the same claims on behalf of the same classes). (This authority is granted under 28 U.S.C. § 1407, authorizing the Judicial Panel on Mulitdistrict Litigation.) State courts lack such interstate consolidation authority and therefore must engage in the wasteful (and often counterproductive) exercise of separately handling such overlapping cases.

- In most state law-based class actions, the proposed classes encompass residents of multiple states. Thus, the trial court – regardless of whether it is a federal or state court – must make the necessary choice-of-law decisions and then interpret and apply the laws of multiple jurisdictions. Because of their more ample resources, federal courts are better equipped to handle that important task.

- In this same vein, it is more appropriate for a federal court to interpret the laws of various states (inherently part of what the constitutional concept of diversity jurisdiction is all about), as opposed to having state courts routinely dictating to other states (to which they have no accountability) what their laws mean. What business does a state court judge in Kentucky have in telling the state of Massachusetts what its laws mean? Why should an Alabama state court judge be rendering interpretations of Oregon law that are binding on Oregon residents and that cannot be reviewed by or appealed to Oregon's courts? These matters are more appropriately handled by federal judges, who are appointed by the President and confirmed by the Senate.

- Even more bizarre is the situation (which arises daily) in which an interstate class action requires a state court to resolve the claims of residents of multiple other states against a defendant that resides in yet another jurisdiction. In short, why should a

Texas court be resolving the claims of Wyoming residents against a California-based corporation? These are the sorts of disputes for which diversity jurisdiction was designed.

In my view, predictions that S. 353's jurisdictional provisions will cause federal courts to be swamped with new class action litigation are unfounded. Initially, there may be some increase as the new statute is tested. But much of the state court class action tidal wave discussed at the May 4 hearing is attributable to the filing of overlapping "copy cat" class actions. Unlike the state courts, federal courts will be able to consolidate such matters before a single judge, achieving great economies. In short, what would have been ten distinct cases requiring the attention of ten different judges under the current state court regime will become a single proceeding before a single federal judge under S. 353. It must also be noted that many state court class actions fall in the frivolous or near-frivolous category – they are filed solely because attorneys believe that certain state courts will not closely scrutinize the cases. Many of those misbegotten cases presumably will not be filed at all if they are likely to end up before a federal district court. In sum, forecasts that the tidal wave of state court class actions will simply be channeled to the federal courts are without merit.

4. A. Do you agree with the Justice Department's comments regarding a defendant corporation's operations within a state and the opportunity for removal to the federal courts? Do you believe that there is a due process problem if non-citizen defendant corporations with substantial operations in the state do not have an opportunity to remove from the state court to the federal courts? Why or why not?

The suggestion (at page 6 of the Justice Department's written statement) that a corporation should be deemed a citizen of any and all states in which it has "substantial operations" is contrary to the core purpose of federal diversity jurisdiction as established in Article III of the Constitution.

Diversity jurisdiction was established, *inter alia*, to ensure that local biases against commercial enterprises did not create a climate that would stymie expansion of commercial and manufacturing interests throughout the country, thereby undermining the forging of a national union.[7] The framers correctly envisioned the evolution of a nation with large commercial enterprises spanning many states – a desirable goal that they believed would be threatened by local courts that might be hostile to such entities.

Because of the existence of diversity jurisdiction, a corporation based in one state that begins conducting business in another state will not subject itself to the exclusive jurisdiction of the local courts in that new state as to any litigation that may arise there. The

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[7] *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.) ("However true the fact may be, that tribunals of the states will administer justice as impartially as those of the nation, to the parties of every description, it is not less true that the Constitution itself . . . entertains apprehensions of the subject . . ., that is has established national tribunals for the decision of controversies between . . . citizens of different states.")

framers thought it important that there be a fair, uniform, and efficient forum (that is, a federal court) for adjudicating interstate commercial disputes, so as to create an environment that would nurture commercial expansion.[8]

The Justice Department's apparent belief that corporations should be deemed citizens of any state in which they conduct "substantial business" conflicts quite directly with the current diversity jurisdiction statute and contravenes the core purpose of diversity jurisdiction. Under that "substantial business" view, the more broadly a company engages in interstate commerce, the more broadly it would be subjecting itself to the exclusive jurisdiction of ***state*** courts and limiting its access to the federal courts. For example, if a Tennessee company decided to do "substantial business" in Texas, it would be waiving its right to have a federal court hear many state law-based disputes that may arise with any or all citizens of Texas. This example makes clear that adding a "substantial business" concept to diversity jurisdiction prerequisites could impede interstate commerce, when the whole purpose of diversity jurisdiction is supposed to be the ***prevention*** of such impediments.

B. What would you think of a practice of a plaintiffs' lawyer who names a local retailer or distributor in a class action simply to divest federal courts of jurisdiction so that a defendant cannot receive equal justice under law? Do you believe that plaintiffs' lawyers are "gaming" the civil justice system?

The practice of counsel naming a local entity as a defendant in a class action so as to avoid federal jurisdiction has become commonplace. Based on my experience, such pleading (or some other form of pleading intended to keep a case out of federal court) occurs in ***most*** class actions originally filed in state courts. The types of tricks that are used by counsel to game the system in this way were cataloged in Mr. Morrison's testimony at the May 4 hearing and in the testimony given by John W. Martin, Jr., at the March 4, 1998 hearing on "Mass Torts and Class Actions" before the Subcommittee on Intellectual Property and the Courts of the House Judiciary Committee.

C. What do you believe to be the purpose of federal diversity of citizenship jurisdiction? Isn't it to provide out-of-state defendants with the "fair forum" so that all defendants can receive equal justice under the law?

The purpose of federal diversity jurisdiction was set forth quite eloquently at the May 4 hearing in both the prepared statement and oral testimony of Prof. Elliott. In a nutshell, the framers of our Constitution established the diversity jurisdiction concept in Article III, *inter alia*, to ensure that the federal courts would provide a forum for the adjudication of disputes between citizens of different states. With that concept, the framers of the Constitution sought to

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[8] "No power exercised under the Constitution . . . had greater influence in melding 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." John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932).

protect citizens in one state from the injustice that might arise if they were forced to litigate against citizens of another state in the courts of that state. In short, there was concern about the appearance (or reality) of locality discrimination or "hometowning." Further, there was concern about local courts discriminating against interstate businesses. Overall, the desire was to create courts in which all litigants would have confidence and to thereby enhance public respect for and reliance on the nation's judicial system. In sum, it is accurate to say that the purpose of federal diversity jurisdiction is to ensure that all interstate litigants will have a "fair forum."

5. A. Professor Daynard contends that S. 353 would be better entitled the "Tobacco Industry Relief Act of 1999" because it would allow for removal of all class actions involving tobacco companies and, consequently, result in tobacco cases being less likely to be certified as class actions. Do you agree?

No. Several points should be made about Prof. Daynard's testimony.

First, it should be stressed that in his written statement, Prof. Daynard stated that he has no quarrel with the core element of S. 353's diversity jurisdiction provisions. He specifically stated that section 4 of S. 353 – the section that would expand federal diversity jurisdiction over interstate class actions – ***"is benign."*** (P. 4 (emphasis added).) However, he strenuously objected to section 5 of the bill, which would allow unnamed class members or defendants to remove class actions to federal court. Put another way, Prof. Daynard says that it is perfectly acceptable to expand federal diversity jurisdiction so that ***attorneys*** may file interstate class actions in federal court if they wish. But if ***unnamed class members*** or ***defendants*** (the people whose rights are actually at issue in the class actions) want to invoke that expanded federal jurisdiction and remove cases to federal court, they should be denied. Prof. Daynard apparently desires a federal jurisdictional provision that works only one way – a provision allowing federal court access that may be invoked only by an attorney filing a class action. Plainly, that position is indefensible. If interstate class actions may appropriately be handled by federal courts (as Prof. Daynard concedes), then the real parties in interest (not just the lawyers) should be allowed to place such cases before those courts.

Second, in his prepared statement (p. 3), Prof. Daynard noted that in the federal courts, some cases cannot be tried as class actions because under the Seventh Amendment, the class trials would deny litigants their fundamental fair trial rights. With that in mind, he urged retention of the status quo – keeping interstate class actions out of federal courts – because doing so would force such cases into state courts, some of which view jury trial rights in a manner "less restrictive than the Seventh Amendment." In short, Prof. Daynard's position on the jurisdictional/removal provisions of the bill admittedly is motivated by his desire to force unnamed class members and defendants into trials in which they would be deprived of their federal Seventh Amendment rights (even though the lawsuits are interstate matters with interstate commerce ramifications). Put another way, he would like to force defendants into trial situations so untenable that they will have not choice but to settle.

Third, in his testimony, Prof. Daynard argued that the ruling in *Castano v. American Tobacco Co.*[9] supports his opposition to the jurisdictional provisions of S. 353 because, as he sees it, *Castano* declared that the smoking addiction claims in that case were "immature torts" and that "state courts should have the first crack at that issue." (Testimony, p. 3.) What *Castano* actually held was that before any smoking addiction cases were tried on a class basis, such claims should be allowed to "mature" – some such claims should be tried on an ***individual*** (not a class) basis to test whether such claims might be susceptible to class trials.[10] Prof. Daynard's interpretation of *Castano* makes no sense. Why would the court in *Castano* have held that the case before it could not be tried properly as a class action, but then urge the parties to go forth and try it as a class action anyway? Contrary to Prof. Daynard's assertion, *Castano* directly contravenes his position on S. 353.

Fourth, Prof. Daynard's prepared statement does not mention several key points about S. 353:

- The bill pertains only to class action lawsuits. The well-publicized tobacco-related settlements typically have occurred in state attorneys general lawsuits, which are ***not*** class actions. Such cases thus would not have been affected by the bill.

- S. 353 will not apply to any pending tobacco-related class actions. The bill is prospective only; it will apply only to future litigation, not to any cases already filed.

- The predicate of many of Prof. Daynard's criticisms of the bill is that tobacco cases would never be certified in federal court and that the purpose of the bill is to keep such cases out of state court. But the basis for Prof. Daynard's position is a single ruling in a single case – the rejection of the ill-conceived, patently overbroad class that Prof. Daynard and his co-counsel proposed for certification in the *Castano* litigation (discussed above). Prof. Daynard offers no proof for his implicit premise that a properly tailored tobacco-related class would never be certified by a federal court. The reality is that tobacco class actions have produced mixed results in ***both*** federal courts and state courts. Depending on their individual merits, some have been certified, and some have not.

B. Do you believe that a legislative "carve out" would be consistent with the principle that all persons – including corporate entities – are entitled to equal justice and fair treatment under the law?

No. Jurisdictional rules should apply equally to all parties. Those who suggest that access to our federal court system should be governed by the public popularity of the party at issue argue against basic equal justice precepts that are the foundation of our legal system.

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[9] 84 F.3d 734 (5th Cir. 1996).

[10] *Id.* at 749-50 ("Through ***individual*** adjudication, plaintiffs can winnow their claims to the strongest causes of action. The result will be an easier choice of law inquiry and a less complicated predominance inquiry.")

Questions from Senator Kohl

1. **Do you believe that something is amiss when a state court certifies a class, while a federal courts says that same class should not be certified?**

Absolutely. Under federal procedural law, the parameters of what kinds of matters may be certified as class actions are dictated largely by due process/fairness considerations – to what extent may claims be litigated on a aggregated basis consistently with due process/fairness principles? Indeed, when federal courts deny class certification, they often explicitly do so based on doubts that a case could proceed on class basis without endangering the interests of the unnamed class members and/or the defendants. Thus, when a state court certifies a class previously rejected by a federal court, it is essentially saying that the state court will proceed with the litigation on a class basis, even though doing so may jeopardize the due process/fairness rights of some parties to the matter.

During last year's debates regarding H.R. 3789 (the House bill that contained a class action jurisdiction provision similar to that in S. 353), ***Public Citizen*** argued strenuously that if a federal court denied certification of a class, counsel should ***not*** be allowed subsequently to propose such a class for certification by a state court. According to Public Citizen, "if a federal judge were to deny [class] certification in a case that had been properly removed to federal court, it is clear that the ***same*** class allegations could not be reasserted in state court."[11] Further, Public Citizen stated that "a plaintiff's lawyer who attempted that type of circumvention of the federal court certification process would likely be subject to significant sanctions, which could include payment of the defendant's attorneys fees."[12]

Notwithstanding Public Citizen's laudable statements about what ***should*** happen, the reality is that state courts have in recent years certified classes rejected by federal courts. And far from being sanctioned, the counsel who obtain such state court certifications are being rewarded in that they are being allowed to proceed with class actions that are actually invalid.[13]

This situation should not be tolerated. It would be halted by enactment of S. 353.

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[11] *See* Aug. 3, 1998 letter to House Judiciary Committee members from Messrs. Clemente and Vladeck at 1 (emphasis in original).

[12] *See id.*

[13] Curiously, other witnesses at the May 4 hearing apparently saw no problem with this abuse. For example, the Justice Department complained that S.353 would prevent counsel from asking a state court to grant a class certification motion previously rejected by a state court. (DOJ Statement at 5.) Similarly, in his statement (p. 3), Prof. Daynard urged that if a federal court determined that trying a matter on a class basis would be unmanageable, state courts should be free to decide whether the case "would also be too difficult" for them to try on a class basis. On what possible basis would a state court be able to do what a federal court could not (unless the state court had in mind cutting corners in ways that would adversely affect the jury trial rights of both plaintiffs and defendants)?

2. Do you believe that as a general matter, federal courts have better resources than state courts for managing class actions?

Yes. As discussed previously (at pages 5-6), the federal courts in most jurisdictions are better positioned to manage class actions than their state court counterparts. Federal courts have available magistrate judges and special masters to handle aspects of class action litigation; many state courts do not. Federal courts typically have more support personnel (particularly law clerks) available to deal with complex class action issues; many state courts have little support staff (many have no law clerks at all). And federal courts have mechanisms for coordinating parallel litigation among various jurisdictions; state courts lack such authority.

3. Our bill would require that class notices, including notices of proposed settlements, be in plain, clearly understood English, and that settlement notices include certain details, like the amount and source of attorneys' fees. Do you believe that class notices are sometimes too confusing for class members to understand, and do you believe our provision is a step in the right direction?

Although recent efforts by some courts have resulted in more informative, user-friendly class notices, many remain deficient. Even though I am supposedly a qualified practitioner in the area, I cannot understand fully many class notices that I receive (particularly those sent at the direction of certain state courts).

I find two types of notices particularly frustrating. First, I see class certification notices that do not adequately inform class members about what they are putting at risk if they fail to opt out of a certified class. Some notices do not fully advise class members that by failing to opt out, they may be waiving certain claims or demanding less than full relief. Second, class settlement notices often do not clearly indicate what the class member is eligible to receive under the proposed settlement, what rights he/she will forego by failing to opt out of the settlement class, what the class member will have to do in order to secure any benefits under the settlement, and what the attorneys will receive under the proposed settlement.

As noted in my prepared statement, the class notice provisions of S. 353 are a positive step toward solving these problems.

4. On a scale of one to 10, how would you rate the following kinds of cases, in terms of whether there is a strong argument for federal jurisdiction? (10 being a strong argument for federal jurisdiction, down to one as a weak argument) Please explain your responses.

As is detailed below, I believe that there is a relatively strong argument for federal jurisdiction as to most of the hypotheticals, although the supporting rationale varies from case to case.

a) Multiple class actions in several state courts, each involving same class members from all 50 states, same claims, millions of dollars sought in damages, same

multiple defendants, governed by primarily state law outside of state where cases filed ("Overlapping class actions against multiple defendants")

This scenario presents a strong (10 point) case for federal jurisdiction because it involves a dispute between citizens of different states. Other factors favoring federal jurisdiction include (a) the need for the forum court to interpret the laws of various other states and (b) the size of the case. Further, the potential for consolidating these cases before a single judge exists only in federal court.

b) Multiple class actions in several state courts, each involving same class members from 50 states, same claims, millions of dollars sought in damages, and same single defendant, governed by primarily state law outside of state where cases filed ("Overlapping class actions against single defendant")

Basically, the same as (a).

c) Single class action, class members from all 50 states, millions of dollars sought in damages, multiple defendants all from outside of state where case is filed, governed primarily by out-of-state law ("Nationwide class action, multiple out-of-state defendants, out-of-state law")

This scenario presents a strong (10 point) case for federal jurisdiction because it involves a dispute between citizens of different states. Other factors favoring federal jurisdiction include (a) the need for the forum court to interpret the laws of various other states and (b) the size of the case.

d) Same as (c), except as governed by law from state where case filed (Nationwide class, multiple out-of-state defendants, in-state law)

This scenario presents a strong (10 point) case for federal jurisdiction because it involves a dispute between citizens of different states. Although the hypothetical assumes that the law of one state would apply to claims of class members of all 50 states, that possibility arguably heightens the need for federal court involvement. I say this because in most cases, it is unlikely that a single state would have sufficient contact with class members in all 50 states to permit a finding under *Shutts v. Phillips Petroleum Co.*[14] that the law of the forum state would apply to all out-of-state class members. Given the concerns about local court bias in this setting and the risk that a state court might reach to apply the law of the forum to all claims, such a choice-of-law determination would be better made by a federal court.

e) Single class action, class members from all 50 states, millions of dollars sought in damages, multiple defendants all from same state where case is filed, governed by

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[14] 472 U.S. 797 (1985). In *Shutts*, the Supreme Court held that a state court may not apply the law of the forum state to non-residents in a multi-state class action unless the state had "a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts 'creating state interest,' in order to ensure that the choice of law is not arbitrary and unfair."

primarily out-of-state law ("Nationwide class action, multiple in-state defendants, out-of-state law")

This scenario presents a strong (10 point) case for federal jurisdiction because it involves a dispute between citizens of different states. Other factors favoring federal jurisdiction include (a) the need for the forum court to interpret the laws of various other states and (b) the size of the litigation.

f) Same as (e), but governed by law from state where case filed (Nationwide class, multiple in-state defendants, in-state law)

This scenario presents a strong (10 point) case for federal jurisdiction because it involves a dispute between citizens of different states. Other factors favoring federal jurisdiction include the size of the litigation. Although the scenario assumes that the law of the forum state would apply to the claims of class members residing in all 50 states, that potential arguably heightens the need for federal court involvement. I say this because it is unlikely that the forum state would have sufficient contact with the claims of all class members in all 50 states (as defined in the *Shutts* ruling discussed above) to allow the application of the forum state's laws to all claims. As discussed above, this determination would be better made by a federal court. In this instance, the plaintiff class members are at greater risk. For example, if the forum state has enacted statutes to benefit its local businesses (*e.g.*, laws severely limiting the types of claims at issue) and the state court decided to apply those forum state laws to the claims of all class members nationwide, the class members may be precluded from seeking the more generous remedies available under their home states' laws.

g) Single class action, class members from all 50 states, millions of dollars sought in damages, single defendant from outside of state where case is filed, governed by primarily out-of-state law ("Nationwide class action, single out-of-state defendant, out-of-state law")

Basically, the same as (c).

h) Same as (g), except governed by law of state where case filed ("Nationwide class action, single out-of-state defendant, in-state law")

Basically, the same as (d).

i) Single class action, class members from all 50 states, millions of dollars sought in damages, single defendant from same state where case is filed, governed by primarily out-of-state law ("Nationwide class action, single in-state defendant, out-of-state law")

Basically, the same as (e).

j) Same as (i) except governed by law of state where case filed ("Nationwide class action, single in-state defendant, in-state law")

Basically, the same as (f).

k) Single class action, class members from same state where case is filed, millions of dollars sought in damages, multiple out-of-state defendants, governed by primarily law from outside of state where case filed ("In-state class action, out-of-state defendants, out-of-state law")

This scenario presents a strong (10 point) case for federal jurisdiction because it involves a dispute between citizens of different states. The case for federal jurisdiction is particularly compelling in this case because the forum court would be adjudicating the claims of its own residents (possibly the voters who directly or indirectly elect the judge presiding over the matter) against an out-of-state entity. Thus, the "hometowning" concerns that prompted establishment of the diversity jurisdiction concept in the first place would be very much in play. In addition, the fact that the court in this case would be required to interpret the laws of other jurisdictions would argue in favor of federal jurisdiction.

l) Single class action, class members from same state where case is filed, millions of dollars sought in damages, single out-of-state defendant, governed by law from outside of state where case filed ("In-state class action, out-of-state single defendant, out-of-state law")

Basically, the same as (k).

m) Single class action, class members from same state where case is filed, millions of dollars sought in damages, multiple out-of-state defendants, governed by law from state where case filed ("In-state class action, out-of-state defendants, in-state law")

Basically, the same as (k), except for the out-of-state law point.

n) Single class action, class members from same state where case is filed, millions of dollars sought in damages, single out-of-state defendant, governed by law from state where case filed ("In-state class action, single out-of-state defendant, in-state law")

Basically, the same as (k), except for the out-of-state law point.

o) Single class action, class members from same state where case is filed, millions of dollars sought in damages, in-state defendants, governed by law from state where case filed ("All in-state class action")

Among the hypotheticals posed, the case for federal jurisdiction is weakest in this instance. Assuming that no federal law claims are presented, the federal interest likely would be near zero. As stated in the hypothetical, all of the parties – both plaintiff class members and

defendants – are citizens of the same state, and the case will be decided under that state's law. Thus, the federal interests in such a case are relatively small. I note that under S. 353, a federal district court judge would have the discretion to abstain from exercising jurisdiction over such a case and presumably would do so unless federal interest is apparent in some additional facts.

p) Single case, in-state plaintiff sues out-of-state defendant for $75,001, governed by law of state other than where filed ("Diversity case just above dollar limit, out-of-state law")

This scenario presents a relatively strong (7-8 point) case for federal jurisdiction because it involves a dispute between citizens of different states. However, the case is less compelling than some of the scenarios listed above because the dispute being presented for adjudication involves only one person and is smaller in monetary amount.

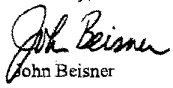
q) Single case, in-state plaintiff sues out-of-state defendant for $75,001, governed by law of state where filed ("Diversity case just above dollar limit, state law where filed")

Basically, the same as (p).

* * *

I appreciate this opportunity to answer the Subcommittee's questions on matters related to S. 353. If you would like further information or clarification on any of my responses, please advise.

Sincerely,



John Beisner