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CLASS ACTION FAIRNESS ACT OF 2003

JUNE 9, 2003.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1115]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1115) to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2003".

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.
Sec. 4. Federal district court jurisdiction of interstate class actions.
Sec. 5. Removal of interstate class actions to Federal district court.
Sec. 6. Appeals of class action certification orders.
Sec. 7. Enactment of Judicial Conference recommendations.
Sec. 8. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds as follows:

(1) Class action lawsuits are an important and valuable part of our legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for the judicial system in the United States.

(3) Class members have been harmed by a number of actions taken by plaintiffs' lawyers, which provide little or no benefit to class members as a whole, including—

(A) plaintiffs' lawyers receiving large fees, while class members are left with coupons or other awards of little or no value;

(B) unjustified rewards being made to certain plaintiffs at the expense of other class members; and

(C) the publication of confusing notices that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Through the use of artful pleading, plaintiffs are able to avoid litigating class actions in Federal court, forcing businesses and other organizations to defend interstate class action lawsuits in county and State courts where—

(A) the lawyers, rather than the claimants, are likely to receive the maximum benefit;

(B) less scrutiny may be given to the merits of the case; and

(C) defendants are effectively forced into settlements, in order to avoid the possibility of huge judgments that could destabilize their companies.

(5) These abuses undermine the Federal judicial system, the free flow of interstate commerce, and the intent of the framers of the Constitution in creating diversity jurisdiction, in that county and State courts are—

(A) handling interstate class actions that affect parties from many States;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(6) Abusive interstate class actions have harmed society as a whole by forcing innocent parties to settle cases rather than risk a huge judgment by a local jury, thereby costing consumers billions of dollars in increased costs to pay for forced settlements and excessive judgments.

(b) PURPOSES.—The purposes of this Act are—

(1) to assure fair and prompt recoveries for class members with legitimate claims;

(2) to protect responsible companies and other institutions against interstate class actions in State courts;

(3) to restore the intent of the framers of the Constitution by providing for Federal court consideration of interstate class actions; and

(4) to benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"Sec.
"1711. Judicial scrutiny of coupon and other noncash settlements.
"1712. Protection against loss by class members.
"1713. Protection against discrimination based on geographic location.
"1714. Prohibition on the payment of bounties.
"1715. Definitions.

"§ 1711. Judicial scrutiny of coupon and other noncash settlements

"The court may approve a proposed settlement under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.

"§ 1712. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member outweigh the monetary loss.

"§ 1713. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1714. Prohibition on the payment of bounties

"(a) IN GENERAL.—The court may not approve a proposed settlement that provides for the payment of a greater share of the award to a class representative serving on behalf of a class, on the basis of the formula for distribution to all other class members, than that awarded to the other class members.

"(b) RULE OF CONSTRUCTION.—The limitation in subsection (a) shall not be construed to prohibit any payment approved by the court for reasonable time or costs that a person was required to expend in fulfilling his or her obligations as a class representative.

"§ 1715. Definitions

"In this chapter—

"(1) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States pursuant to rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed pursuant to a State statute or rule of judicial procedure authorizing an action to be brought by one or more representatives on behalf of a class.

"(2) CLASS COUNSEL.—The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(3) CLASS MEMBERS.—The term 'class members' means the persons who fall within the definition of the proposed or certified class in a class action.

"(4) PLAINTIFF CLASS ACTION.—The term 'plaintiff class action' means a class action in which class members are plaintiffs.

"(5) PROPOSED SETTLEMENT.—The term 'proposed settlement' means an agreement that resolves claims in a class action, that is subject to court approval, and that, if approved, would be binding on the class members.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions ..... 1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION OF INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection—

"(A) the term 'class' means all of the class members in a class action;

"(B) the term 'class action' means any civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons on behalf of a class;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of a civil action as a class action; and

"(D) the term 'class members' means the persons who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) Paragraph (2) shall not apply to any civil action in which—

"(A)(i) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed; and

"(ii) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed;

"(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(C) the number of proposed plaintiff class members is less than 100.

"(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs.

"(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the requirements of rule 23 of the Federal Rules of Civil Procedure.

"(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction.

"(C) In any action that is dismissed under this paragraph and is filed by any of the original named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed under this paragraph that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed action was pending.

"(7) Paragraph (2) shall not apply to any class action brought by shareholders that solely involves a claim that relates to—

"(A) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(B) the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

"(8) For purposes of this subsection and section 1453 of this title, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(9) For purposes of this section and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) of this subsection shall nevertheless be deemed a class action if—

"(A) the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, and is not a State attorney general; or

"(B) monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact.

In any such case, the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims of individual class members. The provisions of paragraphs (3) and (6) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (A). The provisions of paragraph (6) of this subsection, and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (B).".

(b) CONFORMING AMENDMENTS.—

(1) Section 1335(a)(1) is amended by inserting "(a) or (d)" after "1332".

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) DEFINITIONS.—In this section, the terms 'class', 'class action', 'class certification order', and 'class member' have the meanings given these terms in section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

"(c) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of a class certification order in the action, except that a plaintiff class member who is not a named or representative class member of the action may not seek removal of the action before an order certifying a class of which the plaintiff is a class member has been entered.

"(d) PROCEDURE FOR REMOVAL.—The provisions of section 1446 relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action.

"(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS TO STATE COURTS.—The provisions of section 1447 shall apply to any removal of a case under this section, except that, notwithstanding the provisions of section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise.

"(f) EXCEPTION.—This section shall not apply to any class action brought by shareholders that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined

under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).".

(b) REMOVAL LIMITATION.—Section 1446(b) is amended in the second sentence by inserting "(a)" after "section 1332".

(c) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

SEC. 6. APPEALS OF CLASS ACTION CERTIFICATION ORDERS.

(a) IN GENERAL.—Section 1292(a) is amended by inserting after paragraph (3) the following:

"(4) Orders of the district courts of the United States granting or denying class certification under rule 23 of the Federal Rules of Civil Procedure, if notice of appeal is filed within 10 days after entry of the order.".

(b) DISCOVERY STAY.—All discovery and other proceedings shall be stayed during the pendency of any appeal taken pursuant to the amendment made by subsection (a), unless the court finds upon the motion of any party that specific discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

Notwithstanding any other provision of law, the amendments to Rule 23 of the Federal Rules of Civil Procedure which are embraced by the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of the enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

SEC. 8. EFFECTIVE DATE.

(a) IN GENERAL.—The amendments made by this Act shall apply to—

(1) any civil action commenced on or after the date of the enactment of this Act; and

(2) any civil action commenced before such date of enactment in which a class certification order (as defined in section 1332(d)(1)(C) of title 28, United States Code, as amended by section 4 of this Act) is entered on or after such date of enactment.

(b) FILING OF NOTICE OF REMOVAL.—In the case of any civil action to which subsection (a)(2) applies, the requirement relating to the 30-day period for the filing of a notice of removal under section 1446(b) and section 1453(d) of title 28, United States Code, shall be met if the notice of removal is filed within 30 days after the date on which the class certification order referred to in subsection (a)(2) is entered.

PURPOSE AND SUMMARY

H.R. 1115 will provide meaningful improvements in litigation management and diminish abuse of the class action device in two ways: (1) by allowing Federal courts to hear large interstate class actions; and (2) by establishing new protections for consumers against abusive class action settlements.

H.R. 1115 has three core components. First, it amends the current Federal diversity-of-citizenship jurisdiction statute (28 U.S.C. § 1332) to allow large interstate class actions to be adjudicated in Federal courts. Currently, Federal courts have jurisdiction over: (a) cases dealing with a Federal question; and (b) cases meeting current diversity jurisdiction requirements (*i.e.*, matters in which all plaintiffs are citizens of jurisdictions different from all defendants, and each claimant has an amount in controversy in excess of $75,000). H.R. 1115 would change the diversity jurisdiction requirement for class actions, generally permitting access to Federal courts in class actions where there is "minimal diversity" (that is, any member of the proposed class is a citizen of a State different from any defendant), and the aggregate amount in controversy among all class members exceeds $2 million. In that way, H.R. 1115 recognizes that large interstate class actions deserve Federal court access because they typically affect more citizens, involve

more money, and implicate more interstate commerce issues than any other type of lawsuit.

Second, H.R. 1115 implements long-needed protections for consumers against abusive settlements. These protections are established in the "Consumer Class Action Bill of Rights" ("Bill of Rights"). The Bill of Rights would: (1) enhance judicial scrutiny of coupon settlements; (2) provide judicial scrutiny over settlements that would result in a net monetary loss to plaintiffs; (3) prohibit unjustified payments, also known as bounties, to class representatives; and (4) protect out-of-State class members against settlements that favor class members based upon geographic proximity to the courthouse.

Third, H.R. 1115, as amended, puts into effect immediately several critical amendments to Rule 23 of the Federal Rules of Civil Procedure proposed by the Supreme Court that are intended to ensure the clarity of class notice and prevent abuse of the class action device.

BACKGROUND AND NEED FOR THE LEGISLATION

The class action device is one of the most important procedural mechanisms within our civil justice system. It can promote efficiency by allowing plaintiffs with similar claims to adjudicate their cases in one proceeding. The device also enables the adjudication of claims when a large number of people suffer small harms, claims that might otherwise go unredressed because the expense of individual litigation would far exceed any possible benefit. In recent years, however, class actions have been used with increasing frequency and in ways that do not promote the interests they were intended to serve.[1]

Because class actions empower lawyers to represent the interests of thousands (and sometimes millions) of people without their permission or supervision, there is substantial risk of serious abuse. Unfortunately, that abuse has become pervasive in certain county courts. Even more unfortunately, because interstate class actions often have nationwide ramifications, those abuses are affecting persons (both class members and defendants) who have little or no relationship to the jurisdictions in which these abuses are occurring. In short, even though these abuses are occurring primarily in our State court system, the impact is national in scope.

As the *Washington Post* noted last year, in urging Congress to pass class action reform legislation:

> When working properly, class actions are an important component of America's legal system—one that allows efficient court consideration of numerous identical claims against the same defendant. In practice, no component of the legal system is more prone to abuse. For unlike normal lawyers, who are retained by people who actually feel wronged, class counsel—having alleged a product deficiency that caused some small monetary damage to some discernible group of people—largely appoint themselves. The "clients" may not even be dissatisfied with the goods or services they bought, but unless they opt out of a class

[1] *See generally* Deborah Hensler, et. al. (Institute for Civil Justice), *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND (2000).

> of whose existence they may be unaware, they become plaintiffs anyway. Class actions permit almost infinite venue shopping; national class actions can be filed just about anywhere and are disproportionately brought in a handful of state courts whose judges get elected with lawyers' money. These judges effectively become regulators of products and services produced elsewhere and sold nationally. And when the cases are settled, the "clients" get token payments, while the lawyers get enormous fees.[2]

Over the last 6 years, this Committee has held five hearings and amassed considerable evidence regarding increasing problems with State court class actions.[3] The resulting record shows that plaintiffs' lawyers are filing disproportionate numbers of class actions in a small number of "magnet" State courts that have demonstrated a lax attitude toward class certification standards, a disregard for fundamental due process requirements, and a willingness to "rubber-stamp" class action settlements that offer little if anything to the class members while enriching their lawyers. In addition, certain State courts are "federalizing" such litigation; that is, they are issuing orders in nationwide class actions that essentially dictate the substantive laws of other States, often disregarding the policy choices made by the duly-elected authorities in those jurisdictions. The problem is exacerbated by the growing trend among plaintiffs' counsel of filing overlapping or "competing" class actions in various State courts around the country (*i.e.*, cases in which the same claims are asserted on behalf of the same class of persons), resulting in considerable waste and inconsistent judicial rulings.

RULES GOVERNING CLASS ACTIONS

"Class actions" have some roots in common law, but they first appeared in State courts of law and equity. The general concept was first codified in 1849 when several States adopted the Field Code.[4] Rule 23 of the Federal Rules of Civil Procedure, the rule governing Federal court class actions, was first adopted in 1938 and provided for a limited range of class actions.[5] However, the modern concept of class actions that are a familiar part of today's legal landscape did not arise until Rule 23 was substantially amended in 1966, expanding the availability of the device and providing courts more flexibility in certifying class actions.

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[2] Editorial, *Making Justice Work,* WASH. POST, November 25, 2002, at A14.

[3] *See Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* SERIAL NO. 141, 105th Cong., 2d Sess. (Mar. 5, 1998); *Class Action Jurisdiction Act of 1998: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* SERIAL NO. 121, 105th Cong., 2d Sess. (June 18, 1998); *Interstate Class Action Jurisdiction Act of 1999: Hearing before the House Comm. on the Judiciary,* 106th Cong, 1st Sess. (July 21, 1999); *The Class Action Reform Act of 2001: Hearing Before the House Comm. on the Judiciary,* SERIAL NO. 59, 107th Cong., 2d Sess. (Feb. 6, 2002); *The Class Action Reform Act of 2003: Hearing Before the House Comm. on the Judiciary*, 108th Cong., (July 15, 2003).

[4] The Field Code merely required numerous parties and a common interest in law or fact. It reads, in part: "[W]hen the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." *See* HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS Chap. 13 (3d ed. 1997).

[5] For a fuller explanation of the original Rule 23 and its history, *see, e.g., The Class Action Fairness Act of 1999: Hearings on S. 353. Before the Subcomm. on Administrative Oversight and the Courts of the Sen. Comm. on the Judiciary*, 106th Cong., (May 4th 1999) (hereinafter "Hearings on S. 353 "), (prepared statement of John P. Frank).

The Field Code, the original Federal Rule 23, and amended Federal Rule 23 remain the three models for present-day state class action rules. Thirty-six States have adopted the basic Federal class action rule (amended Federal Rule 23), some with minor revisions. Of the remaining States, most have rules that are guided by Federal court class action policy and contain similar requirements. Two States (Virginia and Mississippi) permit class actions at common law, but have no formal class rules. Thus, in principle, State and Federal class action policies ought not to vary so greatly. But application of these similar rules by State courts has created widely divergent standards for class actions and opened the door for abuse.

RULE 23 CLASS ACTION REQUIREMENTS
(FEDERAL RULES OF CIVIL PROCEDURE)

As amended in 1966, Rule 23 of the Federal Rules of Civil Procedure prescribes the conditions under which class action suits may be brought in the Federal courts. Rule 23(a) outlines the prerequisites for a class action. They are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to meeting these prerequisites, an action may only be maintained as a class action if one of the following three conditions outlined in Rule 23(b) are met: (1) the prosecution of separate actions by or against individual members of the class would create a risk of either inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action.

Rule 23(c) outlines the notice requirement for actions brought under Rule 23(b)(3). Under Rule 23(c)(2), members of any class must be provided with the "best notice [of the action] practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." After notice

has been given, class members are automatically included in the action unless they affirmatively opt out of the class. Information on how to opt out is also supposed to be clearly communicated by this notice.

FEDERAL DIVERSITY JURISDICTION

The Constitution extends Federal court jurisdiction to cases arising under Federal law—for instance, cases raising issues under the Constitution or Federal statutes or cases involving the Federal Government as a party—and generally leaves to State courts the adjudication of local questions arising under State law. However, the Constitution also specifically empowers Congress to establish Federal jurisdiction over one category of cases involving issues of State law: "diversity" cases, or suits "between citizens of different States."[6]

Diversity jurisdiction is premised on concerns that State courts might discriminate against out-of-State defendants. As Assistant Attorney General Viet Dinh testified before the Committee at a hearing on May 15, 2003, the "Founders created diversity jurisdiction to provide a Federal forum preventing bias against out-of-State defendants and out-of-State plaintiffs."[7]

Over the years since the First Congress enacted provisions in the Judiciary Act of 1789 setting forth the parameters of Federal diversity jurisdiction, two statutory limitations on that jurisdiction have been constants. The first is the "amount in controversy" requirement—now a $75,000 monetary threshold—to ensure that Federal diversity jurisdiction extends only to non-trivial State law cases.[8] However, the amount in controversy requirement is satisfied in a class action only if all of the class members are seeking damages in excess of the statutory minimum.[9]

The second is the "complete diversity" requirement. Since 1806, with some exceptions, the Federal courts have followed the rule of *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806), which states that Federal jurisdiction lies only where *all* plaintiffs are citizens of States different than all defendants. In a class action, only the citizenship of the named plaintiffs is considered for determining diversity, which means that Federal diversity jurisdiction will not exist if the named plaintiff is a citizen of the same State as the defendant, regardless of the citizenship of the rest of the class.[10]

These procedural limitations regarding interstate class actions are policy decisions, *not* constitutional ones. In fact, the U.S. Supreme Court has repeatedly acknowledged that the complete diversity and minimum amount-in-controversy requirements are political decisions not mandated by the Constitution.[11] It is therefore the prerogative of Congress to modify these technical requirements as it deems appropriate.

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[6] U.S. CONST. art. III, § 2.

[7] *Hearing on H.R. 1115 Before the House Comm. on the Judiciary,* 108th Cong., (May 15, 2003) (prepared statement of Assistant Attorney General Viet Dinh).

[8] *See* 28 U.S.C. § 1332(a).

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

[10] *See Snyder* v. *Harris,* 394 U.S. 332 (1969).

[11] *See, e.g., Newman-Green, Inc.* v. *Alfonzo-Larrian,* 490 U.S. 826, 829 n.1 (1989) (noting that "[t]he complete diversity requirement is based on the diversity statute, not Article III of the Constitution."); *See also, State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530–31 (1967).

STANDARDS FOR REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT

The general removal statute provides, *inter alia*, that any civil action brought in a State court of which U.S. district courts have original jurisdiction, may be removed by the defendant(s) to the appropriate Federal court.[12] Removal is based on the same general assumption as is diversity jurisdiction that an out-of-State defendant may become a victim of local prejudice in State court.[13]

A defendant must file for removal to Federal court within 30 days after receipt of a copy of the initial pleading (or service of summons if a pleading has been filed in court and is not required to be served on the defendant).[14] An exception exists beyond the 30-day deadline when the case stated by the initial pleading is not removable. In such a case, if the circumstances change, a notice of removal must be filed within 30 days of receipt by the defendant of "a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case [is removable]."[15]

Under current law, a case cannot be removed on the basis of Federal diversity jurisdiction more than 1 year after the case was filed, even if plaintiffs make substantial changes to their pleadings at that point.[16]

STUDIES HAVE DOCUMENTED AN EXPLOSION OF CLASS ACTIONS IN STATE COURTS

The number of class actions filed in State courts has been mushrooming in recent years, particularly in a small number of courts that have developed reputations for being friendly to class actions. Although data is difficult to gather, several studies provide a clear picture of the growing problem concentrated in certain State courts. For example:

- A major empirical research project by RAND's Institute for Civil Justice ("ICJ") observed that over a several year period, there was a "doubling or tripling of the number of putative class actions" that was "concentrated in the state courts."[17]
- According to recent studies, Federal court class action filings have increased by 340 percent over the past decade. But State court class action filings have increased more than three times faster—by 1,315 percent. Typically, the new State court filings were on behalf of proposed nationwide or multi-state classes.[18]
- A study submitted to the Committee in 1998 indicated that the local courts of six small Alabama counties were experi-

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[12] *See* 28 U.S.C. § 1441(a).

[13] *See* DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 140 (West Pub. Co.) 3d. Ed. 1990).

[14] *See* 28 U.S.C. § 1446(b).

[15] *Id.*

[16] *Id.*

[17] *Class Action Fairness Act of 2001: Hearings on H.R. 2341 Before the House Comm. on the Judiciary,* 107th Cong., 2d Sess. (Feb. 6, 2002) (prepared statement of John Beisner).

[18] *See Analysis: Class Action Litigation—A Federalist Society Survey,* Class Action Watch at 5 (Vol. 1, No. 1 1998); Deborah Hensler, et al., PRELIMINARY RESULTS OF THE RAND STUDY OF CLASS ACTION LITIGATION 15 (May 15, 1997); see also Advisory Committee Working Papers (Vol. 1) at ix-x (May 1, 1997) (memorandum of Judge Paul V. Niemeyer to members of the Advisory Committee on Civil Rules).

encing a tidal wave of class action filings, many seeking relief on behalf of purported nation-wide classes of national significance.[19]

- The final report on the RAND/ICJ study on class actions concluded that class actions "were more prevalent" in certain States "than one would expect on the basis of population."[20]
- A study by the Manhattan Institute examined data from the dockets of three State courts widely viewed as class action magnets—Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida—and confirmed that the filing of State court class actions is increasing rapidly in numbers wildly disproportionate to their populations.[21] The most dramatic increase occurred in Madison County, a southwest Illinois county with a population of 250,000, where the number of class actions increased by 1,850 percent between 1998 and 2000.[22] The majority of class actions in all three counties were brought on behalf of nationwide classes. In Madison County, for example, 81 percent of the cases filed during the survey period sought to certify nationwide classes of plaintiffs.[23] In Jefferson County, the number was 57 percent.[24] A follow-up study found that the number of nationwide class actions filed in Madison County continued to grow dramatically in 2001 and 2002.[25] And within the past 2 weeks, there have been media reports that the Madison County courts are on track to set a new record for class action filings this year.[26]

ABUSE OF THE CLASS CERTIFICATION DEVICE
IN INTERSTATE CLASS ACTIONS

The Committee believes that the main reason for the explosion in State court class action filings is a growing recognition among plaintiffs' lawyers that certain State courts are particularly friendly to class actions and will readily certify classes or approve settlements with little—if any—regard for class certification standards or the interests of class members. In particular, the Committee is concerned about four types of abuses that have become commonplace in certain State courts.

The first type of abuse is the willingness of certain State court judges to ignore the procedural requirements that govern class actions. For example, some State courts employ very lax class certification criteria, rendering virtually any controversy subject to class action treatment, regardless of whether the plaintiffs actually present sufficiently common claims. A small number of State courts go so far as to routinely certify classes before the defendant is even

[19] *Hearings on "Mass Torts and Class Action Lawsuits" Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property,* 105th Cong., 2d Sess. (March 5, 1998) (prepared statement of John W. Martin, Jr.).

[20] Deborah R. Hensler, *et al.,* CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 19 (1999) (executive summary).

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

[22] *Id.* at 170.

[23] *Id.* at 169.

[24] *Id.* at 186.

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

[26] *Number of Lawsuits is 39 and Counting,* BELLEVILLE (ILL.) NEWS-DEMOCRAT, May 26, 2003, at 1.

served with a complaint and given a chance to defend itself.[27] In one lawsuit filed against an auto manufacturer in a Tennessee State court, for example, the complaint was filed on July 10, 1996. Plaintiffs filed several inches of documents with their complaint. Amazingly, by the time the court closed that same day, the judge had entered a nine-page order granting certification of a nationwide class of 23 million members. The defendant was not even notified about the lawsuit before the certification and thus had no opportunity to tell its side of the story.[28] Upon checking, the defendant discovered that a group of record companies had the same experience with the same judge in an antitrust class action filed several days earlier.[29] Similarly, in one of the cases to develop out of the Firestone tire controversy, a Tennessee State court certified a nationwide class just 4 days after the defendants were served with the complaint (and obviously without benefit of any input from defendants).[30] In another case, a Kentucky State court ordered injunctive relief in favor of the class before the defendant was even notified of the lawsuit.[31]

The second type of abuse is the willingness of certain State courts to certify nationwide class actions in which they apply their States' laws to all class members' claims, including those of class members who live in other jurisdictions. This practice is an affront to federalism, because it results in one State court judge effectively making the law of that State applicable nationwide. Perhaps the best-known example of this phenomenon is *Avery* v. *State Farm Mut. Auto Ins. Cos.*, a case involving allegations that an automobile insurance company breached its policyholder contracts nationwide by requiring the use of less expensive non-original equipment manufacturer parts in making accident repairs, a standard industry practice.[32] In that case, an Illinois county court certified a nationwide class, and at trial, a jury awarded a verdict of $1.18 billion against defendant State Farm. The *Avery* case received broad media attention because the judge granted class certification and allowed the jury verdict to stand, even though several insurance commissioners testified that a ruling in favor of the nationwide proposed class by an Illinois court would actually contravene the laws and policies of other States. Some of those States have enacted laws encouraging (or even requiring) insurers to use less expensive, non-OEM parts in making covered accident repairs to motor vehicles as a means of containing the cost of auto insurance coverage. In upholding the *Avery* jury's award last year, an Illinois court of appeals discounted testimony from "[f]ormer and current representatives of State insurance commissioners [who] testified that the laws in many of our sister States permit and in some cases . . . [even] encourage competitive price control."[33] According to the appellate court, this testimony was irrelevant because of the

[27] *Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* 105th Cong., 2d Sess. (March 5, 1998) (prepared statement of John W. Martin, Jr.).

[28] *Hearings on S. 353,* (prepared statement of Stephen G. Morrison).

[29] *Id.*

[30] *See* Order of National Class Certification, *Davison* v. *Bridgestone/Firestone, Inc.*, Case No. 00C2298 (Eighth Cir. Ct., 20th Jud. Dist., Nashville, Tenn.) (dated Aug. 18, 2000).

[31] *See* Order, *Farkas* v. *Bridgestone/Firestone, Inc.*, Case No. 00–CI–5263 (Cir. Ct., Jefferson County, KY) (dated Aug. 18, 2000).

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

[33] *Id.* at 1254.

trial court's finding that the parts were inferior.[34] *The New York Times* observed that the import of the Illinois decision was to "overturn insurance regulations or State laws in New York, Massachusetts, and Hawaii, among other places" and "to make what amounts to a national rule on insurance."[35]

While it may be the best-known example, *Avery* is not an isolated occurrence. As Lawrence Mirel, the Commissioner of the District of Columbia Department of Insurance and Securities Regulation testified before the Committee on May 15, 2003, class action abuse is wreaking "havoc" on insurance regulation, as State court judges second-guess the policy decisions of other States' insurance regulators.[36] Of course insurance regulation is not the only area where this abuse is occurring. State courts have trampled on federalism principles in a number of other areas as well, all in an effort to certify classes that should not be certified. Among the examples are:

- Earlier this year, the Supreme Court of Oklahoma affirmed the certification of a nationwide product liability class action brought against a car manufacturer, applying the laws of a single State to transactions that occurred in all 50 States.[37] Thus, in this case, a State court has decided effectively to override whatever policy determinations another State's legislature or courts may have made on warranty or product liability policy to protect their own residents.
- The Minnesota Court of Appeals recently affirmed a nationwide class action, applying the laws of a single State to transactions that occurred in many different jurisdictions (and virtually none of which occurred in the State whose laws were applied).[38] One judge who decided the case openly acknowledged that the court was engaging in the "false federalism" that has become part of the State court class action game.

The sentiment reflected in these cases flies in the face of basic Federalism principles by embracing the view that one State court can trump the contrary policy choices made by other States. Indeed, such examples of judicial usurpation, in which one State's courts try to dictate its laws to 49 other jurisdictions, have also been duly criticized by some congressional witnesses as "false federalism."[39]

In contrast, in recent years, numerous Federal courts (applying the choice-of-law doctrines of various jurisdictions) have considered which laws should apply in proposed nationwide class actions asserting State law-based claims. Those courts have consistently concluded that in a nationwide or multi-State class action, the choice-of-law rules of the State in which the action was originally filed must be applied.[40] Further, they have consistently concluded that

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[34] *Id.*

[35] Matthew L. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers,* N. Y. TIMES, Sep. 27, 1998.

[36] *Hearing on H.R. 1115 Before the House Comm. on the Judiciary,* 108th Cong., (May 15, 2003) (prepared statement of Lawrence H. Mirel).

[37] *Ysbrand* v. *DaimlerChrysler Corp.,* 2003 Okla. LEXIS 17 (Okla. 2003).

[38] *Peterson* v. *BASF Corp.,* 2002 Minn. App. LEXIS 275 (Minn. Ct. App. March 11, 2003).

[39] *See Interstate Class Action Jurisdiction Act of 1999: Hearing on H.R. 1875 Before the House Comm. on the Judiciary,* 106th Cong., 1st Sess. (July 21, 1999) (prepared statement of Walter Dellinger, former acting-Solicitor General).

[40] *See, e.g., In re Bridgestone/Firestone, Inc. Prods. Liab. Litig.,* 288 F.3d 1012 (7th Cir. 2002).

those choice-of-law rules must be applied to *"each plaintiff's claims."*[41] Based on those principles, Federal courts have consistently concluded that the laws of all States where purported class members were defrauded, injured, or purchased the challenged product or service must come into play.[42] Of course, this careful application of different states' substantive laws by Federal courts in national class action cases often undermines a key rationale for treating it as a class action in the first place, *i.e.*, that the class members share common issues of law. And in those very few instances in which a Federal district court has toyed with the idea of engaging in "false federalism" (*i.e.,* applying a single State's law to all asserted claims), that notion has been reversed on appeal almost immediately.[43]

The third type of abuse that is becoming far too prevalent in State court class action practice is the "copy-cat" class action phenomenon, under which competing groups of plaintiffs' lawyers (or sometimes the same lawyers) file numerous nearly identical class actions in State courts around the country. In the aftermath of the Ford/Firestone recall, for example, nearly 100 substantially identical class actions were filed in various State courts throughout the country. Sometimes these class actions are brought by attorneys vying to wrest the potentially lucrative lead role away from the lawyers who filed the original class actions. In other instances, the "copy cat" class actions are an exercise in forum-shopping by the same lawyers, who file duplicative actions before multiple courts in an effort to find a receptive judge who will rapidly certify a class.

When such "copycat" cases are filed in various Federal courts, they may be consolidated before a single Federal judge through the multidistrict litigation provisions of 28 U.S.C. § 1407, thereby assuring consistent treatment of legal issues and uniform management of the cases and reducing duplication. Unlike the Federal court system, however, State courts do not have a mechanism whereby they can cogently consolidate or adjudicate numerous competing suits filed in different States. Instead, a settlement or judgment in any of the cases makes the other class actions moot. This creates an incentive for each class counsel to obtain a quick settlement of the case, and an opportunity for the defendant to play the various class counsel against each other and drive the settlement value down. Again, the loser is the putative class member whose claim is extinguished by the settlement, at the expense of counsel

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[41] *See, e.g., Georgine* v. *Amchem Prods.,* 83 F.3d 610, 627 (3d Cir. 1996); *aff'd sub nom. Amchem Prods.* v. *Windsor*, 521 U.S. 591 (1997).

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

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

seeking recovery of fees. Unless copy-cat cases are removed to Federal court, they are litigated separately in each State court, resulting in judicial waste, abuse, and disparate outcomes.

The fourth and most widely recognized form of abuse is the approval of class settlements that provide no real relief for class members—and only benefit their lawyers. Once again, this problem is far more prevalent in State courts than in Federal courts. In a study jointly funded by the plaintiffs' and defense bars, the Institute for Civil Justice/RAND examined where the money goes in class settlements. That study indicates that in State court consumer class action settlements (*i.e.*, non-personal injury monetary relief cases), the class counsel frequently walk away with more money than all class members combined.[44] Another in-depth study found that this "lawyer takes all" phenomenon was *not* occurring in Federal courts—'[i]n most [class actions handled by Federal courts], net monetary distributions to the class exceeded attorneys' fees by substantial margins."[45]

Examples of abusive State court settlements abound. In the now infamous *Bank of Boston* settlement, an Alabama State court judge approved a settlement that awarded no more than $8.16 to individual class members, while the class counsel received more than $8.5 million in fees.[46] One class member testified before the Senate Subcommittee on Administrative Oversight and the Courts that she was charged a mysterious $80 miscellaneous deduction that she later learned was an expense used to pay the class lawyers' fee.[47] In her testimony, that witness expressed disbelief at the notion that "people who were supposed to be my lawyers, representing my interests, took my money and got away with it."[48]

While the Bank of Boston settlement is the best-known (and perhaps the most egregious) example, witnesses who appeared before the Committee have noted an abundance of other settlements that provided millions of dollars to the lawyers—but only pennies to the class members:

- In a recent case involving customers who alleged that they were charged excessive late fees by Blockbuster, the class members received *$1 off* coupons for rentals—at the same time, their attorneys divided up a *$9.25 million* fee award. Experts have predicted that at most, only 20 percent of the class members will redeem the coupons. The settlement allows Blockbuster to continue its practice of charging customers for a new rental period when they return a tape late.[49] In this settlement approved by the Texas State court, only the lawyers got cash.
- In another recent case, Food Lion settled a State court class action filed by a consumer group by offering *28-cent coupons* to customers who held an MVP discount card between 1995

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

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

[46] *Class Action Lawsuits: Examining Victim Compensation and Attorney's fees: Hearing Before the Subcomm on Administrative Oversight and the Courts of the Sen. Comm. on the Judiciary*, 105th Cong., 2d Sess., Hr'g. 105–504 (Oct. 30, 1997).

[47] *Id.*

[48] *Id.*

[49] *Scott* v. *Blockbuster Inc.* (No. D162–535, Jefferson County, Texas, 2001); *Judge OKs Blockbuster Plan On Fees,* ASSOCIATED PRESS, Jan. 11, 2002.

and 1998. The plaintiff class alleged that Food Lion charged too much sales tax on discounted products purchased with the discount card.[50] Only the lawyers got money.

- A manufacturer offered consumers who bought a dozen Pinnacle golf balls free golf gloves. When the manufacturer ran out of the golf gloves and substituted a set of three free golf balls, it was hit with a class action. The settlement provided that the manufacturer would send each class member three more free golf balls. Meanwhile, by order of a State court, the attorneys who brought the lawsuit received *$100,000* in fees and the persons who served as class representatives each received $2,500.[51]
- Under the settlement in a State court case, which resulted from allegations regarding changes in the American Airlines frequent flyer program, members of the program received vouchers good for $25 to $75 off the price of future travel, or a similarly valued reduction in the number of miles required for an award. American also agreed to pay the lawyers up to *$25 million* in fees. One news article about the settlement quoted travel experts saying that "the practical value of those discounts will be modest," and "American could end up generating enough extra revenue to more than offset the cost of the offer."[52]
- Publishers of the Beardstown Ladies investment advice books agreed to a settlement providing plaintiff class members with coupons worth *$15–$25*. Plaintiffs alleged that defendants included false and misleading statements in marketing materials regarding the success rates of investment strategies espoused in the books. The coupons allowed claimants to purchase books from a pre-approved list, which the publishers retained control over.[53] All of the cash paid in this State court-approved settlement went to lawyers.
- In a suit involving port charges, a sea cruise line agreed to give vouchers for a future cruise worth *$25 to $55 off a future cruise* to 4.5 million people who sailed on its cruises between April 19, 1992 and June 4, 1997. The vouchers can be used for a future cruise or redeemed for cash at 15 percent or 20 percent of face value.[54] In this State court class action settlement, only the lawyers received cash payments.
- In a case alleging flawed television sets, Thomson Consumer Electronics agreed to reimburse customers who had receipts documenting repairs, to provide $50 rebates on the purchase of future products for consumers who did not repair their problems or did not have receipts, and to provide $25 rebates on future products to consumers who did not experience a problem. Under the terms of the settlement approved by an Illinois State court, the lawyers reportedly received *$22 million* in fees and costs. According to news reports, more than

[50] *Attention Shoppers: Food Lion Rebate Due,* GREENSBORO NEWS & RECORD, Feb. 25, 2002.
[51] *Enough Already With the Lawsuits,* KANSAS CITY STAR, July 10, 1999.
[52] *American Airlines Settles Lawsuits Over Frequent Flier Program,* FORTH WORTH STAR-TELEGRAM, June 22, 2000.
[53] *See Keimer v. Buena Vista Books: Settlement available at* http://www.beardstownladiessettlement.com.
[54] *Carnival Cruise Settles Lawsuit,* FLORIDA TODAY, Mar. 16, 2001.

2,640 people opted out of the settlement; some said they opted out because the form was complicated and others said they opted out because the attorneys' fees were so high.[55]

- In the settlement of a State court class action involving allegations of overly aggressive fees and rates by a Minnesota credit card company, class members received discount coupons with a retail value of *$19.95*, an $8 dollar donation in their name to the Boys and Girls Clubs of America, the right to apply for a 9.9 percent interest credit card and to join a promotional travel discount club. They also had the potential to receive between $10 and $70 in cash. The company agreed to change its practices, and the lawyers received *$5.6 million* in fees.[56]
- In one State court class action involving faulty pipes, lawyers for a group of Alabama plaintiffs received more than $38.4 million in fees and lawyers for a class of Tennessee plaintiffs case received *$45 million*, or the equivalent of about *$2,000 an hour*. In contrast, the homeowners only received 8 percent rebates toward new plumbing—and to get those rebates, they had to first prove that they had suffered leaks and then go out and buy a new system.[57] The money in the settlement flowed primarily to class counsel.
- In a group of State court class actions settled last year, class members alleging that they were not fully advised of "energy surcharges" applied when they checked into hotels during California's electricity crisis were given $10 coupons.[58] Only the lawyers are receiving cash.
- In another case, an Illinois State court approved a coupon settlement of a class action filed against Southwestern Bell Mobile Systems, Inc., alleging that the company failed to fully disclose the fact that it rounded up customer calls to the next minute. Under the State court settlement, the class members received *$15 vouchers* toward Cellular One products, while the lawyers took home more than *$1 million* in fees.[59]
- In a State court class action alleging that Coca-Cola improperly added sweeteners to apple juice, defendant agreed to distribute 50-cent coupons toward the purchase of apple juice. Meanwhile, class counsel received *$1.5 million*.[60]

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[55] *Baird* v. *Thomson Consumer Electronics, Inc.* (No. 00–L–00761, Madison County, Illinois); *2,640 Television Owners Tune Out Class Action Suit,* BELLEVILLE (ILL.) NEWS-DEMOCRAT, Aug. 19, 2001.

[56] *Fischl* v. *Direct Merchants Credit Card Bank, N.A.* (CT 00–007129, Hennepin County, Minnesota); *Soft Firm: Too Often, The SF Law Firm Of Lieff, Cabraser, Heimann & Bernstein Strikes Settlements That Give The Firm Millions Of Dollars In Legal Fees—And Its Class Action Clients Too Little,* S.F. WEEKLY, May 29, 2002.

[57] *See* Richard B. Schmitt, *Leaky System: Suits Over Plastic Pipe Finally Bring Relief, Especially for Lawyers,* WALL ST. J., Nov. 20, 1995, at A1.

[58] *Hotel Chains Settle Class-Action Suit Over Energy Surcharges,* SAN DIEGO UNION-TRIBUNE, July 4, 2002.

[59] *See* Michelle Singletary, *Coupon Settlements Fall Short,* WASH. POST, Sept. 12, 1999, at H01. For more examples of coupon settlements, see Hearings on S. 353, Prepared Testimony of Stephan G. Morrison.

[60] *Lawyers Get $1.5 Million, Clients Get 50 Cents Off,* FULTON COUNTY DAILY REPORT, Nov. 21, 1997.

- In a State court action alleging that General Mills treated oats with a non-approved pesticide, class members were offered coupons; the attorneys received *$1.75 million*.[61]

As the Washington Post put it last year in an editorial condemning settlements like those listed above: "This is not justice. It is an extortion racket that only Congress can fix."[62]

CURRENT JURISDICTIONAL RULES ARE FOSTERING CLASS ACTION ABUSES BY KEEPING CLASS ACTIONS OUT OF FEDERAL COURTS

The current jurisdictional statutes were originally enacted years ago, well before the modern class action arose. Unfortunately, the way they were drafted results in the exclusion of most interstate class actions from Federal court. Moreover, the current jurisdictional rules enable plaintiffs' counsel to evade Federal jurisdiction through manipulative pleading techniques for two reasons.

First, although the Supreme Court has held that only the named plaintiffs' citizenship should be considered for purposes of determining if the parties to a class action are diverse, the "complete" diversity rule still mandates that *all* named plaintiffs must be citizens of different States from *all* the defendants.[63] In interstate class actions, plaintiffs' counsel frequently and purposely evade Federal jurisdiction in multi-State class actions by adding named plaintiffs or defendants simply based on their State of citizenship in order to defeat complete diversity. During a February 6, 2002, hearing, the Committee received detailed testimony about how attorneys often name irrelevant parties to class actions filed in State court in an effort to "destroy diversity" and keep the case from qualifying for Federal diversity jurisdiction. One witness, Hilda Bankston, testified regarding her experiences of owning a small drugstore in Jefferson County Mississippi, which was repeatedly dragged into lawsuits against pharmaceutical manufacturers.[64] According to Mrs. Bankston, her drugstore was a target because it filled FDA-approved prescriptions, was located in Jefferson County, Mississippi, and kept accurate records.[65] If all it takes to keep a class action in State court is to name one local retailer that keeps good records, it is no surprise that few interstate class actions meet the complete diversity requirement.

Second, in interpreting 28 U.S.C. § 1332(a), some Federal courts of appeals, relying on a 1974 Supreme Court decision,[66] have held that the amount-in-controversy requirement is normally met in class actions only if *each* of the class members individually seeks damages in excess of the statutory minimum.[67] That means Federal courts can only hear class actions in which *each* plaintiff claims damages in excess of $75,000.[68] The Committee believes

[61] *Cereal Plan Called Soggy,* Nat'l Law Journal, May 22, 1995.
[62] Editorial, *Making Justice Work,* WASH. POST, November 25, 2002, at A14.
[63] *See Snyder* v. *Harris,* 394 U.S. 332 (1969).
[64] *Class Action Fairness Act of 2001: Hearings on HR. 2341 Before the House Comm. on the Judiciary,* 107th Cong., 2nd Sess. (Feb. 6, 2002) (prepared statement of Hilda Bankston).
[65] *Id.*
[66] *See Zahn* v. *International Paper Co.,* 414 U.S. 291 (1974).
[67] *See Trimble* v. *Asarco, Inc.,* 263 F.3d 946 (8th Cir. 2000); *Meritcare, Inc.* v. *St. Paul Mercury Ins. Co.,* 166 F.3d 214 (3d Cir. 1999); *Leonhardt* v. *Western Sugar Co.,* 160 F.3d 631 (10th Cir. 1998).
[68] Other Federal courts of appeals have held that for a class action to be heard in Federal court only one or more named plaintiffs must have claims exceeding $75,000. *See, e.g., Rosmer*

Continued

that requiring each plaintiff to reach the $75,000 mark makes little sense in the class action context. After all, class actions frequently involve tens of millions of dollars even though each individual plaintiff's claims are far less than that. Moreover, class action lawyers typically misuse the jurisdictional threshold to keep their cases out of Federal court. For example, class action complaints often include a provision stating that no class member will seek more than $75,000 in relief, even though certain class members may be entitled to more and even though the class action seeks millions of dollars in the aggregate. Under current law, that is frequently enough to keep a major class action in State court.

The current anomaly in jurisdictional law has created a system under which a citizen can bring a "Federal case" by claiming $75,001 in damages for a simple slip-and-fall case against a party from another State, while a class action involving 25 million people living in all 50 States and alleging claims against a manufacturer that are collectively worth $15 billion must usually be heard in State court (because each individual class member's claim is for less than $75,000). Put another way, under the current jurisdictional rules, Federal courts can assert diversity jurisdiction over a typical State law claim arising out of an auto accident between a driver from one State and a driver from another, or a typical trespass claim involving a trespasser from one State and a property owner from another, but they cannot assert jurisdiction over claims encompassing large-scale, interstate class actions involving thousands of plaintiffs from many States, defendants from many States, the laws of many States, and hundreds of millions of dollars—cases that have significant implications for the national economy.

Not surprisingly, a growing chorus of authoritative sources are bringing attention to this anomaly and calling for legislation to correct it.

- The leading Federal civil procedure law treatise has noted: "The traditional principles [regarding Federal diversity jurisdiction over class actions] have evolved haphazardly and with little reasoning. They serve no apparent purpose."[69]
- Former Acting Solicitor General Walter Dellinger testified in 1999 before the Committee on the Judiciary that if Congress were to enact an entirely new Federal diversity jurisdiction statute and consider anew which kinds of cases most warrant access to Federal courts, there would be little legitimate debate that interstate class actions would be at or near the top of the list,[70] since they typically have the most money in controversy, involve the most people, and have the most interstate commerce ramifications.

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v. *Pfizer, Inc.,* 263 F.3d 110 (4th Cir. 2001); *Gibson* v. *Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001); *Stromberg Metal Works. Inc.* v. *Press Mechanical, Inc.,* 77 F.3d 928 (7th Cir. 2000); *In re Abbott Labs., Inc.*, 51 F.3d 524 (5th Cir. 1995), *aff'd by an equally divided Court,* 529 U.S. 333 (2000). In the view of these courts, the value of the claims of the other class members is irrelevant—they are deemed to be part of the class as a matter of supplemental jurisdiction. The Committee stresses, however, that even in those Circuits following this rule, relatively few class actions find their way into Federal court because plaintiffs offer named plaintiffs who do not have $75,000 claims or name a non-diverse plaintiff or defendant in order to prevent removal of the case to Federal court.

[69] Charles A. Wrght, et. al., FEDERAL PRACTICE AND PROCEDURE § 3704, at 127 (3 ed. 1998).

[70] *Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999: Hearings on H.R. 1875 and H.R. 2005 Before the House Comm. on the Judiciary,* 106th Cong., 1st Sess. 57 (July 21, 1999) (prepared statement of Walter Dellinger).

- In a recent Minnesota State appellate court decision upholding a grant of class certification, a concurring judge noted that the nationwide class action before it was a "poster child for national class action reform. We have here a Minnesota [state] district court, applying a New Jersey consumer fraud statute to a nationwide class of plaintiffs, with few of those plaintiffs residing in New Jersey. It is probably a fair assumption that the legislative authors of the New Jersey consumer protection scheme did not have in mind midwestern farmers purchasing agricultural chemicals as the protected class . . . This is not a recipe for uniformity or consistency, it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures."[71]
- The U.S. Court of Appeals for the Eleventh Circuit apologized for sending an interstate class action back to State court, noting that "an important historical justification for diversity jurisdiction is the reassurance of fairness and competence that a Federal court can supply to an out-of-State defendant facing suit in State court." Observing that the out-of-State defendant in that case was confronting "a State court system [prone to] produce[] gigantic awards against out-of-State corporate defendants," the court stated that "[o]ne would think that this case is exactly what those who espouse the historical justification for [diversity jurisdiction] would have in mind. . . ."[72]
- In that same case, Judge John Nangle, the former chairman of the Judicial Panel for Multidistrict Litigation, concurred: "Plaintiffs' attorneys are increasingly filing nationwide class actions in various state courts, carefully crafting language . . . to avoid . . . the Federal courts. Existing Federal precedent . . . [permits] this practice . . ., although most of these cases . . . will be disposed of through 'coupon' or 'paper' settlements . . . virtually always accompanied by munificent grants of or requests for attorneys' fees for class counsel. . . . [T]his judge is of the opinion that the present [jurisdictional rules] do[] not accommodate the reality of modern class litigation and settlements."[73]
- In another case, Judge Anthony Scirica (chair of the Judicial Conference's Standing Committee on Rules and Procedure) observed that although "national (interstate) class actions are the paradigm for Federal diversity jurisdiction because . . . they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises, . . . the current jurisdictional statutes [put] such class actions . . . beyond the reach of the Federal courts."[74]
- Although the Judicial Conference of the United States has at least twice formally opposed any expansion of Federal jurisdiction over class actions, the Judicial Conference signaled a

[71] *Peterson* v. *BASF Corp.,* 2003 Minn. App. LEXIS 275, at *47–48 (Minn. Ct. App. Mar. 11, 2003).
[72] *Davis* v. *Cannon Chevrolet-Olds, Inc.,* 182 F.3d 792, 797 (11th Cir. 1999).
[73] *Id.* at 798.
[74] *In re Prudential Ins. Co. America Sales Practice Litig.,* 148 F.3d 283, 305 (3d Cir. 1998).

significant shift in a March 26, 2002 letter to Congress.[75] The letter acknowledges "current problems with class action litigation." Further, in that letter, the Conference for the first time "recognizes that the use of [expanded] diversity jurisdiction may be appropriate to the maintenance of significant multi-state class action litigation in the Federal courts."[76]

- Even attorneys and scholars associated with the plaintiffs' bar have acknowledged a need to expand Federal court jurisdiction over class actions. For example, at the March 1998 House hearing, Prof. Susan Koniak of the Boston University School of Law stated that such a move would be "a good idea . . . 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."[77] Similarly, Elizabeth Cabraser, one of the foremost members of the plaintiffs' class action bar, testified 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."[78]
- Increasingly, the media has joined the chorus as well. For example, the Washington Post has editorialized that "the existence of . . . 'magnet' courts and troubling settlements, which undermine public confidence in our judicial system, would be greatly reduced if Federal courts had jurisdiction over interstate class actions."[79] The *Washington Post* has endorsed the legislative effort behind H.R. 1115, noting last year: "The House passed a bill in the 107th Congress, which then stalled in the Senate, that would make it easier for defendants to move class actions from State to Federal courts and subject them to more reasonable Federal rules. Passing this bill would be an important beginning."[80]

The Committee agrees with these and many others who recognize that the Federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy.

EFFECT OF H.R. 1115 ON EXISTING LAW

H.R. 1115 would amend the diversity jurisdiction and removal statutes applicable to class actions where there is a substantial risk of discrimination against out-of-State defendants. It amends 28 U.S.C. § 1332 to grant original jurisdiction in the Federal courts

[75] Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States to Chairman Orrin G. Hatch, Sen. Comm. on the Judiciary, (Mar. 26, 2003).
[76] *Id.*
[77] Fed. News Serv. Tr., *Mass Torts and Class Actions: Hearing Before the Subcomm. on Intellectual Property and the Courts of the House Comm. on the Judiciary* (March 9, 1998), 105th at 19 ("FNS Transcript").
[78] *Id.*
[79] Editorial, *Fixing Class Actions,* WASH. POST, Mar. 21, 2002, at A34.
[80] Editorial, *Making Justice Work,* WASH. POST, Nov. 25, 2002, at A14.

to hear interstate class actions where any member of the proposed class is a citizen of a State different from any defendant—a change from "complete diversity" to "minimal diversity." However, to ensure that cases that are truly local in nature are not swept into the Federal courts, the bill would exempt from its reach: (1) cases in which a "substantial majority" of the class members and the "primary defendants" are citizens of the same State and the claims will be governed primarily by that State's law; (2) cases involving fewer than 100 class members or where the aggregate amount in controversy is less than $2 million; and (3) cases where the primary defendants are States or State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

H.R. 1115 would also establish new rules governing the removal of class actions filed in State court. Existing removal procedures would apply with four new features. First, named plaintiffs would be permitted to remove class actions to Federal court and unnamed plaintiffs would be permitted to remove certified class actions, in which their claims are being asserted, to Federal court. Under current rules, only defendants are allowed to remove. Second, parties could remove without the consent of any other party. Current removal rules require the consent of all defendants. Third, removal to Federal court would be available to any defendant, regardless of whether any defendant is a citizen of the State in which the action was brought. Fourth, the current bar to removal of class actions after 1 year would be eliminated, although the requirement that removal occur within 30 days of notice of grounds for removal would be retained.

Under H.R. 1115, if a removed class action is found not to meet the requirements for proceeding on a class basis, the Federal court would dismiss the action without prejudice. Plaintiffs would then be permitted to refile their claims in State court, presumably in a form amended either to fall within one of the types of class actions over which the district court is not to exercise jurisdiction, one which could be maintained as a class action under Federal Rule 23, or as an individual action. The refiled case would once again be eligible for removal if original Federal jurisdiction exists. The statute of limitations on individual class members' claims in such a dismissed class action would not run during the period the action was pending in Federal court, nor would that of claims in new class actions filed by the same named plaintiffs in the same State venue.

Response to Criticisms of H.R. 1115

Opponents of H.R. 1115 have criticized the bill on several grounds, arguing that the legislation would: overload the Federal courts; delay the resolution of class actions; and make it difficult for injured citizens to obtain justice. None of these contentions are true.

H.R. 1115 would not overload the Federal courts.

During Committee debate on previous versions of this bill, the most frequently expressed concern was that its jurisdictional provisions would overload the Federal judiciary. That argument, however, ignores the burden of class actions on our entire national judicial system, which includes both Federal courts and State courts.

In fact, many State courts, where the critics apparently would like to confine all interstate class actions, are just as burdened—if not more so—than the Federal courts, and are less equipped to deal with complex cases like class actions. Indeed, many State courts have comparatively crushing caseloads.

Current data indicate that there has been a 7.2 percent decrease in the number of civil cases pending in our Federal district courts nationwide since 1997.[81] The number of new diversity jurisdiction cases filed in Federal courts has decreased by more than 11 percent since 1997.[82] In contrast, civil filings in State trial courts of general jurisdiction have increased 30 percent since 1984 (compared to a 4 percent increase in the Federal courts).[83] Perhaps most tellingly, in most jurisdictions, each State court judge is assigned (on average) over 1,500 new cases each year,[84] while each Federal court judge was assigned an average of 454 new cases during 2001.[85]

Critics of the bill also ignore the fact that many State courts are tribunals of general jurisdiction—they hear all sorts of cases, including divorce matters, custody disputes, name change petitions, traffic violations, small claims contract disputes, minor misdemeanors, and major felonies. Thus, when a class action is filed before those courts, it diminishes their ability to provide a broad array of basic legal services for the local community. The judges presiding over those State courts have far fewer resources for dealing with huge, complex cases, like class actions. Federal court judges usually have two or three law clerks; State court judges typically have none. Federal court judges usually can delegate aspects of their cases (*e.g.,* discovery issues) to magistrate judges or special masters; State court judges typically lack such resources.

Further, Federal courts regularly decide cases involving difficult conflict of law questions, and are frequently required to apply different States' laws in complex cases—not just class actions. Indeed, it is fair to say that this is "standard fare" for the Federal courts. On the other hand, State courts are not as familiar with these kinds of issues and have been known to avoid applying different State laws by simply—and improperly—imposing their own State law on a nationwide case. Removal of more class actions to the Federal courts can only lead to more appropriate handling of these cases, as well as improve the fairness of class action decisions to both plaintiffs and defendants.

Critics who focus on the Federal courts' workload are missing the point—class actions are precisely the kind of cases that should be heard in Federal court. Class actions usually involve the most people, the most money, and the most interstate commerce issues. They also usually involve issues with nationwide implications. Interstate class actions are certainly no less deserving of a Federal forum than the 24,404 cases to recover a few thousand dollars in student loan arrearages, the 12,307 individual product liability actions (typically one-person injury case), the 17,482 Federal personal

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[81] *See* Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 16 (2002) ("JUDICIAL BUSINESS").

[82] *Id.* at 24.

[83] B. Ostrom, *et al.,* EXAMINING THE WORK OF STATE COURTS 10 (Court Statistics Project 2001).

[84] *Id.* at 12–13.

[85] *See* Administrative Office of the U.S. Courts, 2001 FEDERAL COURT MANAGEMENT STATISTICS 167 (2002).

injury cases (*e.g.,* single person medical malpractice cases), or 24,684 civil *habeas corpus* cases filed in Federal court during 2001.[86] Indeed it is noteworthy that there were almost ten times as many product liability and Federal personal injury cases (normally one-person claims) filed in Federal court during 2001 (29,789) as there were class actions (3,092).[87] Ultimately, regardless of the impact on the Federal court caseload, large interstate class actions belong in Federal court.

H.R. 1115 will not result in delays for injured consumers

For all of the reasons set forth previously, H.R. 1115 would not overwhelm the Federal courts with class action cases and thereby delay consumers' redress for their injuries in Federal court.

Opponents of the bill have presented no data whatsoever that judicial overload would occur. Although some critics have asserted that it takes at least 5 years to get a class action to trial in Federal court, far longer than in State court, in reality, the median time for final disposition of a civil claim filed in Federal court is *8.1 months*, and the median time to get to trial in a civil matter in Federal court is *20.4 months*.[88] The record reflects no hard evidence that on average, State courts proceed more quickly.

When Congress has expanded Federal court jurisdiction in other respects, it normally has not (at least in recent years) had the benefit of any hard data indicating the likely impact on Federal court workload. For example, the Y2K Act (Pub. L. No. 106–37) expanded Federal jurisdiction over Y2K class actions in almost precisely the same manner as proposed in H.R. 1115. Congress enacted that change without knowing its likely judicial workload impact. Likewise, the Securities Litigation Reform Act of 1998 (Pub. L. No. 105–353) contained provisions moving virtually all securities class actions from State courts into the Federal courts. Once again, Congress enacted that expansion of Federal jurisdiction without knowing the precise effects on Federal court workload. In the past, when the case has been made that Federal court jurisdiction should be expanded, Congress has simply enacted the expansion with the understanding that any resulting judicial workload problems could be addressed later. In sum, there simply is no basis for the claims that consumers will be worse off in Federal court or that the resolution of class actions will be delayed because of the Federal judiciary's workload.

H.R. 1115 does not undermine federalism principles

While some critics have alleged that this bill will somehow undermine federalism principles, exactly the opposite is true. H.R. 1115 has been carefully crafted to correct a problem in the current system that does not promote traditional concepts of federalism. In fact, it is the current system and the wave of nationwide State court class actions that has trampled on the rights of States to manage their legal systems by allowing State court judges to interpret and apply the laws of multiple jurisdictions. When State courts preside over class actions involving claims of residents of

[86] *See* JUDICIAL BUSINESS, at 130–31.

[87] *See* Administrative Office of the U.S. Courts, FEDERAL JUDICIAL CASELOAD STATISTICS 56 (2002).

[88] JUDICIAL BUSINESS at 157.

more than one State, they frequently dictate the substantive laws of other States, sometimes over the protests of those other jurisdictions (as discussed previously). 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.

It is far more appropriate for a Federal court to interpret the laws of various States (a task inherent in the constitutional concept of diversity jurisdiction), than for one State court to dictate to other States what their laws mean or, even worse, to impose its own State law on a nationwide case. Why should a State court judge elected by several thousand residents of a small county in Alabama tell New York or California the meaning of their laws? Why should an Illinois State court judge interpret decisions by Virginia or Wisconsin courts? Why should a State court judge be able to overrule other State laws and policies? Why should State courts be setting national policy?

H.R. 1115 simply allows more class action cases filed in State court to be removed to Federal court. H.R. 1115 does not change substantive law—it is, in effect, a procedural provision only. As such, class action decisions rendered in Federal court should be the same as if they were decided in State court—under the *Erie* doctrine, Federal courts must apply State substantive law in diversity cases. Moreover, if Federal court judges are not familiar with State law on a particular issue, they have the authority to "certify" a question of law to a State court, *e.g.*, to advise the Federal court how a State's laws should be applied in an uncharted situation. This procedure allows the Federal courts to apply State law appropriately and gives States the ability to manage their legal systems without becoming bound by other States' interpretations of their laws.

In short, contrary to critics' contentions, the real harm to federalism is the status quo—leaving the bulk of class action cases in State court. Federal courts are the appropriate forum to decide interstate class actions involving large amounts of money, many plaintiffs and interstate commerce disputes. These matters of interstate comity are more appropriately handled by Federal judges appointed by the President and confirmed by the Senate. H.R. 1115 simply restores this proper balance by resolving an anomaly of diversity jurisdiction. True to the concept of federalism, H.R. 1115 appropriately leaves certain "intrastate" class actions in State court: cases involving small amounts in controversy; cases with a class of 100 plaintiffs or less; cases involving plaintiffs, defendants and governing law all from the same State; cases against States and State officials; and certain securities and corporate governance cases. As such, H.R. 1115 promotes the concept of federalism and protects the ability of States to determine their own laws and policies for their citizens.

HEARINGS

The full Committee held a hearing on H.R. 1115 on May 15, 2003. Testimony was received from four witnesses: Hon. Viet Dinh, Assistant Attorney General, U.S. Department of Justice; John Beisner, Esq., Attorney, O'Melveny & Myers LLP; Lawrence H. Mirel, Commissioner, District of Columbia Department of Insur-

ance and Securities Regulation; and Brian Wolfman, Esq., Attorney, Public Citizen Litigation Group.

COMMITTEE CONSIDERATION

On May 21, 2003, the Committee met in open session and ordered favorably reported the bill H.R. 1115, as amended, by a vote of 20 ayes to 14 nays, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the committee's consideration of H.R. 1115:

1. An amendment offered by Mr. Nadler to prohibit the court from sealing class action records relevant to public health or safety. DEFEATED: rollcall vote of 7 ayes and 20 nays.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers			
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	7	20	

2. An amendment offered by Mr. Smith and Mr. Boucher to apply the provisions of the bill to cases that have been filed but not

certified as a class upon date of enactment. ADOPTED: rollcall vote of 21 ayes and 9 nays.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers			
Mr. Berman		X	
Mr. Boucher	X		
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	21	9	

3. An amendment offered by Mr. Scott to strike the bill's prohibition on bounties which disproportionately reward certain class members. DEFEATED: rollcall vote of 12 ayes and 20 nays.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	12	20	

4. An amendment offered by Ms. Jackson Lee and Mr. Conyers to make foreign corporations citizens of the States where a domestic corporation acquired by said foreign corporation (via a corporate repatriation transaction) is incorporated for purposes of Federal diversity jurisdiction. DEFEATED: rollcall vote 13 ayes to 20 nays.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	13	20	

5. A motion by Chairman Sensenbrenner to favorably report H.R. 1115 as amended. ADOPTED: rollcall vote 20 ayes to 14 nays.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher	X		
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	20	14	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1115, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 2, 2003.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1115, the Class Action Fairness Act of 2003.

If you wish further details on this estimate, we will be pleased to provide them.

The CBO staff contact is Lanette J. Walker (for Federal costs), who can be reached at 226–2860, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1115—Class Action Fairness Act of 2003.

H.R. 1115 would expand the types of class-action lawsuits that would be initially heard in Federal district courts. CBO estimates that implementing the bill would cost the Federal district courts about $6 million a year, subject to appropriation of the necessary funds. The bill would not affect direct spending or revenues. H.R. 1115 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on State, local, or tribal governments.

Under H.R. 1115, most class-action lawsuits would be heard in a Federal district court rather than a State court. Therefore, CBO estimates that the bill would impose additional costs on the Federal district court system. While the number of cases that would

be filed in Federal court under this bill is uncertain, CBO expects that a few hundred additional cases would be heard in Federal court each year. According to the Administrative Office of the United States Courts, class-action lawsuits tried in Federal court cost the Government, on average, about $21,000. That figure includes salaries and benefits for clerks, rent, utilities, and associated overhead expenses, but excludes the costs of the salaries and benefits of judges. CBO estimates that implementing H.R. 1115 would cost about $6 million annually.

CBO also estimates that enacting this bill could increase the need for additional district judges. Because the salaries and benefits of district court judges are considered mandatory, adding more judges would increase direct spending. However, H.R. 1115 would not—by itself—affect direct spending because separate legislation would be necessary to authorize an increase in the number of district judges. In any event, CBO expects that enacting the bill would not require a significant increase in the number of Federal judges, so that any potential increase in direct spending from subsequent legislation would probably be less than $500,000 a year.

On May 1, 2003, CBO transmitted a cost estimate for S. 274, the Class Action Fairness Act, as ordered reported by Senate Committee on the Judiciary on April 11, 2003. Our estimate of the Federal costs of implementing S. 274 or H.R. 1115 are the same. Unlike H.R. 1115, the Senate Judiciary bill contains private-sector mandates. That bill would impose a mandate on defendants participating in a proposed class action settlement by requiring them to notify the appropriate State and Federal officials within 10 days after a proposed settlement is filed in court. In addition, by requiring that certain notifications of class members follow a certain format and use easily understood language, S. 274 would impose a private-sector mandate on attorneys. CBO found that the total direct costs of those mandates would fall well below the annual threshold for private-sector mandates established by UMRA ($117 million in 2003, adjusted annually for inflation).

The CBO staff contacts for this estimate are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 1115 does not authorize funding. Therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 and article III, section 1 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1—Short Title; Reference; Table of Contents. Section 1 sets forth the bill's title—the "Class Action Fairness Act of 2003"—

and states that the bill amends title 28 of the U.S. Code and provides a table of contents.

Section 2—Findings and Purposes. Section 2 sets forth Congress's findings and purposes. As explained in Section 2, class actions are an important and valuable part of our legal system. However, over the last decade, class actions have been subject to a number of abuses that injure both consumer plaintiffs and defendants, adversely affect interstate commerce, and undermine public respect for our judicial system. Such abuses are occurring primarily in State and local courts in cases that, consistent with fundamental principles of diversity jurisdiction, should be heard in Federal courts. The purposes of this Act are to assure fair and prompt recoveries for class members with legitimate claims by prohibiting unfair settlements; to restore the intent of the Framers with regard to diversity jurisdiction by creating Federal jurisdiction for interstate class actions; to diminish the adverse impacts of class actions on interstate commerce; and to encourage innovation and lower consumer prices by diminishing incentives for attorneys to file frivolous suits.

Section 3—Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. Section 3 sets forth a "Consumer Class Action Bill of Rights" to address a number of common class action abuses that have come to the Committee's attention. In particular, Section 3 would add the following provisions to 28 U.S.C.:

Section 1711: Judicial scrutiny of coupon and other non-cash settlements. This provision is aimed at situations in which plaintiffs' lawyers negotiate settlements under which class members receive coupons or other non-cash relief of dubious monetary value, while their lawyers receive enormous attorneys' fees.

To address this problem, the provision states that a Federal judge may not approve a coupon or other similar noncash settlement without first conducting a hearing and determining that the settlement terms are fair, reasonable, and adequate for class members. In making that determination, the judge should consider, among other things, the real monetary value and likely utilization rate of the coupons provided by the settlement. In adopting this provision, it is the intent of the Committee to incorporate that line of recent Federal court precedents in which proposed settlements have been rejected (in whole or in part) because the proposed compensation to the class counsel was disproportionate to the real benefits to be delivered to class members through the proposed settlement.[89]

The Committee does not intend, by this provision, to forbid all non-cash settlements. Such settlements may be appropriate where they provide real benefits to consumer class members (*e.g.*, where coupons entitle class members to receive something of actual value free of charge) or where the claims being resolved appear to be of marginal merit. However, where such settlements are used, the fairness of the settlement should be viewed skeptically by the re-

[89] *See, e.g., Cope* v. *Duggins,* 2001 WL 333102 (E.D. La. 2001) (rejecting proposed class settlement because attorneys' fees were disproportionate to class benefits); *Schwartz* v. *Dallas Cowboys Football Club, Ltd.,* 157 F. Supp. 2d 561 (E.D. Pa. 2001) (same); *Sheppard* v. *Consolidated Edison Co.*, 2000 WL 33313540 (E.D.N.Y. 2000) (same); *Polar Int'l Brokerage Corp.* v. *Reeve,* 187 F.R.D. 108 (S.D.N.Y. 1999) (same).

viewing court where the attorneys' fees demand is disproportionate to the level of tangible, non-speculative benefit to the class members.

Section 1712: Protection against loss by class members. This provision states that a Federal judge may not approve a class action settlement in which a class member will be required to pay attorneys' fees that would result in a net loss to the class member unless the judge makes a written finding that the benefits to the class members "substantially outweigh" the monetary loss.

Section 1713: Protection against discrimination based on geographic location. This provision states that a Federal court settlement may not award some class members a larger recovery than others simply because the favored members of the class live closer to the courthouse in which the settlement is filed than do the disfavored class members. The provision, which responds to cases in which settlements have discriminated on the basis of geography, provides assurance that out-of-State class members are not disadvantaged by the parochialism of local judges.

The Committee wishes to emphasize that this provision is intended solely to prohibit circumstances in which the preferential payments have no legitimate legal basis. For example, it is perfectly appropriate for a settlement of an environmental class action to differentiate settlement payment amounts based on a claimant's proximity to an alleged chemical spill. This provision is not intended to affect such a determination. But where putative class members' claims are legally and factually indistinguishable, it is inappropriate to give one class member extra settlement benefits merely because he or she resides in (or closer to) the county where the court sits.

Section 1714: Prohibition on the payment of bounties. Under this provision, a Federal court class action may not be settled on terms that award special and disproportionate bounties to the named class representatives. Class representatives will, however, be able to be compensated for reasonable time and expenses required to fulfill class-related responsibilities. Unfortunately, it is not uncommon in class settlements for the class representatives to receive a share of the damages award that is disproportionately larger than that provided to absent class members.

This kind of settlement leads to a divergence between the interests of the class representatives on the one hand, and those of all other members of the class on the other. As a general matter, class actions are deemed to be fair because the class representatives are identically situated to the absent class members and therefore can be counted on to protect the absent class members' interests. But if the plaintiffs' lawyers and the defendant may arrange for the payment of special bounties to the class representatives, those representatives may approve settlements that are not in the best interests of most class members.

Nevertheless, the Committee is aware that because of the burdens involved in being a class representative, there is a risk that legitimate claims may not be brought because of the unwillingness of any class member to undertake that role. Section 1714(b) therefore makes it clear that section 1714(a) is not intended to preclude payments to class representatives for the reasonable time and costs that they have invested in serving as the class representative (par-

ticularly in providing deposition testimony or responding to discovery requests), so long as the court approves such payments.

Section 1715: Definitions. This provision defines various terms used in this section, including the term "class action," which is defined to include representative actions filed in Federal district court under Rule 23 of the Federal Rules of Civil Procedure, as well as actions filed under similar rules in State court that have been removed to Federal court.

Section 4—Federal District Court Jurisdiction For Interstate Class Actions. Article III of the Constitution protects out-of-State litigants against the prejudice of local courts by allowing for Federal diversity jurisdiction when the plaintiffs and defendants are citizens of different States. Under prevailing law, however, Federal diversity jurisdiction over a class action does not exist unless every plaintiff is a citizen of a different State from every defendant, and (depending on the judicial circuit) at least one named plaintiff and every individual member of the purported class seeks damages in excess of $75,000 as well. This section would clarify the law—and provide additional protection for out-of-State litigants—by creating a minimal diversity rule for class actions and by determining satisfaction of the amount-in-controversy requirement by looking at the total amount of damages at stake:

Section 4 amends 28 U.S.C. § 1332 to redesignate section 1332(d) as section 1332(e). The bill creates a new subsection (d) which gives the Federal courts original jurisdiction over class action lawsuits in which the matter in controversy exceeds the sum or value of $2 million, exclusive of interest and costs, and either: (a) any member of the plaintiff class is a citizen of a State different from any defendant; (b) any member of the plaintiff class is a foreign state or a citizen or subject of a foreign state, and any defendant is a citizen of a State; or (c) any member of the plaintiff class is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state. For purposes of this new section, the term "foreign state" is defined as in 28 U.S.C. § 1603(a).

This provision uses a different class action definition from Section 3 of the bill, specifying that for purposes of the jurisdictional provisions, a civil action will be deemed to be a class action if: (1) the named plaintiff seeks monetary relief on behalf of persons who are not parties to the action (unless the named plaintiff is the State attorney general); or (2) the claims at issue seek monetary relief on behalf of 100 or more persons, on the ground that the claims involve common questions of law or fact and should therefore be jointly tried in any respect. This definition is intended to encompass so-called "private attorney general" suits such as those in which an individual seeks to recover on behalf of the general public. It also includes "mass actions"—suits that are brought on behalf of hundreds or thousands of named plaintiffs who claim that their suits present common questions of law or fact that should be resolved in a single proceeding in which large groups of claims are tried together, in whole or in part. Although private attorney general suits and mass action cases do not proceed under Rule 23 because they do not involve class representatives suing on behalf of unnamed persons, they function very much like class actions. The Committee wishes to note that if removed to Federal court under these provisions, these actions would not be required to meet the

requirements of Rule 23 in order to proceed, unless styled as class actions. Nevertheless, the Federal court would be expected to ensure that the case proceed in a manner that would protect all parties' due process rights and fairness considerations. In short, the use of these devices should not be allowed to permit an end-run around the due process and fairness considerations inherent in the Federal class certification requirements.

Pursuant to section 1332(d)(3), the Federal district courts are directed not to exercise diversity jurisdiction over class actions in which: (a) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed and the claims asserted will be governed primarily by the law of that same State ("intrastate" case); (b) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief ("state action" case); or (c) the number of members of all proposed plaintiff classes in the aggregate is fewer than 100 ("limited scope" case). The purpose of the "state action" cases provision is to prevent States, State officials, or other governmental entities from dodging legitimate claims by removing class actions to Federal court and then arguing that the Federal courts are constitutionally prohibited from granting the requested relief. This provision will ensure that cases in which such entities are the primary targets will be heard in State courts that do not face the same constitutional impediments to granting relief. The "limited scope" cases provision is intended to allow class actions with relatively few claimants to remain in State courts.[90]

Federal courts should proceed cautiously before declining Federal jurisdiction under the subsection 1332(d)(4)(B) "state action" case exception, and do so only when it is clear that the primary defendants are indeed States, State officials, or other governmental entities against whom the "court may be foreclosed from ordering relief." In making such a finding, courts should apply the guidance regarding the term "primary defendants" discussed below. The Committee wishes to stress that this provision should not become a subterfuge for avoiding Federal jurisdiction. In particular, plaintiffs should not be permitted to name State entities as defendants as a mechanism to avoid Federal jurisdiction over class actions that largely target non-governmental defendants. Similarly, the subsection 1332(d)(4)(C) exception for "limited scope" cases (actions in which there are fewer than 100 class members) should also be interpreted narrowly. For example, in cases in which it is unclear whether "the number of members of all proposed plaintiff classes in the aggregate is less than 100," a Federal court should err in favor of exercising jurisdiction over the matter.

Pursuant to new section 1332(d)(4), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum of value of $2 million (exclusive of interest and costs). The Committee intends this section to be interpreted expansively. If a purported class action is removed, the named plaintiffs should bear the burden of

[90] Under Federal law, a purported class action may involve as few as 21 class members. *See, e.g., Cox* v. *American Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir. 1986) (noting that classes encompassing fewer than 21 persons normally are not subject to class certification); *Tietz* v. *Bowen,* 695 F. Supp. 441, 445 (C.D. Cal. 1987).

demonstrating that the removal was improvident (*i.e.*, that the applicable jurisdictional requirements are not satisfied). If a Federal court is uncertain as to whether the matter in controversy in a purported class action exceeds the sum or value of $2 million, the court should err in favor of exercising jurisdiction over the case.

By the same token, the Committee intends that a matter be subject to Federal jurisdiction under this provision if the value of the matter in litigation exceeds $2 million, either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought (*e.g.*, damages, injunctive relief, or declaratory relief). The Committee is aware that some courts, especially in the class action context, have declined to exercise Federal jurisdiction over cases on the ground that the amount in controversy in those cases exceeded the jurisdictional threshold only when assessed from the viewpoint of the defendant. For example, a class action seeking an injunction that would require a defendant to restructure its business in some fundamental way might "cost" a defendant well in excess of $75,000 under current law, but might have substantially less "value" to a class of plaintiffs. Some courts have held that jurisdiction does not exist in this scenario under present law, because they have reasoned that assessing the amount in controversy from the defendant's perspective was tantamount to aggregating damages. Because H.R. 1115 explicitly allows aggregation for purposes of determining the amount in controversy in class actions, that concern is no longer relevant.

The Committee also notes that in assessing the jurisdictional amount in declaratory relief cases, the Federal court should include in its assessment the value of all relief and benefits that would logically flow from the granting of the declaratory relief sought by the claimants. For example, a declaration that a defendant's conduct is unlawful or fraudulent will carry certain consequences, such as the need to cease and desist from that conduct, that will often "cost" the defendant in excess of $2 million. Or a declaration that a standardized product sold throughout the nation is "defective" might well put a case over the $2 million threshold, even if the class complaint did not affirmatively seek a determination that each class member was injured by the product.

Overall, the new section 1332(d) is intended to expand substantially Federal court jurisdiction over class actions. For that reason, its provisions should be read expansively; they should be read as stating a strong preference that interstate class actions be heard in a Federal court if so desired by any purported class member or any defendant.

Consistent with this overriding intent, the provisions of the new section 1332(d)(3)(A) should be read narrowly. A purported class action should be deemed a case that falls outside Federal jurisdiction only if virtually all members of all proposed classes are residents of a single State of which all "primary defendants" are also citizens. For example, a case in which a proposed class of 1000 persons sues a North Carolina citizen corporation presumably would fit this exception if 997 of those persons were North Carolina citizens. Further, Federal courts should be cautious to decline Federal jurisdiction under section 1332(d)(3)(B) only where it is relatively clear that States, State officials, or other governmental entities are

primary defendants against whom the court may be foreclosed from ordering relief.

For purposes of class actions that are subject to subsections 1332(d)(3) and (d)(4)(A), the Committee intends that the only parties that should be considered "primary defendants" are those defendants who are the real "targets" of the lawsuit—*i.e.,* the defendants that would be expected to incur most of the loss if liability is found. Thus, the Committee intends for the term "primary defendants" to include any person who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes (as opposed to simply a few individual class members). For example, in a class action alleging that a drug was defective, the defendant manufacturer of the drug would be a primary defendant, since it is a major target of the allegations of the full class. However, if several physicians who had each prescribed the drug to a handful of class members were also named as defendants, they would not be primary defendants. Similarly, in a class action alleging that a type of ladder was defective, both a defendant manufacturer that made 60 percent of the ladders at issue and a defendant manufacturer that made 20 percent of the ladders at issue would be primary defendants, since both are major targets of the allegations and have substantial exposure to significant percentages of the class in the case. However, if two local hardware stores that each sold a few of the ladders were named as defendants, they would not be deemed "primary defendants." Merely alleging that a defendant conspired with other class members to commit wrongdoing will not, without more, be sufficient to cause a person to be a "primary defendant" under this subsection.

For the purposes of the section 1132(d)(3)(A) carve-out, the only parties that should be considered "primary defendants" are those who are the real "targets" of the suit; that is, the parties that would be expected to incur most of the loss if liability is found. For example, an executive of a corporate defendant who, in the interest of completeness, is named as a co-defendant in a class action against his employer normally should not be deemed a "primary defendant." In most instances, the executive would not be the real "target" of the purported class action; his employer company would be. Moreover, no defendant should be considered a "primary defendant" for purposes of this analysis unless it is the subject of legitimate claims by all class members. To illustrate, if named as a defendant, a dealer, agent, or sales representative of a corporate defendant should not be deemed a "primary defendant" unless that dealer, agent, or sales representative is alleged to have actually participated in the purported wrongdoing with respect to all class members (*e.g.*, the defendant is alleged to have sold a purportedly defective product to all class members). Merely alleging that a defendant conspired with other class members to commit wrongdoing will not be sufficient to cause a person to be a "primary defendant."

It is the Committee's intention with regard to each of these exceptions that the party opposing Federal jurisdiction shall have the burden of demonstrating the applicability of an exemption. For example, if a plaintiff seeks to have a purported class action remanded for lack of Federal diversity jurisdiction under section 1332(d)(3)(C), that plaintiff should have the burden of dem-

onstrating that "the number of proposed class members is less than 100."

New section 1332(d)(5) clarifies that the diversity jurisdiction provisions of this section shall apply to any class action before or after the entry of a class certification order by the court. This allows Federal jurisdiction to apply when changes are made to the pleading that bring the case within Federal court jurisdiction.

New section 1332(d)(6) details the procedures governing cases removed to Federal court on the sole basis of new section 1332(d) jurisdiction. Pursuant to new section 1332(d)(6)(A), the district courts are directed to dismiss any civil action subject to Federal jurisdiction if it is determined that the civil action may not proceed as a class action because it fails to satisfy the condition of rule 23 of the Federal Rules of Civil Procedure. Notwithstanding this subsection, new section 1332(d)(6)(B) clarifies that the action may be amended and refiled in State court, and it may be removed if it is an action over which the district courts of the United have original jurisdiction. The Committee has concluded that the alternative—forbidding re-removal—would be bad policy. That approach would allow lawyers to ask a State court to review and overrule the class certification decision of a Federal court, since Federal and State court class certification standards typically do not differ radically. Allowing a State court to certify a case that a Federal court has already found non-certifiable would set a troubling (if not constitutionally suspect) precedent under which State decisions would serve as points of appellate review of Federal court decisions. Moreover, since Federal court denials of class certification typically involve explicit or implied determinations that allowing a case to be litigated on a class basis would likely result in the denial of some or all of the parties' due process rights, there should be no room constitutionally for a State court to reach a different result on class certification issues.

In addition, new section 1332(d)(6)(C) provides that, if a dismissed case is refiled by any of the original named plaintiffs in the same State court venue in which it was originally filed, the statute of limitations on the claims therein will be deemed tolled during the pendency of the dismissed case. This applies to both Federal and State statutes of limitations. A new class action filed either in a different venue or by different named plaintiffs would not enjoy the benefits of this provision.

However, if a class action is dismissed under this section and an individual action is later filed asserting the same claims, the statute of limitations will be deemed tolled during the pendency of the dismissed class action, regardless of where the subsequent individual case is filed.

In the new section 1332(d)(7), the act provides two exceptions to the grant of original jurisdiction over cases described in new section 1332(d)(2). The first excepts from its reach any claims concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 or section 28(f)(5)(E) of the Securities Exchange Act of 1934. These claims are essentially claims against the officers of a corporation for a precipitous drop in the value of its stock, based on fraud. The Committee recognizes that Congress has previously enacted legislation governing the adjudication of

these claims.[91] So as not to disturb the existing legal framework for litigating in this context, claims involving covered securities are not included in the new section 1332(d)(2) jurisdiction.

The second exception to the new section 1332(d)(2) jurisdiction is for class actions solely involving claims that relate to matters of corporate governance arising out of State law. This exclusion recognizes that class actions regarding business governance issues are more of an internal business nature and do not present the same sorts of risks of abuse as do other forms of class actions.

However, the Committee intends that this exception be narrowly construed. By corporate governance litigation, the Committee means litigation based solely on: (a) State statutory law regulating the organization and governance of business enterprises such as corporations, partnerships, limited partnerships, limited liability companies, limited liability partnerships, and business trusts; (b) State common law of the duties owed between and among owners and managers of business enterprises; and (c) the rights arising out of the terms of the securities issued by business enterprises.

This exemption would apply to a class action relating to a corporate governance claim filed in the court of any State. That is, it will apply to a corporate governance class action regardless of the forum in which it may be filed, and regardless of whether the law to be applied is that of the State in which the claim is filed. So, what constitutes "the internal affairs or governance of a corporation or other form of business enterprise" applies to all forms of business enterprises. For example, a proxy fight would be a matter of corporate governance for any business, whether it is organized as corporation (stock, mutual, or other form), a partnership or any other form of business and would fall within the internal affairs exception. On the other hand, whether the terms of a contract constitute an unfair trade practice is not a matter dealing with internal corporate governance and would be covered under paragraph (2), regardless of whether the business was organized as a corporation (either stock, mutual, or other form), a partnership of any other form of business.

For purposes of this exception, the phrase "the internal affairs or governance of a corporation or other form of business enterprise" is intended to refer to the internal affairs doctrine which the United States Supreme Court has defined as "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders . . ."[92] The phrase "other form of business enterprise" in intended to include forms of business entities other than corporations, including, but not limited to, limited liability companies, limited liability partnerships, business trusts, partnerships and limited partnerships.

The exception to section 1332(d)(2) jurisdiction created by the Act is also intended to cover disputes over the meaning of the terms of a security, which is generally spelled out in some formative document of the business enterprise, such as a certificate of incorpora-

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[91] *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 1104–67, 109 Stat. 737, and Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105–353, 112 Stat. 3227.

[92] *Edgar* v. *Mite Corp.,* 457 U.S. 624, 645 (1982). *See also Ellis* v. *Mutual Life Ins. Co.,* 187 So. 434 (Ala. 1939); *McDermott* v. *Lewis*, 531 A.2d 206, 214–15 (Del. 1987); *Draper* v. *Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 865–66 (Del. 1993); *NAACP* v. *Golding*, 679 A.2d 554, 559 (Ct. App. Md. 1996); *Hart* v. *General Motors Corporation,* 517 N.Y.S.2d 490, 493 (App. Div. 1987); *Amberjack, Ltd., Inc.* v. *Thompson*, 1997 WL 613676 (Tenn. App. 1997).

tion or a certificate of designations. The reference to the Securities Act of 1933 contained in new section 1332(d)(7)(A) is for definitional purposes only. Since the law contains an already well-defined concept of a security, this provision simply imports the definition contained in the Securities Act.

New section 1332(d)(8) provides that for purposes of this new section and section 1453 of title 28, an unincorporated association shall be deemed to be a citizen of a State where it has its principal place of business and the State under whose laws it is organized. This provision is added to ensure that unincorporated associations receive the same treatment as corporations for purposes of diversity jurisdiction. The U.S. Supreme Court has held that "[f]or purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association."[93] This rule "has been frequently criticized because often * * * an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business."[94] Some insurance companies, for example, are "inter-insurance exchanges" or "reciprocal insurance association." They, therefore, have been viewed by Federal courts as unincorporated associations for purposes of diversity jurisdiction. Since such companies are nationwide companies, they are deemed to be citizens of any State in which they have insured customers.[95] Consequently, these companies can never be completely or even minimally diverse in any case. It makes no sense to treat an unincorporated insurance company differently from, for example, an incorporated manufacturer for purposes of diversity jurisdiction. New section 1332(d)(8) corrects this anomaly.

Section 5—Removal of Interstate Class Actions to Federal District Court. Section 5 of the Act governs the procedures for removal from State court of interstate class actions over which the Federal court is granted original jurisdiction in the new section 1332(d). The general removal provisions currently contained in chapter 89 of title 28, would continue to apply to such class actions, except where inconsistent with the provisions of the act. For example, under new section 1453(b), the general requirement contained in section 1441(b) that an action be removable only if none of the defendants is a citizen of the State in which the action is brought would not apply to the removal of class actions. Imposing such a restriction on removal jurisdiction would subvert the intent of the Act by allowing a plaintiff to defeat removal jurisdiction by suing both in-State and out-of-State defendants. This would essentially perpetuate the current "complete diversity" rule in class actions that the new section 1332(b) rejects. The Act does not, however, disturb the general rule that a case may only be removed to the district court of the United States for the district and division embracing the place where the action is pending.[96] In addition, the Act does not change the application of the *Erie* doctrine, which requires Federal

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[93] *United Steelworkers of America* v. *Boulingy, Inc.,* 382 U.S. 145 (1965).

[94] *See. e.g.,* J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE ¶¶17–25, 17–209 (1987 rev.) ("Congress should remove the one remaining anomaly and provide that where unincorporated associations have entity status under State law, they should be treated as analogous to corporations for purposes of diversity jurisdiction.").

[95] *Tuck* v. *United Services Automobile Assn.,* 859 F.2d 842 (10th Cir. 1988).

[96] *See* 28 U.S.C. § 1441(a).

courts to apply the substantive law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction

New section 1453(b) also would permit removal by any plaintiff class member who is not a named or representative class member of the action for which removal is sought. Generally, removal by the plaintiff is not permissible, under the theory that as the instigator of the suit the plaintiff had the choice of forum from the outset. When a class action is filed, however, only the named plaintiffs and their counsel have control over the choice of forum; the vast majority of the real parties in interest—the unnamed class members on whose behalf the action is brought and the defendants have no voice in that decision. This provision thus extends to those unnamed class members of class action that have been certified the same flexibility to choose the forum as offered to the defendant. Also, by operation of new section 1453(b), removal may occur without the consent of any other party. This revision will combat collusiveness between a corporate defendant and a plaintiffs' attorney who may attempt to settle on the cheap in a State court at the expense of the plaintiff class members. Similarly, it will prevent a plaintiffs' attorney from recruiting a "friendly" defendant (a local retailer, for example) who has no interest in joining a removal action and may therefore thwart the legitimate efforts of the primary corporate defendant in seeking removal.

New section 1453(c) is intended to confirm that the provisions of section 1453 are to apply to any class action regardless of whether an order certifying classes or denying certification of classes has been entered. However, a plaintiff who is not a representative class member can only seek removal after the class has been certified. Named plaintiffs and defendants can remove at any time.

New section 1453(d) provides that a plaintiff class member who wishes to remove a purported class action to Federal court must do so within 30 days after receiving the initial written notice of the class action. The provision also indicates that a class member who is not a named plaintiff in a class action may not remove the case until the State court has certified a class in the action. In addition, subsection 1453(d) makes an additional change to section 1446(b), which requires that removal occur within 30 days of receipt of "paper" (*e.g.,* a pleading, motion, order, or other paper source) from which it may be ascertained that the case is removable. Under the current statute, a defendant may remove an action beyond the 30-day limit if it can prove that prior to that time it had not received paper from which it could be ascertained that the case was removable. Section 1453(d) extends this provision to class members seeking removal, by allowing them to file removal papers up to 30 days after receiving initial written notice of the class action. The Committee intends that the term 'initial written notice" refer to the initial notice of the class action that is disseminated at the direction of the State court before which the action is pending. The Committee further intends that the 30-day period referenced by this section be deemed to run as to each class member on the thirtieth day after dissemination of notice to the class (as directed by the court) is completed.

New section 1453(e) confirms that 28 U.S.C. § 1447 generally applies to the removal of a purported class action. However, the provisions of section 1447(d) shall not apply. That section states that

"an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." The prohibition on remand order review was added to section 1447 after the Federal diversity jurisdictional statutes and the related removal statutes had been subject to appellate review for many years and were the subject of considerable appellate level interpretive law. The Committee wishes to ensure that the appellate courts have an opportunity to supervise the expansion of Federal jurisdiction over class action established by this legislation through *de novo* review of remand orders and to contribute to the precedents interpreting the provisions of this act. Therefore, the non-reviewability provisions of section 1447(d) will not apply in the event of a removal of a class action to Federal court.

In order to be consistent with the exceptions to Federal diversity jurisdiction granted under new section 1332(b), section 1453(f) provides that the new removal provisions shall not apply to claims involving covered securities, or corporate governance litigation. The parameters of this section and that of section 1332(b)(3) and (4) are intended to be coterminous.

Section 5(b) amends current section 1446(b) to clarify that the 1-year limit otherwise imposed on removal of suits filed pursuant to section 1332 has no application to class actions; that is, the bill permits a defendant to remove to Federal court more than 1 year after commencement of a suit in State court. This change to present law is intended to prevent plaintiffs' attorneys from the type of gaming that occurs under the current class action system. In the most extreme example, a plaintiffs' attorney could file suit under current law against a friendly defendant, triggering the start of the 1-year limitation after which removal may not be sought under any condition. One year and 1 day after filing suit, the plaintiff's attorney could then serve an amended complaint on an additional defendant, at which time it would be too late for that new defendant to remove the case to Federal court—regardless of whether diversity jurisdiction exists and irrespective of the practical merits of the case. The same unfair result would also occur if plaintiffs' counsel dismisses non-diverse parties or increases the amount of damages being pled after the 1-year deadline. By allowing class actions to be removed at any time when changes are made to the pleadings that bring the case within section 1332(d)'s requirements for Federal jurisdiction, this provision will ensure that such fraudulent pleading practices can no longer be used to thwart Federal jurisdiction. It is not the intention of the Committee to change section 1446(b)'s requirements that an action must be removed within 30 days of being served with the initial pleading or 30 days after receipt of an amended pleading, motion, order, or other paper from which it may be ascertained that the case is one which is or has become removable.

Section 6—Appeal of Class Certification Orders. Several years ago, Federal Rule 23 was amended to add a provision, section (f) which authorized for the first time discretionary review of orders granting or denying class certification. In the Committee's view, that change has been very successful, allowing appellate courts to be a full participant in the development of the governing principles of class certification. The Committee is concerned, however, that the various Federal Circuit Courts of Appeal have been incon-

sistent in the extent to which they have exercised their discretion to review class certification orders. The Committee believes that both fairness to the parties and the need to develop stronger, clearer class certification precedents strongly favors the more frequent appellate review of class certification rulings. Section 6 of the bill therefore establishes that the parties to a class action may take an immediate appeal as of right from any district court ruling granting or denying a motion for class certification. While the matter is pending on appeal, the presumption shall be that other activity in the litigation shall be stayed. However, upon a finding that specific discovery must be taken to preserve evidence or to prevent undue prejudice to a party, the district court may order that such discovery may proceed.

Section 7—Effective Date. Section 7, as reported, provides that the provisions in H.R. 1115 apply to: (1) any civil action commenced *on or after* the date of enactment of this legislation; and (2) any civil action commenced *before* the date of enactment in which a class certification order is entered on or after the date of enactment. This section further specifies that with regard to cases commenced before the date of enactment, the 30-day removal period would begin on the date on which the class certification order is entered by a State court.

The Committee is concerned that the pendency of this legislation may cause a race to the State courthouse as counsel seek to file class actions before the new jurisdictional and removal provisions become effective. In order to ensure that this legislation does not have the unintended effect of increasing class action abuse, section 7 provides for removal of previously filed class actions that are certified after the date of enactment.

The Committee believes that there is no logical reason why these cases should not be covered—the new rules should apply to all cases certified as class action cases after the date of enactment, so that plaintiffs and defendants newly swept into a class action by later certifications are not discriminated against solely because the filing date occurred before the date of enactment of the bill. In short, all parties to a case certified as a class action after the date of enactment of the bill should receive the benefits of the bill's protections against abuse. Further, the Committee believes that this provision will help ensure that the purpose of the legislation is not undermined by continued abusive State court activity. Upon the removal of such a case to Federal court in which a class has already been certified by the State court, it is the Committee's intent that the Federal court promptly review the appropriateness of the State court's class certification order, essentially conducting a de novo review of the State court's order affording that order no deference. If the State court order certifying a class is not disturbed by the Federal court, that conclusion should be subject to immediate appellate review under section 6 or any other applicable statute or rule providing for such review. However, an order reversing a State court class certification order should be subject to review only if the Federal district court determines that the certification of a class in the matter would be inappropriate (as opposed to reversing the order on the grounds that the plaintiff had failed to comply with one or more requirements and should be allowed an opportunity to demonstrate compliance).

Section 8—Adopting Rule 23 Changes. Section 8, as reported, is intended to put into effect immediately several critical amendments to Rule 23 of the Federal Rules of Civil Procedure that pertain to the manner in which Federal courts handle class actions, particularly proposed class settlements.

A core premise of this legislation is that our Federal courts have amassed an admirable record in working to minimize abuses of the class action device. A key part of that record has been the efforts of the Federal courts' rulemaking apparatus to develop amendments to the Federal class action rules that would memorialize "best practices" developed by our Federal courts to ensure that the class action device serves the purposes for which it is intended.

Last year, several proposed amendments to Rule 23 were approved by the Advisory Committee on Civil Rules (which initially drafted the proposed changes), the Standing Committee on Rules of Practice and Procedure, and the Judicial Conference of the United States. Then, on April 1, 2003, the Supreme Court of the United States entered an order adopting those changes in the form recommended by the Judicial Conference, subject to the opportunity for congressional review established by 28 U.S.C. § 2074 (the Rules Enabling Act).

As provided by that section, those changes to Rule 23 will become effective on December 1, 2003 in the form approved by the Supreme Court, unless Congress acts to reject or modify them. Under Section 2074, however, Congress may accelerate the effective date of an amendment to the Federal Rules of Civil Procedure promulgated by the Court. *See* 28 U.S.C. § 2074(a) (noting that a proposed amendment "shall take effect no earlier than December 1 of the year in which such rule is so transmitted *unless otherwise provided by law*") (emphasis added).[97] Section 8 is intended to be an exercise of that prerogative, so as to put into effect the pending Rule 23 amendments simultaneously with the enactment of this legislation.

The Rule 23 amendments are wholly consistent with the spirit and purpose of H.R. 1115, particularly given their core purposes of seeking to minimize abuses of the class action device and attempting to improve communications with class members about the litigation being conducted on their behalf. In their key respects, the amendments would:

- Clarify the appropriate timing for determining whether an action may proceed as a class action (Rule 23(c)(1)(A)).
- Require that an order certifying a class define the class and class claims, issues, or defenses and appoint class counsel (Rule 23(c)(1)(B)).
- Modify the current rules concerning the content and form of the notice provided to class members concerning the certification of a proposed classes, including a requirement that the notice must state "in plain, easily understood language" (Rule 23(c)(2)(A), (B)):

[97] On other occasions, Congress has acted to adjust the effective date of proposed rules, setting effective dates other than what is provided in the Rules Enabling Act. *See, e.g.,* Pub. L. No. 97–227, 96 Stat. 246 (1982) (adjusting effective date of civil rules amendments proposed April 28, 1982); Pub. L. No. 96–42, 93 Stat. 326 (1979), (adjusting effective date of criminal and evidence rules proposed April 30, 1979); Pub. L. No. 93–595, § 3, 88 Stat. 1949 (1975), (adjusting effective date of proposed civil and criminal procedure rules).

  - the nature of the action;
  - the definition of the class certified;
  - the class claims, issues, and defenses;
  - that a class member may enter an appearance through counsel if the member so desires;
  - that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and
  - the binding effect of a class judgment on class members under Rule 23(c)(3).
- Require that any judgment entered in a matter that has been litigated on a class basis include and describe the class members (Rule 23(c)(3)).
- Allow an action to be brought or maintained as a class with respect to particular issues, or allow a class to be divided into subclasses and each subclass to be treated as a class (Rule 23(c)(4)).
- Specify more detailed procedures for reviewing and approving a proposed class settlement, including (Rule 23(e)):
  - a specific requirement that notice must be directed "in a reasonable manner" to all class members who would be bound;
  - an explicit direction that a settlement may be approved only "after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate;"
  - a mandate that all agreements (including any side agreements) related to the settlement must be filed with the court;
  - an authorization that courts may permit class members an opportunity to opt out of a proposed settlement, even though they may have previously declined to opt out of the class action; and
  - a specific authorization for class members to object to proposed settlements and a prohibition on withdrawing such objections without court approval.
- Require that upon certifying a class, a court shall appoint class counsel, taking account of specified criteria, including (Rule 23(g)(1)):
  - counsel's work on the matter;
  - counsel's experience;
  - counsel's knowledge of applicable law;
  - the resources counsel will commit to representing the class;
  - counsel's proposed attorneys' fees terms; and
  - any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.
- Establish a procedure for appointing class counsel (Rule 23(g)(2)).
- Establish a procedure for making attorneys' fee and cost awards in class actions, including a requirement that any claim for fees or costs be made by motion, that the claim be

subject to objections, that the motion may be subject to a hearing, and that the motion must be resolved on the basis of formal factual findings and conclusions of law, in accordance with Rule 52(a) (Rule 23(h).

Because a core purpose of this legislation is to permit more class actions to be subject to the more deliberate management of such matters typically found in our Federal court system, the Committee believes that these important improvements to the Federal court rules governing class action procedures should become effective simultaneously with H.R. 1115's expansion of Federal diversity jurisdiction over such cases. In short, the Committee applauds the efforts of the Federal courts and their rulemaking committees to make these improvements and believes that they should become effective without further delay, particularly in light of the changes in class action jurisdictional rules contained in this legislation.

The Committee notes that as originally introduced, H.R. 1115 contained a provision concerning the content of notices to class members. To avoid confusion, those provisions have been removed from the legislation in favor of the class notice provisions reflected in the proposed amendment of Fed. R. Civ. P. 23(c)(2)(A), (B). However, the Committee wishes to stress that it is deferring to the rule promulgated by the Federal judiciary with the understanding that improvements are being made to the form and content of class notices issued by our Federal courts so as to achieve notifications that are stated "concisely and clearly" in "plain, easily understood language," an objective stated in both the original H.R. 1115 language and the Rule 23 amendments.

The Committee notes that this provision is not intended to alter the Supreme Court's determination that the amendments to Rule 23 "shall govern in all proceedings in civil cases . . . commenced [after the effective date] and, insofar as just and practicable, all proceedings then pending."

The Committee stresses that Section 8 is intended to express approval of only the Rule 23 amendments contained in the April 1, 2003 order of the Supreme Court of the United States and to accelerate the effective date only for those Rule 23 amendments. The other amendments to the Federal Rules of Civil Procedure and the amendments to the Federal Rules of Evidence and the Federal Rules of Bankruptcy Procedure reflected in that Order shall remain subject to the process contemplated by 28 U.S.C. § 2074 (as to the civil procedure and evidence rules) and 28 U.S.C. § 2075 (as to the bankruptcy procedure rules), including their respective provisions regarding effective dates.

The proper test for determining if class notice is written in "plain, easily understood language" is reasonableness—*i.e.,* whether a reasonable person would find the language in the notice to be "plain, easily understood language." The Committee intends for class counsel to bear the burden of proving that a reasonable person would find that the notice includes all of the requirements listed in this section in "plain, easily understood language."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill,

as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 83—COURTS OF APPEALS

* * * * * * *

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) * * *

* * * * * * *

(4) Orders of the district courts of the United States granting or denying class certification under rule 23 of the Federal Rules of Civil Procedure, if notice of appeal is filed within 10 days after entry of the order.

* * * * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

* * * * * * *

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) * * *

* * * * * * *

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons on behalf of a class;

(C) the term "class certification order" means an order issued by a court approving the treatment of a civil action as a class action; and

(D) the term "class members" means the persons who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) Paragraph (2) shall not apply to any civil action in which—

(A)(i) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed; and

(ii) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed;

(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(C) the number of proposed plaintiff class members is less than 100.

(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs.

(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the requirements of rule 23 of the Federal Rules of Civil Procedure.

(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction.

(C) In any action that is dismissed under this paragraph and is filed by any of the original named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed under this paragraph that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed action was pending.

(7) Paragraph (2) shall not apply to any class action brought by shareholders that solely involves a claim that relates to—

(A) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

(B) the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as

defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

(8) For purposes of this subsection and section 1453 of this title, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(9) For purposes of this section and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) of this subsection shall nevertheless be deemed a class action if—

(A) the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, and is not a State attorney general; or

(B) monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact.

In any such case, the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims of individual class members. The provisions of paragraphs (3) and (6) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (A). The provisions of paragraph (6) of this subsection, and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (B).

[(d)**]** *(e)* The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

* * * * * * *

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332*(a) or (d)* of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judg-

ment of the court with respect to the subject matter of the controversy.

* * * * * * *

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

Sec.
1441. Actions removable generally
* * * * * * *
1453. Removal of class actions.
* * * * * * *

§ 1446. Procedure for removal

(a) * * *

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332*(a)* of this title more than 1 year after commencement of the action.

* * * * * * *

§ 1453. Removal of class actions

(a) DEFINITIONS.—In this section, the terms "class", "class action", "class certification order", and "class member" have the meanings given these terms in section 1332(d)(1).

(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

(1) by any defendant without the consent of all defendants; or

(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

(c) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of a class certification order in the action, except that a plaintiff class member who is not a named or representative class member of the action may not seek removal of the action before an order certifying a class of which the plaintiff is a class member has been entered.

(d) PROCEDURE FOR REMOVAL.—The provisions of section 1446 relating to a defendant removing a case shall apply to a plaintiff

removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action.

(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS TO STATE COURTS.—The provisions of section 1447 shall apply to any removal of a case under this section, except that, notwithstanding the provisions of section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise.

(f) EXCEPTION.—This section shall not apply to any class action brought by shareholders that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

* * * * * * *

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

* * * * * * *

§ 1603. Definitions

For purposes of this chapter—

(a) * * *

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) * * *

* * * * * * *

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and ⟦(d)⟧ *(e)* of this title, nor created under the laws of any third country.

* * * * * * *

PART V—PROCEDURE

Chapter	Section
111. General Provisions	**1651**
* * * * * * *	
114. Class Actions	***1711***
* * * * * * *	

CHAPTER 114—CLASS ACTIONS

Sec.
1711. Judicial scrutiny of coupon and other noncash settlements.
1712. Protection against loss by class members.
1713. Protection against discrimination based on geographic location.
1714. Prohibition on the payment of bounties.
1715. Definitions.

§ 1711. Judicial scrutiny of coupon and other noncash settlements

The court may approve a proposed settlement under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.

§ 1712. Protection against loss by class members

The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member outweigh the monetary loss.

§ 1713. Protection against discrimination based on geographic location

The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

§ 1714. Prohibition on the payment of bounties

(a) IN GENERAL.—The court may not approve a proposed settlement that provides for the payment of a greater share of the award to a class representative serving on behalf of a class, on the basis of the formula for distribution to all other class members, than that awarded to the other class members.

(b) RULE OF CONSTRUCTION.—The limitation in subsection (a) shall not be construed to prohibit any payment approved by the court for reasonable time or costs that a person was required to expend in fulfilling his or her obligations as a class representative.

§ 1715. Definitions

In this chapter—

(1) CLASS ACTION.—The term "class action" means any civil action filed in a district court of the United States pursuant to rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed pursuant to a State statute or rule of judicial procedure authorizing an action to be brought by one or more representatives on behalf of a class.

(2) CLASS COUNSEL.—The term "class counsel" means the persons who serve as the attorneys for the class members in a proposed or certified class action.

(3) CLASS MEMBERS.—The term "class members" means the persons who fall within the definition of the proposed or certified class in a class action.

(4) PLAINTIFF CLASS ACTION.—The term "plaintiff class action" means a class action in which class members are plaintiffs.

(5) PROPOSED SETTLEMENT.—The term "proposed settlement" means an agreement that resolves claims in a class action, that is subject to court approval, and that, if approved, would be binding on the class members.

* * * * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MAY 21, 2003

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

The Committee met, pursuant to notice, at 10:01 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

[Intervening business.]

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

The next item on the agenda, pursuant to notice, I call up the bill H.R. 1115, the "Class Action Fairness Act of 2003," for purposes of markup and move its favorable recommendation to the full House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 1115, follows:]

I

108TH CONGRESS
1ST SESSION

H. R. 1115

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 6, 2003

Mr. GOODLATTE (for himself, Mr. BOUCHER, Mr. SENSENBRENNER, Mr. MORAN of Virginia, Mr. SMITH of Texas, Mr. STENHOLM, Mr. DELAY, Mr. DOOLEY of California, Mr. HYDE, Mr. HOLDEN, Mr. COX, and Mr. CRAMER) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28,

United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Class Action Fairness Act of 2003''.

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.
Sec. 4. Federal district court jurisdiction of interstate class actions.
Sec. 5. Removal of interstate class actions to Federal district court.
Sec. 6. Appeals of class action certification orders.
Sec. 7. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds as follows:

(1) Class action lawsuits are an important and valuable part of our legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be ag-

gregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for the judicial system in the United States.

(3) Class members have been harmed by a number of actions taken by plaintiffs' lawyers, which provide little or no benefit to class members as a whole, including—

(A) plaintiffs' lawyers receiving large fees, while class members are left with coupons or other awards of little or no value;

(B) unjustified rewards being made to certain plaintiffs at the expense of other class members; and

(C) the publication of confusing notices that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Through the use of artful pleading, plaintiffs are able to avoid litigating class actions in Federal court, forcing businesses and other organizations to defend interstate class action lawsuits in county and State courts where—

(A) the lawyers, rather than the claimants, are likely to receive the maximum benefit;

(B) less scrutiny may be given to the merits of the case; and

(C) defendants are effectively forced into settlements, in order to avoid the possibility of huge judgments that could destabilize their companies.

(5) These abuses undermine the Federal judicial system, the free flow of interstate commerce, and the intent of the framers of the Constitution in creating diversity jurisdiction, in that county and State courts are—

(A) handling interstate class actions that affect parties from many States;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(6) Abusive interstate class actions have harmed society as a whole by forcing innocent parties to settle cases rather than risk a huge judgment by a local jury, thereby costing consumers billions of dollars in increased costs to pay for forced settlements and excessive judgments.

(b) PURPOSES.—The purposes of this Act are—

(1) to assure fair and prompt recoveries for class members with legitimate claims;

(2) to protect responsible companies and other institutions against interstate class actions in State courts;

(3) to restore the intent of the framers of the Constitution by providing for Federal court consideration of interstate class actions; and

(4) to benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"Sec.
"1711. Judicial scrutiny of coupon and other noncash settlements.
"1712. Protection against loss by class members.
"1713. Protection against discrimination based on geographic location.
"1714. Prohibition on the payment of bounties.
"1715. Clearer and simpler settlement information.
"1716. Definitions.

"§ 1711. Judicial scrutiny of coupon and other noncash settlements

"The court may approve a proposed settlement under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.

"§ 1712. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member outweigh the monetary loss.

"§ 1713. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the

class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1714. Prohibition on the payment of bounties

"(a) IN GENERAL.—The court may not approve a proposed settlement that provides for the payment of a greater share of the award to a class representative serving on behalf of a class, on the basis of the formula for distribution to all other class members, than that awarded to the other class members.

"(b) RULE OF CONSTRUCTION.—The limitation in subsection (a) shall not be construed to prohibit any payment approved by the court for reasonable time or costs that a person was required to expend in fulfilling his or her obligations as a class representative.

"§ 1715. Clearer and simpler settlement information

"(a) PLAIN ENGLISH REQUIREMENTS.—Any court with jurisdiction over a plaintiff class action shall require that any written notice concerning a proposed settlement of the class action provided to the class through the mail or publication in printed media contain—

"(1) at the beginning of such notice, a statement in 18-point Times New Roman type or other functionally similar type, stating 'LEGAL NOTICE: YOU ARE A PLAINTIFF IN A CLASS ACTION LAWSUIT AND YOUR LEGAL RIGHTS ARE

AFFECTED BY THE SETTLEMENT DESCRIBED IN THIS NOTICE.'; and

"(2) a short summary written in plain, easily understood language, describing—

"(A) the subject matter of the class action;

"(B) the members of the class;

"(C) the legal consequences of being a member of the class;

"(D) if the notice is informing class members of a proposed settlement agreement—

"(i) the benefits that will accrue to the class due to the settlement;

"(ii) the rights that class members will lose or waive through the settlement;

"(iii) obligations that will be imposed on the defendants by the settlement;

"(iv) the dollar amount of any attorney's fee class counsel will be seeking, or if not possible, a good faith estimate of the dollar amount of any attorney's fee class counsel will be seeking; and

"(v) an explanation of how any attorney's fee will be calculated and funded; and

"(E) any other material matter.

"(b) TABULAR FORMAT.—Any court with jurisdiction over a plaintiff class action shall require that the information described in subsection (a)—

"(1) be placed in a conspicuous and prominent location on the notice;

"(2) contain clear and concise headings for each item of information; and

"(3) provide a clear and concise form for stating each item of information required to be disclosed under each heading.

"(c) TELEVISION OR RADIO NOTICE.—Any notice provided through television or radio (including transmissions by cable or satellite) to inform the class members in a class action of the right of each member to be excluded from the class action or a proposed settlement of the class action, if such right exists, shall, in plain, easily understood language—

"(1) describe the persons who may potentially become class members in the class action; and

"(2) explain that the failure of a class member to exercise his or her right to be excluded from a class action will result in the person's inclusion in the class action or settlement.

"§ 1716. Definitions

"In this chapter—

"(1) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States pursuant to rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed pursuant to a State statute or rule of judicial procedure authorizing an action to be brought by one or more representatives on behalf of a class.

"(2) CLASS COUNSEL.—The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(3) CLASS MEMBERS.—The term 'class members' means the persons who fall within the definition of the proposed or certified class in a class action.

"(4) PLAINTIFF CLASS ACTION.—The term 'plaintiff class action' means a class action in which class members are plaintiffs.

"(5) PROPOSED SETTLEMENT.—The term 'proposed settlement' means an agreement that resolves claims in a class action, that is subject to court approval, and that, if approved, would be binding on the class members.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions ..... 1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION OF INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

''(d)(1) In this subsection—

''(A) the term 'class' means all of the class members in a class action;

''(B) the term 'class action' means any civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons on behalf of a class;

''(C) the term 'class certification order' means an order issued by a court approving the treatment of a civil action as a class action; and

"(D) the term 'class members' means the persons who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) Paragraph (2) shall not apply to any civil action in which—

"(A)(i) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed; and

"(ii) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed;

"(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(C) the number of proposed plaintiff class members is less than 100.

"(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs.

"(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the requirements of rule 23 of the Federal Rules of Civil Procedure.

"(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the

1 district courts of the United States have original jurisdic-
2 tion.

3 ''(C) In any action that is dismissed under this para-
4 graph and is filed by any of the original named plaintiffs
5 therein in the same State court venue in which the dis-
6 missed action was originally filed, the limitations periods
7 on all reasserted claims shall be deemed tolled for the pe-
8 riod during which the dismissed class action was pending.
9 The limitations periods on any claims that were asserted
10 in a class action dismissed under this paragraph that are
11 subsequently asserted in an individual action shall be
12 deemed tolled for the period during which the dismissed
13 action was pending.

14 ''(7) Paragraph (2) shall not apply to any class action
15 brought by shareholders that solely involves a claim that
16 relates to—

17 ''(A) a claim concerning a covered security as
18 defined under section 16(f)(3) of the Securities Act
19 of 1933 and section 28(f)(5)(E) of the Securities
20 Exchange Act of 1934;

21 ''(B) the internal affairs or governance of a cor-
22 poration or other form of business enterprise and
23 arises under or by virtue of the laws of the State in
24 which such corporation or business enterprise is in-
25 corporated or organized; or

"(C) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

"(8) For purposes of this subsection and section 1453 of this title, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(9) For purposes of this section and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) of this subsection shall nevertheless be deemed a class action if—

"(A) the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, and is not a State attorney general; or

"(B) monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact.

In any such case, the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims of individual class members. The provisions of paragraphs (3) and (6) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (A). The provisions of paragraph (6) of this subsection, and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (B).''.

(b) CONFORMING AMENDMENTS.—

(1) Section 1335(a)(1) is amended by inserting ''(a) or (d)'' after ''1332''.

(2) Section 1603(b)(3) is amended by striking ''(d)'' and inserting ''(e)''.

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

''§ 1453. Removal of class actions

''(a) DEFINITIONS.—In this section, the terms 'class', 'class action', 'class certification order', and 'class member' have the meanings given these terms in section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

"(c) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of a class certification order in the action, except that a plaintiff class member who is not a named or representative class member of the action may not seek removal of the action before an order certifying a class of which the plaintiff is a class member has been entered.

"(d) PROCEDURE FOR REMOVAL.—The provisions of section 1446 relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member,

through service or otherwise, of the initial written notice of the class action.

"(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS TO STATE COURTS.—The provisions of section 1447 shall apply to any removal of a case under this section, except that, notwithstanding the provisions of section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise.

"(f) EXCEPTION.—This section shall not apply to any class action brought by shareholders that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).".

(b) REMOVAL LIMITATION.—Section 1446(b) is amended in the second sentence by inserting ''(a)'' after ''section 1332''.

(c) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

''1453. Removal of class actions.''.

SEC. 6. APPEALS OF CLASS ACTION CERTIFICATION ORDERS.

(a) IN GENERAL.—Section 1292(a) is amended by inserting after paragraph (3) the following:

''(4) Orders of the district courts of the United States granting or denying class certification under rule 23 of the Federal Rules of Civil Procedure, if notice of appeal is filed within 10 days after entry of the order.''.

(b) DISCOVERY STAY.—All discovery and other proceedings shall be stayed during the pendency of any appeal taken pursuant to the amendment made by subsection (a), unless the court finds upon the motion of any party that specific discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of the enactment of this Act.

○

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes for purposes of an opening statement.

The legislation expands Federal diversity jurisdiction over interstate class actions and in a manner consistent with the constitutional intent that the Federal court should provide—preside over controversies between citizens of different States. The problem of abuse of State class action suits is now systemic. It is a threat to the integrity of our civil justice system and a drain on the national economy. Since this Committee last reported class action reform legislation in the 107th Congress, the problem has only gotten worse and not better.

In the last 10 years, State court class actions filing nationwide have risen over 1,000 percent. In certain magnet courts known for certifying even the most speculative class action suits, the increase in filing over the last 5 years is now approaching 4,000 percent.

The present rules encourage a race to any available State courthouse in hopes of a rubber-stamp, nationwide settlement that produces millions in attorneys' fees for the winners of that race. But as the Department of Justice testified at our last hearing, the losers in this race are the victims who often gain little or nothing through the settlement and yet are bound by it in perpetuity.

As the *Washington Post* editorial board observed last November, "This is not justice. It is an extortion racket only Congress can fix."

This Committee has held hearings over the last 2 years on class action legislation, and we have received valued input from many perspectives about the present abuse of the current system. We have heard testimony from a small business owner repeatedly brought into class action style lawsuits simply because her drug store filled prescriptions, kept accurate records, and had the misfortune of being located in a county court jurisdiction notorious for certifying speculative nationwide class action claims.

We've heard testimony from a high-tech company subject to defective product class action suits in State courts throughout the country for alleged injuries that are either trivial, highly speculative, or totally non-existent.

We have heard testimony from a State insurance commissioner who testified that class action verdicts and settlements imposed by county courts in other States are undermining his regulatory ability to make insurance available and affordable to citizens of his jurisdiction.

All of these witnesses and others who testified before the Committee agreed with the pressing need for this legislation. Even witnesses who testified against the bill admitted that the present system has serious flaws and requires congressional action and an expanded role for the Federal courts to fix it.

H.R. 1115 would address many of these problems with the present system by applying a new Federal diversity jurisdiction standard to class action cases. The bill provides for Federal jurisdiction over class actions where any plaintiff and any defendant reside in different States and where the aggregate of all plaintiffs' claims is at least $2 million. These modest changes will keep large actions of a national character in Federal court where they belong.

H.R. 1115 also addresses another major area in need of reform: the incentives for settlements in class action cases and scrutiny of those settlements. Under current rules, the first case settled wins.

Those left out must either find a way to join the settlement or forego their claim. This leads to bad settlements favoring lawyers over consumers in jurisdictions noted for lax class action requirements.

In the last year, more such one-sided settlements benefiting only lawyers have occurred, such as: a settlement with Blockbuster over late fees produced $9.2 million in lawyers' fees and nothing but dollar coupons for the consumers represented, only 20 percent of which are likely to be redeemed; a settlement with Crayola over asbestos included in crayons produced $600,000 in attorneys' fees and a 75-cent discount on more crayons.

In order to help prevent abuses like these, the bill aims to protect plaintiffs by prohibiting the payment of bounties to class representatives, barring approval of net loss settlements, requiring better notice to class members about their rights, and requiring greater scrutiny of coupon settlements or settlements affecting out-of-State class members.

The need to restore some common sense and certainty to our class action system is clear, and the time to act is now. And I urge the Members to favorably report this bill.

Who wishes to give the minority statement? The gentleman from Virginia, Mr. Boucher, whom I hope is more persuasive than others with people seated to my left. [Laughter.]

Mr. BOUCHER. I'm not sure about that, Mr. Chairman.

Thank you very much for recognizing me and for scheduling the markup on this legislation today. During the course of the last Congress, class action reform legislation, which I was pleased to coauthor with my Virginia colleague Congressman Goodlatte, was reported from this Committee and approved with a broad bipartisan majority on the floor of the House. Unfortunately, during the course of the last Congress, the Senate did not act on class action reform.

In the intervening 2 years, the problems that we're seeking to address with this measure have grown worse and more voices have now been raised in support of our modest remedy. Cases that are truly national in scope are being filed as State class actions before certain favored judges, who almost—who always employ a broad approach to class certification. And that broad approach renders virtually any controversy subject to certification as a class action.

In such an environment, defendants and plaintiff class members are routinely denied their range of normal rights, as there is a rush to certify classes and then a rush to settle the cases. Plaintiffs suffer a range of harms. In order to prevent removal of a case to Federal court, the amount sued for is sometimes kept artificially below the $75,000 Federal jurisdictional amount, even though a claim and a higher amount would be justified. Individual plaintiffs are, therefore, denied their opportunity to recover the full range of damages to which they might be entitled.

In another effort to avoid removal to Federal court, the class action complaint sometimes will not assert Federal causes of action that legitimately could be raised, denying the plaintiffs an opportunity to have that portion of their claim heard. Sometimes in the settlement of the cases, the plaintiffs get mere coupons while their lawyers receive millions in attorneys' fees. And in at least one case, the plaintiff class members at the end of the settlement had a deficit of $91 posted to their mortgage escrow accounts while their

lawyers received more than $8 million in attorneys' fees for their services. The plaintiffs had a net loss because of this class action suit having been filed and settled. They were literally worse off than if the class action case had not been filed to begin with.

Our bill addresses these problems by permitting cases that are truly national in scope to be removed to the Federal court even if the diversity of citizenship requirements of current law are not strictly met. Instead, we look to the center of gravity of the case. The target of these cases is typically a large out-of-State corporation. The plaintiffs are usually consumers who reside in many States. These cases are national in character, and our bill would permit their removal to Federal court even if a local defendant has been sued for the purpose of destroying complete diversity.

In one noted example, also referred to by the Chairman in his opening statement, there is a drug store owner in the State of Mississippi who has been sued hundreds of times, not because anyone expects to recover anything from her, but because her mere presence in the case as a party defendant destroys complete diversity of citizenship and prevents the removal of the case from the Mississippi State court into a Federal court.

The reform that we're putting forward is truly modest. I've served in the House now for more than 20 years and have seen a lot of litigation reform measures be considered in this Committee, and of that broad range of measures—most of which, by the way, I have not supported—I can truly say that this is the most modest and it strikes at a problem that is egregious, that is notorious, and that cries out for this modest remedy.

I'm pleased to be co-authoring this measure with my colleague Mr. Goodlatte, and, Mr. Chairman, I urge the Members of this Committee to give their approval. Thank you. I yield back.

Chairman SENSENBRENNER. Without objection, all Members' opening statements will be included in the record at this point.

[The prepared statement of Ms. Jackson Lee follows:]

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

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

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

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

H.R. 1115 also provides a party to a class action lawsuit with the right to an interlocutory appeal of the court's class certification decision provided an appeal notice is filed within 10 days. The appeal would stay discovery and other proceedings during the pendency of the appeal. This is a substantial change to Rule 23(f) which presently provides the court with discretion to allow an appeal of the class certification order without staying other proceedings. The automatic stay under H.R.1115 provides defendants with another delaying tactic and another tool to increase the expense for plaintiffs.

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

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

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

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

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

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

Chairman SENSENBRENNER. Are there amendments?

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman from North Carolina have an amendment?

Mr. WATT. No, I don't have an amendment. I——

Chairman SENSENBRENNER. Are there amendments?

Mr. GOODLATTE. Mr. Chairman?

Mr. WATT. I want to strike the last word.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 1115, offered by Mr. Goodlatte. In section 3 of the bill, (1) strike section 1715——

Mr. GOODLATTE. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection. Without objection, so ordered.

[Mr. Goodlatte's amendment follows:]

AMENDMENT TO H.R. 1115
OFFERED BY MR. GOODLATTE

In section 3 of the bill—

(1) strike section 1715 of title 28, United States Code (as proposed to be added by such section);

(2) redesignate section 1716 of such title (as proposed to be added by such section) as section 1715; and

(3) make such other technical and conforming changes as may be appropriate.

Redesignate section 7 as section 8 and insert the following new section:

1 **SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE REC-**
2 **OMMENDATIONS.**

3 Notwithstanding any other provision of law, the
4 amendments to Rule 23 of the Federal Rules of Civil Pro-
5 cedure which are embraced by the order entered by the
6 Supreme Court of the United States on March 27, 2003,
7 shall take effect on the date of the enactment of this Act
8 or on December 1, 2003 (as specified in that order),
9 whichever occurs first.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, this is an amendment to the legislation that I have offered following communications from the Judicial Conference and a recommendation that they have that the provisions in the bill dealing with plain English—in other words, requiring that some of the notifications that are sent to parties in the suit be written in plain English—be made consistent with the new provisions of rule 23, which the U.S. Judicial Conference has recommended, and, in fact, this would incorporate those recommendations which they have adopted as a Conference into the law and substitute that for the section 1715 that is in my bill. I think this is appropriate and necessary to maintain consistency, and I would urge my colleagues to accept this amendment.

Chairman SENSENBRENNER. The question is on the Goodlatte——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I'm just trying to make sure I understand what we're doing here. This has not been the subject of any hearings before the Committee or Subcommittee, I take it. Is that right, Mr. Goodlatte?

Mr. GOODLATTE. If the gentleman would yield?

Mr. WATT. Yes.

Mr. GOODLATTE. That is not correct. A hearing was held on this issue last week, and a number of hearings have been held on the previous——

Mr. WATT. No. I mean this particular amendment.

Mr. GOODLATTE. Oh, this particular amendment? No, it's not——

Mr. WATT. I'm aware of the——

Mr. GOODLATTE.—usual that we have hearings held on individual amendments.

Mr. WATT. Okay. But this is a broad-brushed amendment to rule 23, or is it some technical amendment to rule 23?

Mr. GOODLATTE. It conforms the bill to new changes to rule 23 made by the United States Judicial Conference.

Mr. WATT. Okay.

Mr. GOODLATTE. With relation to the plain English language. We didn't want to have two different plain English requirements, one that they'd adopted for other rule 23 proceedings and this for class actions. It made more sense to us to accept their provisions and substitute them into our bill.

Mr. WATT. Okay. I appreciate it. I——

Mr. SCOTT. Would the gentleman yield?

Mr. WATT. I'll yield to Mr. Scott.

Mr. SCOTT. Will the gentleman yield and respond? Could he briefly tell us what differences there are between rule 23 and what's in the bill? Or is it essentially the same with just slightly different language?

Mr. GOODLATTE. Let me read to you the changes. They modify the current rules concerning the content and form of the notice provided to class members concerning the certification of a proposed

class—of proposed classes, including a requirement that the notice must state in plain, easily understood language the nature of the action, the definition of the class certified, the class claims, issues, and defenses, that a class member may enter an appearance through counsel if he or she so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under rule 23(c)(3).

It specifies more detailed procedures for reviewing and approving a proposed class settlement including a specific requirement that notice must be directed in a reasonable manner to all class members who would be bound; an explicit direction that a settlement may be approved only after a hearing and on finding that the settlement is fair, reasonable, and adequate; a mandate that all agreements, including any side agreements related to the settlement, must be filed with the court; an authorization that the courts may permit class members an opportunity to opt out of a proposed settlement even though they may have previously declined to opt out of the class action; and a specific authorization for class members to object to proposed settlements; and a prohibition on withdrawing such objections without court approval. That's rule 23(e). And also rule—the first part of that was rule 23(c)(3), and that second part is rule 23(e).

Mr. WATT. Mr. Chairman, I yield back.

Chairman SENSENBRENNER. The question is on the Goodlatte amendment. Those in favor will say aye. Opposed, no.

The ayes appear to have it. The ayes have it; the amendment is agreed to.

Are there further amendments? The gentleman from New York.

Mr. NADLER. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 1115, offered by Mr. Nadler. Page 9, insert the following after line 23 and——

Mr. NADLER. Mr. Chairman?

The CLERK.—redesignate——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[Mr. Nadler's amendment follows:]

AMENDMENT TO H.R. 1115
OFFERED BY Mr. Nadler

Page 9, insert the following after line 23 and redesignate the succeeding section accordingly:

1 **"§ 1716. Sunshine in court records**

2 "No order, opinion, or record of the court in the adju-
3 dication of a class action, including a record obtained
4 through discovery, whether or not formally filed with the
5 court, may be sealed or subjected to a protective order
6 unless the court makes a finding of fact—

7 "(1) that the sealing or protective order is nar-
8 rowly tailored, consistent with the protection of pub-
9 lic health and safety, and is in the public interest;
10 and

11 "(2) if the action by the court would prevent
12 the disclosure of information, that disclosing the in-
13 formation is clearly outweighed by a specific and
14 substantial interest in maintaining the confiden-
15 tiality of such information.

Page 6, in the matter preceding line 2, strike the item relating to section 1716 and insert the following:

"1716. Sunshine in court records.
"1717. Definitions.".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

This amendment is designed to prevent the sealing of information in class action lawsuits that could be used to protect the health and safety of others. I have been concerned for a number of years about records from lawsuits that affect public health and safety being sealed by court order. There is little justification for this practice. More often than not, the reason a class action lawsuit is filed is because a number of people have been harmed by the actions of the negligence or the alleged actions of a large corporation. These people come together to recover damages by proving that a company behaved in a way that is harmful to their health and safety.

So what then happens very often, the company settles the lawsuit, pays the people it harms, and then tells them to be quiet, as a condition of the settlement enters a non-disclosure order. But the companies never change their dangerous practices. They simply regard the lawsuits as the cost of doing business and ignore the underlying problem.

Since the companies force the plaintiffs to avoid discussing the problem with anyone else, more people end up getting injured. This is reprehensible. If people knew about the settlement, if people knew about the practice or the injuries, then the companies might be forced to change their practices or people would not buy the products of the companies.

The Firestone tire situation is a case in point. One of the main reasons there was not timely public disclosure of the dangers of Firestone tires is because Firestone insisted on a series of gag orders when settling a whole series of product liability lawsuits. And let me read from an article in the September 25, 2000, edition of the *Legal Times* article on the Firestone case. It says, "One of the principal roadblocks to timely public disclosure of the danger of Firestone tires has been a series of gag orders the company insisted on as a condition of settling product liability lawsuits in the early 1990's. Simply put, Firestone made a calculated determination that they would compensate victims so long as the plaintiffs agreed not to share their stories with other victims or with the public. Congress was given the opportunity to address this very problem in 1995 when an amendment was offered that would prevent such gag orders if the public safety need outweighed the privacy interests of the litigants. Unfortunately, the amendment was defeated, with opponents arguing that the information was proprietary information that does not belong in the public domain."

The reality is that the release of such information in the Firestone case 7 or 8 years could have saved human lives. We cannot blame the people who settled their cases for recovering damages and agreeing to the gag orders as a condition of getting the money. But as a result, the public was kept in the dark, and many more people who could have avoided it were injured. This should not happen again.

It's important for the people to be aware of the health and safety hazards that may exist so that other people can make informed choices and, I might add, so that public agencies perhaps can crack

down on such dangers. Too often, critical information is sealed from the public and other people are harmed as a result.

Now, Mr. Chairman, this amendment is reasonably drafted. The amendment is designed to say that the judge must make a finding of fact in any case in which a gag order is requested. If the judge finds that the privacy interests of any of the litigants is broader than the public interest, the judge must issue the gag order. If the judge finds that the public interest and health and safety outweighs the privacy interest asserted, the judge may not issue the gag order.

The judge also has to draft the gag order as tightly as possible to prevent the unnecessary disclosure of confidential information. So this will prevent the unnecessary disclosure of confidential information but will not allow the sealing of information that may harm the public.

When it comes to health and safety, public access to class action lawsuit materials is absolutely essential, and I want to remind the Chairman—and I want to extend my appreciation to the Chairman—that in consideration of this bill or a similar bill last year, the Chairman said, and I quote, "This is a very constructive amendment, and we are pleased to support it." And I hope that his reaction today will be similar.

So I thank the Chairman and I yield back.

Chairman SENSENBRENNER. The gentleman from Virginia?

Mr. GOODLATTE. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Mr. Chairman, I speak in opposition to this amendment, in fact, strong opposition. The gentleman from New York is correct that it was accepted on the floor. It was, however, defeated in this Committee by a 16–9 vote, and for good reason. The Committee had it right in the first place. Although the amendment which would prohibit the court from sealing class action court records relevant to public health and safety may seem innocuous enough at first blush, it's both unnecessary and harmful. The amendment is unnecessary because, except in very rare circumstances really not relevant here, court orders and opinions normally are issued publicly and are readily available to the media.

Now, we just passed an amendment that made the provisions regarding plain English in class action lawsuits compatible with rule 23 as it applies to various types of legal proceedings. This amendment would have the opposite effect. It would make the protective order provisions of these class actions inconsistent with other legal proceedings, and it is far more common in individual lawsuits to find these protective orders than it is in class actions.

There are a number of reasons why this would have adverse consequences. First, it would cause invasions of privacy. It could result in the massive relief of—release of private information, personal medical records, information about alcohol or substance abuse treatment, and this information might be released about non-parties to the litigation, pure, innocent bystanders.

Second, it could discourage innovation. What innovation is there—what incentive is there for a company to develop a new drug or a life-saving chemical process if an enterprising plaintiff's lawyer

can walk in and demand that such information be made public through this proposed amendment?

Third, it could cause unfair competition. Competitors could simply file lawsuits in an attempt to gain access to critical trade secret information, then release that information to the public in an effort to show that it is no longer secret and thus can no longer be legally protected.

And, finally, the provision will discourage the settlement of lawsuits. As noted previously, class action settlements are never subject to protective order because of the public approval process. They can't be. But in some class actions, plaintiffs' counsel seek to obtain through discovery information about individual claims settlements. If that information is routinely made public, negotiators in individual claims cases will know the results of all other similar negotiations. As a result, there will be nothing to negotiate in those individual cases. One would simply demand more than the last person got. As a result, fewer cases will settle and more cases will be tried. The result will be an increasingly onerous burden on our judicial system, parties going to trial in cases that could be and should be settled.

A well-known civil procedures specialist, Harvard Law School Professor Arthur Miller, has written an article urging that so-called reform of protective order rules, such as those proposed here, would wreak havoc on our litigation process. I would urge my colleagues to oppose the amendment and leave the discretion to the judge as it exists now.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Mr. Chairman, I yield to gentleman from New York.

Mr. NADLER. I thank the gentleman.

Mr. Chairman, most of the arguments that were just made against this amendment are, frankly, facetious and don't address the wording of the amendment. The amendment doesn't open up everything and prohibit every sealed order. It says that no order, opinion, or record of the court in adjudication of a class action may be sealed or subjected to a protective order unless the court makes a finding of fact (1) that the sealing or protective order is narrowly tailored, consistent with the protection of public health and safety, and is in the public interest; and (2) if the action by the court would prevent the disclosure of information, disclosing the information is clearly outweighed by a specific and substantial interest in maintaining the confidentiality of such information.

All this amendment really does is say that you have to show a good reason for keeping it secret and that the—and that it has to be narrowly tailored to protect that interest.

Now, everything that Mr. Goodlatte said about revealing information about individuals and private information is all nonsense because it wouldn't be revealed. There would be no reason for a court to reveal any of that. What is necessary to reveal is that a judgment or a settlement was entered by Firestone or whoever because of unsafe tires in that Model A–1–2 was unsafe, so people could avoid buying A–1–2 or could ask that A–1–2 have proper safety provisions put into them. And that people are entitled to know.

And lives—I mean, frankly, such protective orders are not—I mean, the gentleman said they're rare, and then he said that havoc would be wrought by putting this kind of protection in. They're not rare and havoc would not be wrought because the judge in his discretion—the judge in his discretion could still say there's a good public—there's a good public policy reason to keep it secret, or there is no good public policy to keep it secret but there are reasons to keep part of it secret, to protect private information, to protect proprietary information. But the fact of the settlement, the fact of what the basic safety defect or whatever was, if there is, in fact, the basic safety defect, all this really says is if there's a public need to know of something that impinges upon the public health or safety, you can't seal it unless you can convince the judge that there's a good reason to do so.

Let there be some judicial discretion here. That's what we decided. That's what the Chairman agreed to on the House floor, and I think that's the better judgment. And I think the gentleman for yielding to me.

I yield back.

Chairman SENSENBRENNER. Does the gentleman from Virginia yield back?

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. The question is on the Nadler amendment. Those in favor will say aye. Opposed, no.

The noes appear to have it——

Mr. NADLER. Mr. Chairman, I ask for a rollcall vote.

Chairman SENSENBRENNER. A rollcall is ordered. The question is on agreeing to the amendment offered by the gentleman from New York, Mr. Nadler. Those in favor will as your names are called answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Ms. Hart?

Ms. HART. No.
The CLERK. Ms. Hart, no. Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no. Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence, no. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Carter?
Mr. CARTER. No.
The CLERK. Mr. Carter, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mrs. Blackburn?
Mrs. BLACKBURN. No.
The CLERK. Mrs. Blackburn, no. Mr. Conyers?
[No response.]
The CLERK. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Pass.
The CLERK. Mr. Watt, pass. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
[No response.]
The CLERK. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote? The gentleman from California, Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? The gentleman from North Carolina, Mr. Watt?

Mr. WATT. I vote no.

The CLERK. Mr. Watt, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report. The gentleman from California, Mr. Schiff?

Mr. SCHIFF. Aye.

The CLERK. Mr. Schiff, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 7 ayes and 20 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. SCOTT. Scott 1, AM5.

The CLERK. Amendment to H.R. 1115, offered by Mr. Scott.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and the gentleman——

Mr. SCOTT. Mr. Chairman, could she read—make sure we've got the right one. I have several.

The CLERK. Page 15, lines 14 and 15.

Mr. SCOTT. Thank you. I would withdraw my reservation.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[Mr. Scott's amendment follows:]

AMENDMENT TO H.R. 1115
OFFERED BY MR. SCOTT

Page 15, lines 14 and 15, strike "if—

1 "(A) the "

and insert "if the".

Page 15, line 20, strike "; or" and all that follows throughout line 25 and insert a period.

Page 16, line 7, strike "The provisions" and all that follows through "subparagraph (B)." on line 10.

Page 16, line 7, strike "subparagraph (A)" and insert "this paragraph".

Chairman SENSENBRENNER. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, this amendment simply strikes mass torts from the scope of the bill. The proponents of the class action reform say they're only interested in changing the rules of diversity to create additional Federal jurisdiction over class action suits, but the scope of the bill as written is far broader than traditional class actions. My amendment would simply strike what are called "mass torts" from being considered a class action.

Mr. Chairman, my home State of Virginia doesn't even have class actions, but it does have a process of consolidation for court management purposes; that is, if you have—you could have in some cases 150 plaintiffs with the same issue, the court can consolidate those cases for the purpose of management, but that's not really a class action.

Under the provisions of the bill, if you've got more than 100 plaintiffs, you are a class action. And just because you've got 150 plaintiffs in the same case doesn't convert a State action into a Federal action. I would hope that we would, therefore, remove the mass torts from the provisions of the bill.

I yield back.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, I speak in opposition to this amendment. The legislation provides for—that for purposes of Federal diversity jurisdiction and removal action, certain civil actions shall be deemed to be class actions even though they may not be so labeled on the court dockets, the principle being: If it walks like a duck, if it quacks like a duck, it is a duck. And, therefore, it should be included in the same coverage that class actions are covered.

This provision is critical to ensuring that plaintiffs' lawyers cannot avoid the logical reach of H.R. 1115 by relabeling cases that are effectively class actions as "mass actions" to keep those cases in State court. Mass actions are effectively class actions because in such matters attorneys seek to adjudicate substantial numbers of claims simultaneously in a single trial. They are opt-in class actions in the sense that they include only those claimants who have affirmatively consented to the inclusion of their claims in the action.

As empirical evidence now shows, mass actions are an end run around class action rules because counsel seek to try the claims in a single trial, that is, on a class basis, even though the actions do not satisfy the basic fairness, due process prerequisites for litigating a matter as a class action.

Mr. Chairman, I would urge my colleagues to oppose this amendment.

Mr. SCOTT. Would the gentleman yield?

Mr. GOODLATTE. I'd be happy to yield.

Mr. SCOTT. Thank you. In a class action, one of the problems that apparently the bill is getting at is that people don't know the rights

being litigated and have nothing to do with it. In a mass tort in a consolidated trial, everybody has their own lawyer. Some may be represented by the same lawyers, but, I mean, everybody is controlling their own destiny. They don't have to be in the case if they don't want to be. So you don't have the problem in a consolidated case that you do in the same—in the class actions.

Mr. GOODLATTE. Reclaiming my time, you're correct that you don't have that particular problem, but there are many other problems that are abused in class action that are addressed in this matter that would also be abused in that matter, the principal one being the issue of whether or not attorneys use the State courts and the limitations in the Federal rules today on diversity jurisdiction to restrict cases to Federal court that could—to State court that could and should be removed to Federal court because of the nature of the action. And you shouldn't be able to disguise the case as a mass action when it has the same effect in that regard as a class action.

Mr. SCOTT. In this case, however, with the mass consolidation, each and every one of those cases, if adjudicated separately, would be, in fact, in State court.

Mr. GOODLATTE. That's correct. Just as in a class action lawsuit, if you brought each and every individual plaintiff into State court, that case would be heard in State court and wouldn't be removed to Federal court because it wouldn't meet the jurisdiction requirements of an individual case or of the $2 million requirements in this legislation.

Mr. SCOTT. Well, if you'll yield another time, there may be some in the case that would not be—might live in another State. In this case, each and every case has to satisfy—in a consolidated case has to satisfy its individualized jurisdiction in State court.

Mr. GOODLATTE. Right, and the gentleman should note that in this legislation, there are restrictions on bringing actions—removing actions to Federal court who don't meet the criteria of that diversity. And, secondly, the Federal court judge has the discretion to bounce the case back to State court if he thinks it's more appropriate to be heard there. So, again, I don't think the gentleman's amendment is necessary for the protection of the ability to handle mass actions in State courts under appropriate circumstances, but we have to prevent the abuse of their using this as a manner of getting around the provisions of the bill with regard to class action. So I would object to the gentleman's amendment.

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. Who seeks recognition? The gentleman from Massachusetts.

Mr. DELAHUNT. You know, this has to be the most egregious affront to federalism that I have observed since my service on this particular Committee. Not only does it do it a disservice to the Federal system, because I can just imagine if these cases—I can just imagine a Federal district court judge sitting on these cases, garden variety tort cases, if you will, and it's a perfect explanation of why the Judicial Conference is opposed to this bill as well as their State counterpart, the Conference of State Supreme Court Justices. To vest in a Federal district court the authority to deem these cases as a class action is simply outrageous.

You know, these individual State cases also, unlike the bill's treatment of genuine class action cases, are not dismissed without prejudice, so they could be refiled if the rule 23—in State court if the rule 23 requirements are not met. Rather, they remain in this limbo.

And as I said, it goes directly against the purpose of what I understood the proponents to be looking for, which is efficiency and judicial economy, because in the end it would require the Federal court to adjudicate these cases on an individual basis if they fail a certification under rule 23, and at values at far less than the $75,000 jurisdictional amount set by Congress for Federal diversity requirements.

I would think that this particular provision should receive careful consideration by both sides. It's far overreaching and is an incredible transformation of power to the Federal courts, a power—authority, by the way, they do not welcome, they're not looking for. They've been very clear about that. They do not want it. And the States do not want to cede it.

With that, I yield back.

Chairman SENSENBRENNER. The question is on the amendment offered——

Mr. CHABOT. Mr. Chairman? Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Ohio——

Mr. CHABOT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CHABOT. I yield to the gentleman from Virginia.

Mr. GOODLATTE. I thank the gentleman. I'll be very brief. But I do need to respond to this States rights argument raised by the gentleman from Massachusetts, because I very strongly disagree with him.

If there's a $75,000 slip and fall between a Massachusetts plaintiff and a Connecticut defendant, that can be brought in the United States District Court for the Eastern District of Massachusetts without any problem. On the other hand, if there is a claim for damages of $50,000 to each of a million plaintiffs, or a $50 billion lawsuit, involving parties of all 50 States, that matter cannot be brought into Federal court because of the fact that when our Founding Fathers wrote our Constitution and wrote the provisions for our Federal courts, they didn't know anything about class action lawsuits. They are a much more recent development.

Now, there have been abuses—there have been abuses in the State courts many times where one State court judge in one jurisdiction has effectively rewritten the law in the other 49 States. That is where States rights come into play here. We are protecting the rights of the States where the action is not brought and the plaintiffs in those States and the defendants in those States to have these cases heard in diversity jurisdiction.

Finally——

Mr. DELAHUNT. Will my friend yield?

Mr. GOODLATTE. I will in just a second. But finally—and it's up to the gentleman from Ohio. But, finally, there have been abuses of mass actions, which is the point of the gentleman's amendment. And a new study shows that it's used heavily in a number of States: Mississippi, West Virginia—they've been used in West Vir-

ginia, for example, to consolidate for trial the claims of as many as 8,000 plaintiffs from over 35 States against over 250 defendants, all without having to meet the requirements of the class action rules. So you have to include a protection against that kind of abuse in the legislation. And if the gentleman from Ohio wishes to yield, I'd be happy to.

Mr. CHABOT. Reclaiming my time, I'll yield to the gentleman from Massachusetts.

Mr. DELAHUNT. Well, I'm glad that the gentleman referred me to a particular study, because up until this particular moment, I have never heard of any data whatsoever indicating that this was a problem. But I still go back to the principle. What we're doing here is eroding the traditional role of the State court systems. This is absolutely a derogation of the role of the State—of the States. And I'd remind my friend, you're right, the Founders didn't have any idea of a class action suit. But the concept of a class action suit evolved from our common law and from equity that found its genesis in State decisions. In State decisions.

And I yield back.

Mr. CHABOT. Reclaiming my time, I yield back the time.

Chairman SENSENBRENNER. The question is on——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER.—the Scott amendment——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I first of all want to associate myself with the remarks of Mr. Delahunt on the States abuse of federalism points that he has made. I want to associate myself with Mr. Goodlatte in acknowledging that there have been abuses of the class action system in the States. But he should also be aware that there have been substantial abuses of class actions in the Federal courts, and it takes a very arrogant perspective to believe that somehow the Federal courts have some lock on the ability to do things right. It is that that is absolutely inconsistent with the federalist principles that were in our Founding Fathers' minds. In fact, they reserved to the States everything that was not specifically given to the Federal Government for that reason.

So just because there have been abuses doesn't justify what you're doing, and I think it is very arrogant to assume that there are not going to be, have not been abuses in the Federal system. And it's arrogant to——

Mr. GOODLATTE. Would the gentleman yield?

Mr. WATT.—believe that we somehow have a lock on a better way. And it is also arrogant to believe that you are going to get a different result in Federal court than you got in State court, which is really the underlying basis of this legislation.

My experience in 22 years of practicing law was that I got some good results in Federal court and some good results in State court. I got some bad results in Federal court; I got some bad results in State court. And it is just absolutely arrogant, in my opinion, to

think that we somehow can just take over anything we want to take over because you've identified some abuse at the State level.

I'll yield to the gentleman.

Mr. GOODLATTE. Would the gentleman yield? First of all, I take it the gentleman is not referring to me personally when he says it is arrogant to take this position. Is that correct?

Mr. WATT. No, I'm not referring to you. I'm saying——

Mr. GOODLATTE. I thank the gentleman for that reassurance.

Now, let me, if the gentleman would yield further, I agree with the gentleman's point. We're not trying to guarantee an outcome in Federal court or State court. All we're saying is that in the typical action, the plaintiff's attorney can choose from several different jurisdictions and bring it one of maybe four, five, six different jurisdictions, and the defendant can often——

Mr. WATT. With all respect, let me just reclaim my time. Yes, the plaintiffs can do that, and right now if there is a basis for removing something to Federal court, the defendants can remove it to Federal court.

Mr. GOODLATTE. But they can't under these cases.

Mr. WATT. And so I just—I disagree. I'll yield to Mr. Scott.

Mr. SCOTT. Thank you. And I thank the gentleman for yielding because I just want to piece together all the stuff on page 12, which starts off saying "any civil action," so it's not just mass torts. If you have a situation where the same defendant has ripped off 150 named people who are suing him for the same thing, and the damages amount to an aggregate $2 million or more, and one of them happens to be out of State, according to this you can get removed. At 13, if the number is more than 100, the defendant can remove everything to Federal court and subject you to all the delaying tactics that's in there. Is that right on a civil case on just contracts where you've ripped—150 people have been ripped off by the same person, suing the same way, the case gets consolidated, that is subject to removal to Federal court? It seems to me it is under the language under 12 and 13 with the "or" on line 4 on page 13. And that's why this should not happen and they ought to be able to remain in State court. And if nobody wants to answer.

Mr. GOODLATTE. I'll yield back.

Chairman SENSENBRENNER. The gentleman's time has expired. The question is on the amendment offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye? Opposed, no?

The noes appear to have it. The noes have it. The amendment is not agreed to.

For what purpose does the gentleman from Texas, Mr. Smith, seek recognition?

Mr. SMITH. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 1115, offered by Mr. Smith of Texas and Mr. Boucher. Page 20, strike lines 2——

Mr. SMITH. I reserve a point of order.

Chairman SENSENBRENNER. Point of order is reserved. Without objection, the amendment is considered as read.

[Mr. Smith's amendment follows:]

AMENDMENT TO H.R. 1115
OFFERED BY MR. SMITH OF TEXAS AND MR. BOUCHER

Page 20, strike lines 2 through 4 and insert the following:

1 (a) IN GENERAL.—The amendments made by this
2 Act shall apply to—
3 (1) any civil action commenced on or after the
4 date of the enactment of this Act; and
5 (2) any civil action commenced before such date
6 of enactment in which a class certification order (as
7 defined in section 1332(d)(1)(C) of title 28, United
8 States Code, as amended by section 4 of this Act)
9 is entered on or after such date of enactment.
10 (b) FILING OF NOTICE OF REMOVAL.—In the case
11 of any civil action to which subsection (a)(2) applies, the
12 requirement relating to the 30-day period for the filing
13 of a notice of removal under section 1446(b) and section
14 1453(d) of title 28, United States Code, shall be met if
15 the notice of removal is filed within 30 days after the date
16 on which the class certification order referred to in sub-
17 section (a)(2) is entered.

Chairman SENSENBRENNER. And the gentleman from Virginia will be recognized for 5 minutes. Texas, I'm sorry.

Mr. SMITH. Thank you, Mr. Chairman. This amendment, though, is offered on behalf of the gentleman from Virginia and me, and I strongly support this legislation, but I do believe it can be improved. And that's because there is a loophole in the bill.

As currently drafted, the bill would apply only to cases filed and certified on or after the date of enactment. This excludes cases that have already been filed but are waiting for certification. This does not further the goals of class action reform.

If this bill is enacted but pending cases that have not been certified for class treatment are excluded, it would discriminate against those who may be joined to a class in a pending case after the date of enactment. This would deprive them of the protections of the new rules.

Also, unless the loophole is closed, this bill provides lawyers with an incentive to file frivolous cases in anticipation of the enactment of the proposed legislation. These frivolous cases would not be covered by the proposed legislation and the abuses of the class action system would continue.

The goal of this bill is to ensure that legitimate plaintiffs receive fair and prompt recoveries. To ensure this, the bill also should apply to those cases that are pending but not yet certified for class action treatment.

This amendment simply closes the loophole that exists in the underlying bill. It does so by applying the law to cases that have been filed but where a class certification order is entered after the date of enactment. This will eliminate any incentive to rush to the courthouse to avoid the reforms in the underlying legislation. It will prevent individuals from being made part of a frivolous suit that is filed in anticipation of the new laws.

Mr. Chairman, this amendment does not cause the bill to be applied retroactively. The cases covered by the amendment already have been filed, with the classes only awaiting certification. The amendment means that cases that gain class certification after the date of enactment have the new rules applied to them.

Mr. Chairman, this amendment has received strong support from those in the business community, particularly among the high-tech industry, and I have letters which I'd like to be made a part of the record from AEA and TechNet.

Chairman SENSENBRENNER. Without objection.

[The letters follow:]

May 9, 2003

Hon. F. James Sensenbrenner, Jr.
Chairman, House Judiciary Committee
2138 Rayburn HOB
Washington, DC 20515

Dear Mr. Chairman:

AeA would like to express its strong support for H.R. 1115, the Class Action Fairness Act of 2003. This legislation is, in our view, critical to restoration of balance and fairness to the American legal system. It would establish rational and sensible rules to govern proceedings in "national" class action lawsuits, and strengthen the rights of ordinary consumers who are, in many cases, involuntarily joined as plaintiffs in class action cases far removed from their state of residence.

Technology companies have regularly been the target of entrepreneurial class action lawyers who specialize in extraction of large settlements from companies for spurious claims through aggressive use of state class action procedures. Often, suits are grounded upon claimed product defects that are either of minimal impact to consumers, or theoretical in nature. A favored tactic is to "forum shop" the suits through several states until a friendly judge is identified who will certify a national class action in a state court on the basis of a minimal filing.

Key among this bill's provisions are prohibitions upon the payment of plaintiff bounties, upon discrimination among class members on the basis of geographic location, and protection of class members against losses incurred as a result of excessive settlements. Most importantly, the bill provides for "minimal diversity" rules that will enable large class action cases, filed on behalf of plaintiffs in multiple states, to be removed to federal court where they can be more effectively managed and where multiple cases filed in multiple states on the same facts can be consolidated.

AeA supports all of the key provisions of H.R. 1115. Nevertheless, we believe that the bill can and should be improved in the following respect: the bill should be applicable to cases commenced prior to date of enactment, *but as to which a class certification order is entered* ***after*** *the date of enactment.* The reason for this is simple: we believe that a bill that is applicable *only* to cases filed on or after the date of enactment is simply an invitation to class action lawyers to manipulate the system by "rushing to the courthouse" to file cases prior to enactment.

The modification to the bill we propose (language attached) is completely consistent with the principle of "prospective applicability" in that it would simply allow the new rules to govern cases as to which a class certification order is entered in a pending matter after enactment of the bill. This would remove any incentive to file spurious cases prior to enactment as a means to avoid the effect of the legislation.

601 Pennsylvania Avenue, NW, North Building, Suite 600 / Washington, D.C. 20004 / P 202.682.9110 / F 202.682.9111
www.aeanet.org

Moreover, the language we propose would help implement the larger goal of the legislation, which is to remedy abuses of the law from the date of enactment forward for the benefit of all parties in cases certified for class treatment. Consumer plaintiffs who are joined as members of a class certified *after* enactment should not lose the benefit of these protections simply because the original complaint was filed *before* the enactment of the bill.

AeA urges the Committee to approve H.R. 1115, with the modifications to Section 7 that we propose herein. We look forward to working with you in supporting this legislation. Please feel free to call me or Marc-Anthony Signorino, AeA's Technology Policy Counsel, at 202/682-4428 with any questions or concerns.

AeA, the nation's largest high-tech trade association, represents more than 3,000 companies with 1.8 million employees. These 3000+ companies span the high-technology spectrum, from software, semiconductors, medical devices and computers to Internet technology, advanced electronics and telecommunications systems and services. With 17 regional U.S. offices, and bases in Brussels and Beijing, AeA has been the accepted voice of the U.S. technology community since 1943. For more information, I invite you to visit our website at www.aeanet.org.

Sincerely,

William T. Archey /s/

cc:
Ranking Member Conyers
Members of the Committee

Attachment

2600 East Bayshore Road • Palo Alto, California 94303 • Telephone: 650.213.1160 • Facsimile: 650.213.9059 • e-mail: info@technet.org

May 19, 2003

Honorable F. James Sensenbrenner, Jr.
Chairman
House Judiciary Committee
Washington, DC 20515

Dear Mr. Chairman:

Technology companies are increasingly the victim of "national" class action strike suits filed by legal mills using cookie cutter petitions and a stable of paid plaintiffs who agree to let their names be used for suits across the country. These cases, filed for the purpose of extracting large settlements that primarily benefit the attorneys and not class plaintiffs, cannot be removed to federal court due to a lack of "absolute" diversity.

Often, these suits are based upon claimed product defects that are either of minimal impact to consumers, or theoretical in nature. The suits are sometimes filed in several states until a favorable local judge is identified who will certify a national class action on the basis of a minimal filing.

TechNet, the leading voice for the high-tech industries, strongly supports enactment of HR 1115 in order to put an end to this abuse of the legal system. Meritorious cases should have their day in court, and appropriate relief granted where warranted. Our legal system, businesses, and consumers would best be served by administration of these national class action cases in federal court under rules that will effectively protect the interests of consumers. HR 1115 would accomplish these objectives and its passage is long past due.

However, HR 1115 *can* be improved: it should be made applicable to cases pending on the date of enactment but as to which class certification occurs after the date of enactment. In this way, consumers joined as plaintiffs in class actions after the date of enactment will receive the protection of the new rules, not just those whose cases were filed after the enactment date. And businesses will not be faced with a wave of ill-considered petitions, hastily filed at the last minute in order to beat the "deadline date" of the bill as presently drafted.

On behalf of TechNet member companies, I urge the Committee to amend the effectiveness date of HR 1115 to eliminate these risks.

Sincerely,

Rick White
President and CEO

Mr. SMITH. I'd also like to say that a Member of this Committee, the gentlewoman from California, Ms. Lofgren, is at another Committee hearing down the hall, and although she is not a fan of the underlying bill, she does support this amendment.

And, with that, Mr. Chairman, I urge my colleagues to support this amendment and yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from California is——

Mr. WATT. I'll withdraw my point of order.

Chairman SENSENBRENNER. Okay.

Mr. BOUCHER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Boucher, for what reason do you see recognition?

Mr. BOUCHER. Thank you, Mr. Chairman. I rise in support of the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BOUCHER. I'm pleased to join with our colleague from Texas, Mr. Smith, in offering this amendment. The basic purpose of our proposal is to prevent a rush to the courthouse to file often frivolous class action suits as this bill nears passage in order to get the suit filed before the new rules take effect. The amendment achieves this goal by applying the new rules to all suits in which class certification has not occurred as of the effective date of the new law.

I also find appealing the fact that under this amendment the numerous new protections for the plaintiff class members that are contained in the underlying bill will be extended to the class members in all suits that receive certification of the class after the effective date of the law.

For both of these reasons, I'm pleased to join with Mr. Smith——

Mr. GOODLATTE. Would the gentleman yield?

Mr. BOUCHER.—in offering the amendment, and I urge its adoption.

Mr. GOODLATTE. Would the gentleman yield?

Mr. BOUCHER. And I'd be pleased to yield to the gentleman from Virginia.

Mr. GOODLATTE. I think the gentleman for yielding.

Mr. Chairman, this is a fine amendment, and I would encourage my colleagues to accept it. It would prevent an abuse.

Mr. BOUCHER. Thank you. Mr. Chairman, I yield back.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Mr. Chairman, it won't take me that long to say that this just makes a terrible bill worse, and I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment——

Mr. DELAHUNT. Mr. Chairman? Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I thank the Chair. It's my understand that the classes, for example, that have not been certified—and we should

be very clear about what we're doing here—include Enron, Adelphia, WorldCom, and Tyco. That's just simply to name a few. And what—and I'm looking for information. But what we will be doing here is taking from—or potentially doing is taking from State courts, where judges have been presiding over these cases for a considerable period of time, have dealt with these issues, and removing them to the Federal court, sacrificing a year, 2, 3 years, where those that have been aggrieved by those entities will be further delayed in having their grievances addressed.

Now, I could be wrong. I see people——

Mr. BERMAN. Would the gentleman yield?

Mr. DELAHUNT. I'll yield to Mr. Berman.

Mr. BERMAN. Wouldn't, one, the civil action commenced on or after the—the amendments made by this act shall apply to any civil action commenced on or after the date of enactment of this act? Number one. Two is certification. One—in other words, a pending civil—oh, "and." In other words, it has to be both.

Mr. DELAHUNT. Right. I just want to—reclaiming my time——

Mr. BERMAN. This will affect both the civil action filed after the effect of the act and ones filed before which—for which there is no class certification on.

Mr. DELAHUNT. Exactly. I just think—it's clear this amendment will pass, but I just think we have to be very clear. And, again, I don't want to represent that I'm sure about my facts. But I want everyone, when they cast their vote, to think carefully about the implications because, clearly, it could result in consequences that we are not aware of, and I would dare say that this amendment ought not to pass until we have an opportunity for clarification.

Mr. SCOTT. Mr. Chairman?

Mr. DELAHUNT. I yield to the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Thank you.

Mr. Chairman, changing the process of the law after a case has been filed is inherently wrong and unfair. I'm reminded that when the gentleman, my colleague from Virginia, and I served in the General Assembly, we would frequently ensure that legislation that we passed did not affect pending litigation. And I'm sure that my friend from Virginia campaigned, as I did, we would bring Virginia values to Washington. So I'm disappointed that he would support such an amendment, and I would hope the amendment would be defeated.

Mr. BOUCHER. Would the gentleman yield? I can't resist a comment. Oh, I'm sorry, would the gentleman from Massachusetts yield? Very briefly, as I said to my friend from Virginia in our side discussion, I frequently differed with that policy. [Laughter.]

Mr. BOUCHER. And on occasion it was very clear that legislation should pass that would have some tangential effect on pending litigation where it was necessary to address a larger public policy concern. That is precisely the matter here, and I'm pleased to support this amendment.

I thank the gentleman——

Mr. WATT. Would the gentleman yield?

Mr. DELAHUNT. I'll continue to yield to Mr. Watt.

Mr. WATT. I appreciate the gentleman yielding. I just want to express my hope that, whatever's in the water in other parts of Vir-

ginia, Mr. Goodlatte and Mr. Boucher's part don't flow down to the eastern part of the State. [Laughter.]

Chairman SENSENBRENNER. Well, the Chair will stipulate that all three gentlemen from Virginia on this Committee are men of values.

Mr. DELAHUNT. Just as a final observation, clearly, in those cases which I enumerated, if my information is correct, we will be incentivizing those firms to delay certification. Let's be very clear what we're doing, and I just respectfully suggest that to my colleagues.

And I'll yield back the——

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Texas, Mr. Smith. Those in favor will say aye. Opposed, no.

The noes appear to have it——

Mr. SMITH. Mr. Chairman, I call for a rollcall vote, please.

Chairman SENSENBRENNER. A recorded vote is ordered. Those in favor of the Smith amendment will as your names are called answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

[No response.]

The CLERK. Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye. Mr. Hostettler?

[No response.]

The CLERK. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

[No response.]

The CLERK. Ms. Hart?

Ms. HART. Aye.

The CLERK. Ms. Hart, aye. Mr. Flake?

Mr. FLAKE. Aye.

The CLERK. Mr. Flake, aye. Mr. Pence?

Mr. PENCE. Aye.

The CLERK. Mr. Pence, aye. Mr. Forbes?

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye. Mr. King?

Mr. KING. Aye.

The CLERK. Mr. King, aye. Mr. Carter?

Mr. CARTER. Aye.

The CLERK. Mr. Carter, aye. Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye. Mrs. Blackburn?
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn, aye. Mr. Conyers?
[No response.]
The CLERK. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman, no. Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no. Mr. Delahunt?
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no. Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Ms. Sánchez?
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their vote? The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. Aye.
The CLERK. Mr. Coble, aye.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon?

Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye.

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?

Mr. GREEN. Aye.
The CLERK. Mr. Green, aye.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye.

Chairman SENSENBRENNER. Are there further Members—the gentleman from Florida, Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye.

Chairman SENSENBRENNER. Are there further Members in the chamber who wish to cast or change their votes? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 21 ayes and 9 noes.

Chairman SENSENBRENNER. And the amendment is agreed to.

Are there further amendments? The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. I have an amendment at the desk, number 2.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 1115, offered by Mr. Scott. Page 18, line 25, strike the quotation marks and second period. Page 18——

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that it be considered as read.

Chairman SENSENBRENNER. All right. Without objection, the amendment is considered as read.

[Mr. Scott's amendment follows:]

H.L.C.

AMENDMENT TO H.R. 1115

OFFERED BY MR. SCOTT

Page 18, line 25, strike the quotation marks and second period.

Page 18, insert the following after line 25:

1 "(g) PROCEDURE AFTER REMOVAL.—If, after an ac-
2 tion is removed under this section, the court determines
3 that any aspect of the action that is subject to its jurisdic-
4 tion solely under the provisions of section 1332(d) may
5 not be maintained as a class action under Rule 23 of the
6 Federal Rules of Civil Procedure, the court shall remand
7 all such aspects of the action to the State court from
8 which the action was removed. In such event, the State
9 court may certify the action or any part thereof as a class
10 action pursuant to the laws of that State, and such action
11 may not be removed to Federal court unless it meets the
12 requirements of section 1332(a).".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this has—this amendment has to do with what happens if the Federal court decides that the claim is, in fact, not a class action. The H.R. 1115 instructs the Federal judge to dismiss the entire case. This amendment would have him, instead of dismissing the case, sending it back to State court so that they could proceed with the litigation. The fact that he has to dismiss the case means that the plaintiffs, who had a case at one time, don't have a case at all. The statute of limitations is tolled while it's pending in Federal court, but they have to file all over again in State court.

You have a yo-yo effect because once it's filed, any plaintiff can—or defendant can remove it again, and you're right back—if the Federal court decides it's not a class action, gets to dismiss it again. So you have a yo-yo. You can never have your case heard.

If he remands it, you still have the live case. That case has already been—you've already tried to remove it, didn't do it, so I guess you've got res judicata there. You can proceed with the litigation.

At some point in this process, Mr. Chairman, you ought to be able to proceed with the litigation and try the case. This will allow at least some progress made. If you've gone to Federal court and can't try it there, at least you can try it back in State court.

I would hope that we would adopt the amendment.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. SCOTT. I yield back. I'm sorry.

Mr. GOODLATTE. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. Mr. Chairman, I wish to speak in opposition to the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. I thank the Chairman.

Mr. Chairman, I strongly oppose this amendment. The gentleman uses the yo-yo language. We call this the merry-go-round amendment because this has the effect of defeating the whole purpose of H.R. 1115. If you can't achieve a review in a court of competent jurisdiction, the Federal court, and have finality to the decision like you can in any other kind of case because the case can be bounced back to State court, there's no meaning to the whole effort we're undertaking. The amendment would constitute a full endorsement, not a correction, of the rampant class action abuse that's occurring in the State courts. It's based on the myth that most States have class action rules radically different from the Federal class action rule, and that if a Federal judge says that a case may not proceed as a class action under the Federal rule, counsel should be able to take their case back to State court and try their luck under the State rule.

That is, quite frankly, not the case. Federal rules are similar. What we're trying to cure with this legislation is abuse of forum shopping where in these nationwide class action suits, the plaintiffs' attorneys have the opportunity to choose from 4,000 jurisdictions, and the defense or plaintiffs who weren't involved in bringing

the case but have been made a part of the case cannot even have the opportunity to have the case moved to Federal court like they can so many other diversity cases and then have finality of judgment in the case.

As we've noted, if the Federal court judge feels it's more appropriate to have the case heard in State court, the judge can remand it to State court. But a judge is going to apply fair rules in Federal court. There's never been an argument made that the Federal rules for class actions are going to unfairly treat people. It simply ends the abuse of forum shopping on a massive scale where plaintiffs' attorneys know the few dozen jurisdictions in the country—and we're talking about county courts and various places—where there is a great sympathy for certifying class actions. We don't know what Federal court it's going to be removed to. Presumably, there will be different treatment in different places. But at least they'll have the opportunity to choose an alternative jurisdiction like they can in lesser cases. And I would encourage my colleagues to oppose this amendment for the reasons cited.

Mr. SCOTT. Would the gentleman yield?

Mr. GOODLATTE. Be happy to.

Mr. SCOTT. If you have 150 plaintiffs in a case in State Court, and the Federal Court decides that it is not a class action, when could you ever start the litigation? Where? Where could they try their case? If the Federal Court decides it is not a class action, then there are alternatives to bring individual suits in the State Court or in whatever court they choose to, but the Federal Court, just as they would in a $75,000 slip and fall, render a decision which would not entitle you to go back to the State Courts to bring the action again, which is what your amendment allows.

Mr. BERMAN. Would the gentleman yield?

Mr. GOODLATTE. I would be happy to yield.

Mr. BERMAN. You talked about the Federal judge having the choice between dismissal and remand. Let us assume it is the case where 95 percent of the plaintiffs are in the State in which the action is originally brought, the chief defendant is. It is about an incident that occurred in that State. The Federal judge says let us not dismiss this case. Let us remand it back to that court. Can a defendant then remove it again under this bill?

Mr. GOODLATTE. No. No. Courts remand cases to other courts all the time. It doesn't mean that the party can say, well, I don't like the remand, I'm bringing it back up to the other court again.

Mr. BERMAN. What in this bill prohibits another removal petition from being filed by one of the defendants?

Mr. GOODLATTE. The mere rules of procedure that when a judge remands a case, it stays remanded. You can't force the case upon the judge.

Mr. BERMAN. And if that is not the case, is the gentleman prepared to change his bill?

Mr. GOODLATTE. We would certainly work with the gentleman if there is a need to make that point clear.

Chairman SENSENBRENNER. The question is on——

Mr. DELAHUNT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman from Massachusetts is recognized for 5 minutes.

Mr. DELAHUNT. I just would follow up by saying, in the hypothetical that was put forth by Mr. Scott, your response was that the option then was to proceed through individual—I'm directing this to Mr. Goodlatte—would be to proceed with individual causes of action, and yet, under a provision within this particular, within the underlying bill is that I presume that the defendant could then move within the Federal Court to have those, if there was in excess of 100 individual cases, deemed to be a class action; am I correct?

Mr. GOODLATTE. No, the gentleman is not correct. You still have to meet the other diversity requirements of the law. So if it goes back, if the individual plaintiffs meet the requirements of the law, they could bring their case in Federal Court, and more likely they'll bring their case in State Court if they can't meet those diversity requirements. But if they can, yes, they can bring an action individually in Federal Court. That's no different than any class action consideration on any different type of issue.

One of the issues before the court is are these claims in common in such a way as to merit being certified as a class? They'll apply the rules just like they always have. We don't change those.

Mr. DELAHUNT. If the gentleman is incorrect in his understanding, would he be willing to consider a change?

Mr. GOODLATTE. We will certainly work with anybody to——

Mr. DELAHUNT. Thank you. I yield back.

Chairman SENSENBRENNER. The question is on the Scott amendment.

Those in favor will say aye.

Opposed, no.

The noes appear to have it, the noes have it, the amendment is not agreed to.

Are there further amendments?

The gentlewoman from California, Ms. Sánchez?

Ms. SÁNCHEZ. Thank you, Mr. Chairman. I have an amendment at the desk, the Lofgren-Sánchez amendment.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 1115 offered by Ms. Sánchez and Ms. Lofgren, Page 15, line 14——

Ms. SÁNCHEZ. Mr. Chairman——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[Ms. Sánchez's amendment follows:]

AMENDMENT TO H.R. 1115
OFFERED BY MS. LOFGREN AND MS. LINDA T. SÁNCHEZ

Page 15, line 14, strike "if—" and all that follows through "(B)" on line 21 and insert "if".

Page 16, line 4, strike "The provisions" and all that follows through "subparagraph (A)." on line 7.

Page 16, line 10, strike "subparagraph (B)" and insert "this paragraph".

Chairman SENSENBRENNER. The gentlewoman from California is recognized for 5 minutes.

Ms. SÁNCHEZ. Thank you, Mr. Chairman.

There is no doubt that there are a series of abuses of the class action system in this country. Most of them involve these coupon settlements, where lawyers collect big fees, and victims get nothing but a discount on a future purchase.

But instead of targeting the abuses, this bill follows a scored-earth approach that targets every class action, including those brought to include the environment, senior citizens and minorities. The bill greatly increases the Federal Court's workload. It makes class actions more expensive and time-consuming for plaintiffs. It steps on State's rights and negatively impacts the ability of consumers to engage in class action lawsuits against major industries.

In addition to all of these reasons that apply nationwide, H.R. 1115 also intrudes on a very specific State issue. California, like many other States, has enacted strong consumer protection and anti-trust laws that prohibit unfair combinations and unlawful restraints on trade. In addition to permitting enforcement of laws by the State attorney general, Californians have chosen to allow their district and city attorneys, as well as private attorneys general, to enforce these laws in State Courts.

The private attorney general provision in California's business and professions code allows private parties to combat corporate fraud and other crimes. This is critical to protect consumers, since there are more violations than the California Attorney General's Office has the capacity to respond to.

It allows my State to protect consumers more broadly than would otherwise be possible. Yet, this bill seeks to take that option away. H.R. 1115 negates California's choice under the guide of class action reform. It does so by defining private attorney general actions as class actions and removing them to Federal Court. It takes them out of the jurisdiction of the State where the harm has generally occurred.

It's appalling to see yet another example of Congress intruding on State's rights. Members of this Committee often talk about the importance of letting States decide what is best for them, but in the end that seems to matter only when it's convenient for their purposes. Federalism becomes much less critical when certain issues are on the table.

Here, we have a State that has spoken quite loudly on the subject, and instead of listening, some Members of Congress are producing a bill that would run roughshod right over that State's views. This federalism-when-convenient agenda is not the way to make policy.

I've also heard proponents of this bill say that if it quacks like a duck, it must be a duck. Well, these California cases are not ducks. In one case, the San Francisco District Attorney's Office successfully settled a major consumer protection action against Providian Financial Corporation that netted Californians $300 million. Under this bill, that case would have been forced into the Federal Court, where the D.A. would have had to either figure out some way to comply with rule 23 or lose the case.

That's preposterous. A district attorney bringing a case under State law, on behalf of the residents of his or her county against

a corporation that does significant business in the county, should not be forced into Federal Court. The ability to bring these suits is a powerful tool for local district attorneys, many of whom have set up consumer protection units devoted to them.

This bill will undoubtedly have a chilling effect on State and local consumer protection actions, as well as anti-trust law enforcement. That is why this very same provision was opposed last year by the California District Attorney's Association. This argument or, pardon me, this amendment would remedy that serious defect in the bill, and I urge my colleagues to support it, and want to just mention that Congresswoman Lofgren, unfortunately, cannot be here on markup, but she strongly supports this amendment as well.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I move to speak in opposition of the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. I thank you, Mr. Chairman.

I oppose this amendment for the same reasons that we opposed the previous amendment regarding mass actions. This is simply another way around the ability of diverse parties to have their day in Federal Court. California is presently the only State with a statute, commonly known as section 17200, that permits private citizens to bring actions seeking recovery on behalf of persons who allegedly have been injured, even though the private citizen bringing the action has himself suffered no injury at all. The statute permits such actions be brought concerning any commercial activity that is "unfair."

One of the reasons why our Founding Fathers created diversity jurisdiction in our courts is so that if you have an issue involving local folks who see all kinds of great benefits to be derived from bringing an action against individuals in another State that they could have the opportunity to remove those matters to Federal Court. That's exactly what this allows.

If all of the parties in the case that the gentlewoman described or residents of the State of California, they cannot be removed, the case cannot be removed under this law. But if it meets the diversity requirements of the law, then they should have their opportunity to have their day in Federal Court, just like anybody else would, and for that reason, I strongly oppose this amendment.

Mr. BERMAN. Will the gentleman yield?

Mr. GOODLATTE. I'd be happy to yield.

Mr. BERMAN. Would the gentleman feel differently if he knew that a Member of this Committee was the author of that State law in California?

Mr. GOODLATTE. No. [Laughter.]

Chairman SENSENBRENNER. Would the gentleman yield back?

Mr. GOODLATTE. I yield back.

Chairman SENSENBRENNER. The question is on the Sánchez amendment.

Those in favor will say aye.

Opposed, no.

The noes appear to have it, the noes have it, and the amendment is not agreed to.

Are there further amendments?

The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. No. 3.

Chairman SENSENBRENNER. The clerk will report Scott No. 3.

The CLERK. Amendment to H.R. No. 1115 offered by Mr. Scott. Page 7, strike line 3 through 14 and redesignate the succeeding sections accordingly.

Mr. SCOTT. Mr. Chairman, I can ask that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from Virginia is recognized for 5 minutes.

[Mr. Scott's amendment No. 3 follows:]

H.L.C.

AMENDMENT TO H.R. 1115

OFFERED BY MR. SCOTT

Page 7, strike line 3 through 14 and redesignate the succeeding sections accordingly.

Page 6, in the matter preceding line 2, strike the item relating to section 1714 and redesignate the succeeding items accordingly.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, this amendment would strike the prohibition on so-called bounties in the underlying bill. The current language in the bill says that a court may not approve a proposed settlement if a class representative receives a greater share of the settlement award than other class members. The only exception is payment for reasonable time or expenses of the class representative expended in fulfilling his or her obligations.

This provision ignores the way that many civil rights actions actually work. In a civil rights case, there may be a large number of individuals who were harmed by a pattern of discriminatory denial of jobs. In most cases, because there are obviously a limited number of jobs, not all of the class members can be given the same denied job opportunity, plus full back pay as compensation.

If the prohibition on bounties is not struck from the bill, victims of discrimination will be discouraged from bringing their claims as class actions if they hope for a job as part of their compensation. The relief awarded must be equalized among the class. The class representative will not be able to get that relief personally in the process of affording everybody a remedy.

The very purpose of civil rights class actions is to help others who have experienced similar discriminatory treatment. That purpose will be undermined unless we amend the bill, and the very effect of this provision in the underlying bill will be to greatly expand the number of individual cases, since there is no incentive to resolve the issue once and for all by way of a class action.

This will be bad for businesses because they not only have an efficient method of resolving similar discriminatory claims filed against them, but they'll also be required to spend money to defend each and every case that will be particularly egregious because, under these cases, they'll have to pay the civil rights, in civil rights cases, they'll have to pay attorneys' fees for each and every one they defend. That would be bad for business, bad for individuals, bad for everybody, so I hope that this amendment will be adopted, and I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I move to speak in opposition of the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, I am opposed to this amendment. This is an area that has been rife for abuse. In many instances, the bounty provision of the Class Action Fairness Act provides that when a class action is settled, the terms may not provide a greater share of the award or class representative on the basis of the formula for distribution to all other class members than that awarded to the other class members.

The gentleman correctly notes that if the named plaintiff or other plaintiffs contribute to the action and incur expenses or compensation for reasonable time expended, that can be done, but not simply a bounty, a reward, for being the person to put their name up.

And I've seen a number of abuses of this. In the State of Mississippi, there have been class actions where Mississippi residents were given greater awards than the residents of the other States whose claims were identical to those in Mississippi and were all being heard in Mississippi court.

I, myself, was made part of a class action lawsuit against Massachusetts Mutual Life Insurance Company for not telling their customers, their insured that if they paid their premiums on a monthly basis or quarterly basis, they'd pay a small amount more than they pay on an annual basis. The settlement that was proposed in the court, and thankfully rejected, but the settlement proposed gave the named plaintiffs $100,000 and gave the rest of us notice and promise that they would not do that in the future.

Mr. DELAHUNT. Would the gentleman yield?

Mr. GOODLATTE. I'd be happy to yield.

Mr. DELAHUNT. Well, I'm glad that—I presume that you were one of the intervening objectors that set aside that settlement, but it clearly demonstrates that there are mechanisms to deal with the issue of abuse that exist under current law.

Mr. GOODLATTE. I would just point out to the gentleman that bounties are very common in these cases. They are very commonly granted, and in the, I don't believe that case has yet been settled, but in the new proposal, there is also a bounty, a premium paid to the named plaintiffs in the case. So that goes on. I can give you other——

Mr. DELAHUNT. Well, I——

Mr. GOODLATTE. It's my time. In a just-settled action against a film processor, most class members received a roll of film or a dollar off future processing charges, while the six named plaintiffs received $2,500.

In one nationwide class action initiated in Beaumont, Texas, complaining of an entirely theoretical defect in the floppy disk controllers of Toshiba laptops, even though the asserted defect had never resulted in injury to any user of the defendant's product, but facing potential liability of some $10 billion, Toshiba settled the case by giving most class members small cash payments and coupons worth no more than a few hundred dollars, while paying the two named plaintiffs $25,000 each.

Incidently, the lawyers received $147.5 million in fees. In a class action against gulf equipment manufacturers, the unnamed class members got three new golf balls, while the class representative got $2,500, and his attorneys got $100,000. If they do something that positively contributes to advancing the case, that takes some of their time or reimbursement for expenses, that should be allowed, but a pure bounty should not be allowed, and I urge my colleagues to reject it.

Mr. DELAHUNT. Would the gentleman yield for just a moment?

Mr. GOODLATTE. I would continue to yield, yes.

Mr. DELAHUNT. I wonder would the gentleman, because he makes a point that has some legitimacy in terms of bounties, I don't disagree with the gentleman, but I do think that a suggestion that was put forward by one of the witnesses that testified before this Committee regarding the use of coupons, where fees were based upon actual redemption, the value of actual redemption,

would this be a concept that the gentleman would entertain as this bill moves from this Committee to the floor?

Mr. GOODLATTE. As long as all of the parties are treated fairly, I don't think the issue needs to be addressed further, but I've promised to talk to the gentleman about a whole host of things, so I don't see a reason why I wouldn't continue to discuss this matter with him as well.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. Without objection, the agenda of the two gentlemen's discussions is expanded by one. The time of the gentleman has expired. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Mr. Chairman, I actually don't like bounties either, and if this provision were limited to bounties, I probably would be on the side of Mr. Goodlatte. The problem is that the provision is so accessibly, broadly drawn that it's going to cover things that go well beyond bounties, and while Mr. Goodlatte was having a good time while Mr. Scott was describing the problem that he's trying to address, he still has not addressed that problem.

If you've got a civil rights case, an employment discrimination case, and there are monetary damages awarded, it's one thing to say that the monetary damages or award can't be disproportionate to the named plaintiff, but if it's about getting a job, that's part of the award in the case, also, and you can't take a job and divide it between a thousand employees equally. I mean, what are they going to do, show up and work one one-thousandths of the job on a weekly basis? That's part of the award in the case.

And the way this is drawn at this point, it is just absolutely too broad because it says that the class representative can't get a greater share of the award. It's not limited to monetary awards, it's not, I mean, it's just—so if there is an attempt to address the bounty issue that is really a fair attempt to address it, I think I would probably be the first to try to conspire with the gentleman from Virginia to try to address that, but this provision is too broad.

Mr. GOODLATTE. Would the gentleman yield?

Mr. WATT. Yes, I'm happy to yield.

Mr. GOODLATTE. I would be happy to include the gentleman and the gentleman from Virginia in the discussions that are to be scheduled——

Mr. WATT. Well, discussions are not going to solve this problem. You all got a bill here that you have said, you know, is supposed to be a fair thing. You put a title on this section calling it a bounty, and you act like we're not operating in the real world here. This is the real world that we are supposed to be impacting here that you say this bill is designed to address. There are people on the Committee who would like to address the abuses. We are here at the full Committee, and I guarantee you won't hear another word from you all about this issue until 2 years from now when this is in effect.

So the provision is too broad, and you need to correct it. And you know it's too broad.

Mr. GOODLATTE. Will the gentleman yield?

Mr. WATT. Yes.

Mr. GOODLATTE. I will again renew my offer, as this legislation goes to floor, to work with the gentleman——

Mr. WATT. Well, the predicate for that is you acknowledge that this——

Mr. GOODLATTE. If the gentleman doesn't want to participate in the discussions, he doesn't have to, but if he would like to, he will. I oppose the amendment.

Mr. WATT. Reclaiming my time.

Chairman SENSENBRENNER. The time belongs to the gentleman from North Carolina.

Mr. WATT. Reclaiming my time.

I would just ask, as a predicate for any discussions we're going to have, does the gentleman acknowledge that this language is too broad and would do harm to the plaintiffs in the cases that Mr. Scott talked about?

Mr. GOODLATTE. At this point in time, I do not agree to that. I will have to look at the issues raised by Mr. Scott, but I am in good faith offering to do that.

Mr. WATT. Are you reading the language, Mr. Goodlatte, on Page 7 of the bill that says, "The court may not approve a proposed settlement that provides for the payment of a greater share of the award to a class representative"?

Mr. GOODLATTE. Yes, I'll stand by that language at this point, but I'm also willing to discuss this in further detail to see if clarification can be made that satisfies the gentleman. If that doesn't satisfy the gentleman, then vote for the amendment. I'm voting against it.

Mr. WATT. All right. Well, that's fine. Just yet another case where this is just a bad piece of legislation, and arrogance about the whole purpose that——

Chairman SENSENBRENNER. The gentleman's time——

Mr. WATT.—disregards what's going on in the real world.

Chairman SENSENBRENNER. The gentleman's time has expired.

The question is on the Scott amendment. Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes——

Mr. WATT. I ask for a recorded vote.

Chairman SENSENBRENNER. A recorded vote is ordered. Those in favor of the amendment offered by the gentleman from Virginia, Mr. Scott, labeled Scott No. 3, will, as your names are called, answer aye; those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no. Mr. Cannon?
[No response.]
The CLERK. Mr. Bachus?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no. Mr. Hostettler?
[No response.]
The CLERK. Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Ms. Hart?
Ms. HART. No.
The CLERK. Ms. Hart, no. Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Carter?
Mr. CARTER. No.
The CLERK. Mr. Carter, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mrs. Blackburn?
Mrs. BLACKBURN. No.
The CLERK. Mrs. Blackburn, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye. Mr. Weiner?

Mr. WEINER. Aye.

The CLERK. Mr. Weiner, aye. Mr. Schiff?

[No response.]

The CLERK. Ms. Sánchez?

Ms. SÁNCHEZ. Aye.

The CLERK. Ms. Sánchez, aye. Mr. Chairman?

Chairman SENSENBRENNER. No.

The CLERK. Mr. Chairman, no.

Chairman SENSENBRENNER. Further Members in the chamber wish to cast or change their vote?

The gentleman from Indiana, Mr. Pence?

Mr. PENCE. No.

The CLERK. Mr. Pence, no.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no.

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff?

Mr. SCHIFF. Aye.

The CLERK. Mr. Schiff, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?

[No response.]

Chairman SENSENBRENNER. If not, the clerk will report.

The gentleman from New York, Mr. Nadler?

Mr. NADLER. Aye.

The CLERK. Mr. Nadler, aye.

Chairman SENSENBRENNER. The clerk will report, again.

The CLERK. Mr. Chairman, there are 12 ayes and 20 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments?

[No response.]

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Mr. Chairman, I have one more amendment.

Chairman SENSENBRENNER. The clerk will report one more amendment.

Mr. SCOTT. No. 4.

The CLERK. Amendment to H.R. 1115, offered by Mr. Scott of Virginia. Page 19——

Chairman SENSENBRENNER. Without objection, the amendment is read, and the gentleman from Virginia is recognized for 5 minutes.

[Mr. Scott's amendment No. 4 follows:]

H.L.C.

AMENDMENT TO H.R. 1115
OFFERED BY MR. SCOTT OF VIRGINIA

Page 19, line 9, strike "(a) IN GENERAL.—".

Page 19, strike lines 16 through 21.

Mr. SCOTT. Thank you, Mr. Chairman. This is on Page 19, line 9. The amendment removes the provision requiring a stay for discovery pending removal. Since the intent of the bill apparently is to determine where the case will be tried, and not if it can be tried, there is no need to delay discovery pending that determination. Discovery often aids in settlement of claims. From discovery information, plaintiffs or defendants may determine that there may be weaknesses in their evidence and choose to settle the case or even drop it rather than risk trial.

Staying discovery unnecessary delays the collection and assessment of relevant evidence and can only impede the search for justice. I would particularly note, Mr. Chairman, that even if the plaintiff wants to proceed in Federal Court or doesn't care where the case is tried or how the case is tried, any party can appeal that case to the Federal Circuit Court, whatever the decision is one way or the other. Anybody can appeal. And while that's pending, after that decision comes down, they can appeal it up to the Supreme Court.

And during all of those appeals, you can't even do discovery. At least while all that's going on, you can proceed with discovery so when you finally figure out where the case is going to be tried, you'll be ready for trial. I would hope, Mr. Chairman, we wouldn't give a perverse incentive to people, one, to remove and, two, to appeal so that the case can be delayed a minimum, under this bill, a minimum of 2 years, where you can't even start discovery.

I would hope that this provision is adopted. I yield back.

Mr. GOODLATTE. Mr. Chairman?

Mr. SMITH. [Presiding] The gentleman from Virginia.

Mr. GOODLATTE. Mr. Chairman, I oppose this amendment and move to strike the last word.

Mr. SMITH. I thank the Chairman.

Mr. Chairman, the provision cited by the gentleman from Virginia provides that if the court feels there is a need to do so, the court can order that the discovery continue. It says, "Unless the court finds upon the motion of any party that specific discovery is necessary to preserve evidence or to prevent undue prejudice to that party, you shouldn't allow a class whose certification is in question to continue to put forth discovery requests to defend it."

Also, under the current bill, the court does not have to stay discovery, and it seems to me that the abuse is more likely on the other side. It becomes essentially a fishing expedition. You don't even have at this point certification that you have a class action, and yet you're going to have the discovery proceed as though there were a case when there, in fact, may or may not be a case, and the court should, in proper order, determine whether there is an appropriate action be brought in that court as a class and then do the discovery and not the other way around. It's going to waste a lot of resources of the parties involved, and I urge my colleagues to oppose the amendment.

Mr. SCOTT. Will the gentleman yield?

Mr. GOODLATTE. I would be happy to yield.

Mr. SCOTT. The gentleman says, talks about the discretion of the court. My reading of Page 19, line 16, is that everything shall be stayed unless the court finds that specific discovery is necessary to preserve evidence or to prevent undue prejudice.

There may not be any preservation of evidence issue or undue prejudice. You're just trying to get people on the record. And if you can't——

Mr. GOODLATTE. Reclaiming my time. I would just say to the gentleman that if there is no case, there shouldn't be a record. The first step that you've got to take is to establish that there is indeed a cause of action that can be brought in that court, and therefore the discovery should not proceed until such time as you determine that there is an action.

If, on the other hand, the court believes that during an interlocutory appeal or some other time where there may be a delay there should be some real harm to the plaintiffs, then the court can order that the discovery continue, but you shouldn't require parties to go to the great expense of participating in discovery when you don't even have an action.

Mr. SCOTT. Does the gentleman yield?

Mr. GOODLATTE. I would be happy to yield.

Mr. SCOTT. Is a 2-year delay undue prejudice?

Mr. GOODLATTE. It would be up to the court to determine what constitutes that type of a prejudicial circumstance.

Mr. SMITH. Do you yield back?

Mr. GOODLATTE. I yield back.

Mr. SMITH. Are there any others who wish to be heard on this amendment?

Mr. WATT. Mr. Chairman?

Mr. SMITH. The gentleman from North Carolina, Mr. Watt, is recognized.

Mr. WATT. I move to strike the last word.

Mr. SCOTT. The gentleman is recognized for 5 minutes.

Mr. WATT. This is yet another instance in which the parties are doing exactly what they say they don't intend to do—delaying the lawsuit, delaying the discovery, making it impossible for justice to be done in the courts so that 5 years from now they'll be back saying that the whole system is flawed, and we need to do something even more dramatic.

This—it is just so unfair that it's even hard to even talk about, and the way this thing is structured, it is just an invitation to delay. And what I think the proponents of this bill fail to understand is that delay is costly and disadvantageous not only to plaintiffs, but it's costly and disadvantageous in most cases to defendants too.

And you're setting up a system here that really is just, if you think the processing of these cases now proceeds at a snail's pace, just wait.

First of all, you're heaping all of this stuff onto the Federal Courts, where there is not the manpower or womanpower to absorb it. You're putting all of these procedural delays into the process that just invite litigants to delay the process. You're putting all of these appeals processes in, which means that it will take at least a year to get anything even heard by the appeals court, and then you've got the nerve to say that you're trying to deliver expeditious justice in the courts.

There is something wrong with this picture, and I yield back.

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. [Presiding] Who seeks recognition?

The gentleman from Massachusetts?

Mr. DELAHUNT. Yes, I just want to associate myself with the remarks of Mr. Watt. I mean, I think we've got to be candid with ourselves. This is simply an effort to do everything possible to delay justice on behalf of corporate America. It truly is. I mean, there is a permissive appeals provision now. This is a mandatory interloc—an automatic interlocutory appeal. The average time from filing of an appeal to when it is finally concluded is a year, but that's the average case. That's the average case.

Class action suits tend to be significantly more complex. It's clear that it will take longer. In a large corporation, undoubtedly, in most cases, would, despite the fact that it is remotely awarded, would seek certioari in front of the United States Supreme Court, putting an additional year or two on.

I mean, the reality is, you know, justice—justice delayed is justice denied. You know, we know what the end result is going to be, but this again is an example of overreaching. This is not about efficiency, this is not about justice. It can only be providing corporate America opportunities not to settle and not to meet their responsibilities.

I yield to Mr. Scott.

Mr. SCOTT. Under this amendment, as you suggested, if you have what is, in fact, a class action and don't care where—you file it in State Court—don't care where it is, they remove it to Federal Court, and you're ready to go. They appeal to the circuit court. You finally get a ruling that, yes, you can try it in Federal Court. They appeal that to the Supreme Court, and we wait for certioari. That's denied, and you finally—how much time can be wasted waiting to start the discovery process by the invitation to appeal to the circuit court and the Supreme Court?

Mr. DELAHUNT. In my opinion, if the gentleman is posing the question to me, we're talking years. Clearly, at that point in time, documents are lost, witness's memories become more vague. It, clearly, as I said, goes to a bottom line where the delay of justice is justice denied. The kind of cases that were referred to earlier by the gentleman from New York, Mr. Nadler, in the case of the Firestone. This is what will be the end result. These things will not happen.

And irresponsible corporate behavior will never be revealed.

Mr. SCOTT. Thank you.

Mr. CARTER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Texas, Mr. Carter.

Mr. CARTER. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CARTER. Mr. Chairman, this provision that is presently in this law is a provision that exists in the law of every State in this union, and the Federal Courts across the board. It gives the judge the option to make a common-sense judgment based upon the facts of the case as they stand. There's nothing that limits this motion from being filed at various stages during this appeal to make the request that as the time passes, these things are becoming prejudicial to one or the other party in this case.

As it is stated in this bill presently, it is a good statement of how discovery is done as a practical matter in every court in this country, and I think it's a good law.

Mr. WATT. Will the gentleman yield?

Mr. CARTER. Yes, sir, I'll yield to you.

Mr. WATT. I appreciate the gentleman yielding. If that is, in fact, the case, why do we need this provision which imposes an additional evidentiary problem, as opposed to letting the judges make the discretion based on the available standards that are there.

Mr. CARTER. Would the gentleman yield back?

Mr. WATT. Yes.

Mr. CARTER. Recovering my time. That's exactly what this says. This gives the judge the option from day one, and continuing throughout the appeal process, upon any motion raised by either party that raises the prejudice against his case.

You're not taking into effect the fact that, as far as I'm concerned, most trial judges have pretty decent common sense, and they have good ability to look at a case to figure out where it is and what's needed. And I don't think any judge that is out there is going to try to prejudice somebody's case on appeal. If it's necessary to maintain their case, the judge is going to go and let the motion. It may be for individual discovery to be done, it may be for mass discovery to be done at the judge's discretion.

Judicial discretion is a great part of what makes our courts work, and I fully support this.

Mr. WATT. Will the gentleman yield?

Mr. CARTER. Yes, sir.

Mr. WATT. Two responses. Number one, this takes away the common-sense discretion the judges have because it sets up standards that are much, much higher than common-sense standards.

Number two, I think the gentleman has forgotten that this whole exercise is in response to what the proponents of this bill perceive as being uncommon sense that judges are exercising. If judges were exercising common sense, maybe this bill, at least the proponents of this bill, don't think they're exercising common sense. So I agree with the gentleman. I mean, most of the judges I know are exercising common sense, which makes the whole underlying reason for this bill problematic to me, but you need to be giving that speech to the proponents of this bill.

Mr. CARTER. Retaking my time. I consider this good language, and I support it.

Chairman SENSENBRENNER. Will the gentleman yield back?

Mr. CARTER. I yield back my time.

Chairman SENSENBRENNER. The chair recognizes the gentleman from Michigan for a unanimous consent request.

Mr. CONYERS. I thank you, Mr. Chairman.

I merely wanted to put in, maybe after this debate is over, an amendment that I will not proceed with that strikes the whole automatic interlocutory appeal from this provision. I have a brilliantly crafted statement, and the amendment itself, plus letters from the Judicial Conference and the Committee on Rules of Practice and Procedure from the Judicial Conference.

[The material referred to follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

AMENDMENT ON INTERLOCUTORY APPEALS

One of the worst provisions in H.R. 1115 is the one that provides a party the right, *in every single case*, to an interlocutory appeal of a court's decision granting or denying class action certification. The provision also stays discovery and other proceedings *in every single case* while the appeal is pending.

The amendment I'm offering strikes that provision in its entirety. This amendment is consistent with the position taken by the U.S. Judicial Conference, which has unequivocally stated that the provision directly conflicts with Rule 23(f) of the Federal Rules of Civil Procedure and should be struck from the bill.

The current rule 23(f) provides courts of appeals with discretion to permit an appeal from an order granting or denying class certification, as well as *discretion* to say discovery while the appeal is pending.

This rule was not enacted in a vacuum. The Advisory Committee on Civil rules conducted an exhaustive study of class actions, taking into account the views of distinguished state and federal Judges who handle complex litigation, the defense bar, the plaintiff's bar, corporate counsel, consumer and civil rights groups, and the nation's leading academics. The Advisory Committee held days of public hearings on the topic. Once the Advisory Committee was done with the Rule, it was reviewed by the Judicial Conference, the U.S. Supreme Court, and Congress.

There is absolutely no evidence that the current rule has not been working. In fact, according to the Judicial Conference, the rule works very well. Under the current rule, appeals have been accepted in approximately 80% of cases in which they're requested. Since the rule's inception, a circuit court has never reversed a district court's decision to deny class certification. There has been no showing that the federal courts of appeals have not granted review in enough cases, or that this rule has been unfairly applied to defendants. The Judicial Conference has stated that its rules committees know of no person, judge or practitioner, who has expressed dissatisfaction with the current rule.

My question then is, why change a rule that has proven to work? Why change a rule that the Judicial Conference itself approves?

Unfortunately, the answer has nothing to do with good policy, efficient resolution of claims, or the desire to fix bad class action lawsuits and settlements. Rather, it's a provision written exclusively for corporate defendants. It will benefit the likes of Ken Lay, Jeff Skilling, and the investment bankers who allegedly helped them at the expense of defrauded investors. If this provision had been law when the Enron shareholder lawsuit was filed, the innocent victims in the case would have to wait another year or more to get their money back. Enron shareholders have already endured a discovery delay of approximately 1 ° years because of special rules that apply to securities lawsuits. In fact, it was during this delay that the accounting firm Arthur Andersen was caught destroying documents.

Interlocutory appeals are generally disfavored. They are reserved for cases in which an erroneous decision threatens to impose serious harm on a litigant. If this provision remains in the bill, however, the result will be unwarranted, expensive and wasteful interruptions of class action lawsuits while proving no benefits to parties with legitimate class certification issues.

I urge my colleagues to vote yes on this amendment and strike this harmful and nonsensical provision of the bill.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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JERRY E. SMITH
EVIDENCE RULES

May 12, 2003

Honorable F. James Sensenbrenner, Jr.
Chair
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Sensenbrenner:

On March 26, 2003, the Director of the Administrative Office of the United States Courts, Leonidas Ralph Mecham, advised you of the March 18, 2003, Judicial Conference resolution recognizing "that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses." I am writing you about two specific provisions of the "Class Action Fairness Act of 2003" (H.R. 1115), which are not affected by the Judicial Conference resolution but which directly affect Rule 23 of the Federal Rules of Civil Procedure and are inconsistent with the Rules Enabling Act rulemaking process. (28 U.S.C. §§ 2072-2077.)

The first provision requires courts of appeals to rule on all interlocutory appeals of class-action certification decisions. It directly conflicts with Rule 23(f). The second provision imposes extensive plain-English requirements on settlement notices. It overlaps with amendments to Rule 23(c)(2)(B) approved by the Supreme Court that are presently before the Congress and will take effect on December 1, 2003, unless Congress acts otherwise. We respectfully request your committee to withdraw both provisions from H.R. 1115.

Party Entitled to Interlocutory Appeal of Class-Action Certification Decision

Section 6 of H.R. 1115 amends 28 U.S.C. § 1292(a) and would provide a party the right to an interlocutory appeal of a court's decision granting or denying class-action certification, if an appeal notice is filed within 10 days. The provision also stays all discovery and other proceedings during the pendency of the appeal.

Rule 23(f) was added by the Supreme Court in 1998. It provides courts of appeals with discretion to permit an appeal from an order granting or denying class-action certification. This provision also gives the district court and court of appeals discretion to stay proceedings in the district court pending outcome of the appeal.

Rule 23(f) was promulgated as a result of an exhaustive study of class-action practices by the Advisory Committee on Civil Rules. In its study of Rule 23, the committee considered hundreds of public comments, empirical studies, discussions at several major conferences of practitioners and judges well experienced in class actions, and statements given at public hearings at which witnesses from major corporations, law firms, and law schools testified. The final Rule 23(f) was reviewed and approved by the Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, and Supreme Court of the United States before it was transmitted to the United States Congress in accordance with the Rules Enabling Act.

Rule 23(f) made the necessary changes to reduce unwarranted procedural obstacles in obtaining appellate review of a district court's class-action certification decision. At the same time, however, it addressed concerns expressed by many judges and lawyers that interlocutory appeals are often unnecessary and would be abused as a procedural tactic to delay proceedings and unfairly increase litigation expense in many class actions. These concerns would be heightened by an automatic-stay provision, which could disrupt the district court's ability to manage the case. Providing an appeal as of right might tempt a party to file an interlocutory appeal solely for tactical reasons. Staying discovery and other proceedings in the district court would only increase the tactical advantages of filing an interlocutory appeal, particularly because resolution of the appeal may not occur for 12 to 18 months.

Interlocutory appeals in general have been traditionally disfavored because they can cause unwarranted, expensive, and wasteful interruptions. Rule 23(f) vests discretion in the appellate judges to permit interlocutory appeal of class-action certifications in appropriate cases and gives both the district court and the appellate court discretion to decide whether to stay proceedings pending appeal. It has been working well, as evidenced by a significant and growing body of appellate law. The courts of appeals have announced detailed criteria to guide practitioners in deciding whether to seek leave to appeal. And the decisions that have granted leave to appeal are developing much-needed guidance on class action certification. The rules committees are unaware of any dissatisfaction expressed by the bench and bar with the rule. Moreover, the rule was only recently promulgated. Any consideration of amending it should be deferred until the bench and bar have had more experience with it.

Plain-English Settlement Notice Requirement

Section 3 of H.R. 1115 adds a new § 1715 to title 28, United States Code, prescribing detailed requirements governing the contents of proposed class-action settlement notices. On March 27, 2003, the Supreme Court transmitted to Congress amendments to Rule 23, which take effect on December 1, 2003, unless Congress acts otherwise. The amendments prescribe the contents of class-certification notices and also require that the court direct notice of a proposed settlement in a reasonable manner to all class members. The matters addressed by these amendments overlap to a certain extent with § 1715. We also believe that in its present form § 1715 may undermine the bill's stated objectives by requiring notices so elaborate that most class members will not even attempt to read them. Moreover, if H.R. 1115 is enacted without revision before December 1, 2003, reconciling any differences between the bill's notice provisions and the notice provisions in Rule 23 that are due to take effect in December 2003 may generate unnecessary confusion and litigation.

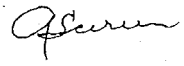
In the course of our Rule 23 study, we examined proposals that would have required extensive notices, but found that requiring detailed information in a class notice would be counterproductive, resulting in more complicated and unclear notices. It would defeat the goal of providing clearer and simpler information to putative class members. H.R. 1115's settlement-notice requirements are detailed and would likely encounter the same types of problems. Moreover, H.R. 1115's provisions are directed primarily at settlement notices, while the Rule 23 amendments address not only settlement notices but also the class-certification notice in which putative class members are first notified of the action and, when appropriate, given an opportunity to exercise their right to opt out of the class. The interface between Rule 23 and § 1715 is complicated by the growing number of "prepackaged" class actions that combine the first notice of class certification, including the opportunity to opt out, with notice of proposed settlement provisions.

At our request, the Federal Judicial Center worked with expert communications and linguistics consultants to develop sample plain-English class-action certification and settlement notices in products liability and securities cases. These notices are available on the Center's web site at <http://www.fjc.gov>. The illustrative forms were subjected to consumer testing by representative focus groups. The forms were well publicized and appeared in Law Week and BNA's Class Action Reporter. The Center's sample notices together with the Rule 23 amendments represent the culmination of many years of intensive study and work addressing the problems raised by unclear class-action notices. It is our belief that these models will significantly improve class-action notices.

At the same time, the rules committees do not consider that their class-action work has ended with the Rule 23 amendments. They will continue to monitor the status of class-action practice, including the use of class-action notices.

We recommend that section 6 and new § 1715 as added by H.R. 1115 be withdrawn. Thank you for considering our request.

Sincerely,



Anthony J. Scirica
United States Court of Appeals

cc: Honorable John Conyers, Jr., Ranking Democrat
Members of the House Judiciary Committee
Honorable David F. Levi, Chair, Advisory Committee on Civil Rules

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 26, 2003

Honorable Orrin G. Hatch
Chair
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch:

I write to provide you with the recently adopted views of the Judicial Conference of the United States, the policy-making body for the federal judiciary, on class action legislation, including S. 274, the "Class Action Fairness Act of 2003," introduced by you and other co-sponsors.

On March 18, 2003, the Judicial Conference unanimously adopted the following recommendation:

> That the Judicial Conference recognize that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions may appropriately include such factors as whether substantially all members of the class are citizens of a single state, the relationship of the defendants to the forum state, or whether the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference should continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that do not unduly intrude on state courts or burden federal courts.

The Conference in 1999 opposed the class action provisions in legislation then pending (S. 353; H.R. 1875, 106th Cong.). That opposition was based on concerns that the provisions would add substantially to the workload of the federal courts and are inconsistent with principles of federalism. The March 2003 position makes clear that such opposition continues to apply to similar jurisdictional provisions.

The Conference recognizes, however, that Congress may decide to base a statutory approach to remedy current problems with class action litigation by using minimal diversity jurisdiction. The Conference position recognizes that the use of minimal diversity may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts. The use of the term "significant multi-state class action litigation" focuses on the possibility of multi-state membership within the plaintiff class. The actions to which this term applies are nationwide class actions, as well as class actions whose members include claimants from states within a smaller region or section of the country. Minimal diversity in these cases would facilitate the disposition of litigation that affects the interests of citizens of many states and, through their citizens, affects the many states themselves.

Parallel in-state class actions in which the plaintiff class is defined as limited to the citizens of the forum state are not included within the term "significant multi-state class action litigation." Parallel in-state class actions might share common questions of law and fact with similar in-state actions in other states, but would not, as suggested herein, typically seek relief in one state on behalf of citizens living in another state. Accordingly, parallel in-state class actions would not present, on a broad or national scale, the problems of state projection of law beyond its borders and would present few of the choice of law problems associated with nationwide class action litigation. In addition, to the extent problems arise as a result of overlapping and duplicative in-state class actions within a particular state, the state legislative and judicial branches could address the problem if they were to create or utilize an entity similar to the Judicial Panel on Multidistrict Litigation, as some states have done.

Further, the position seeks to encourage Congress to include sufficient limitations and threshold requirements so as not to unduly burden the federal courts and to fashion exceptions to the minimal diversity regime that would preserve a role for the state courts in the handling of in-state class actions. The position identifies three such factors that may be appropriately considered in crafting exceptions to minimal diversity jurisdiction for class actions. These factors are intended to identify those class actions in which the forum state has a considerable interest, and would not likely threaten the coordination of significant multi-state class action litigation through minimal diversity. (The factors do recognize certain situations where plaintiffs from another state may be included in an otherwise in-state action.)

The first factor would apply to class actions in which citizens of the forum state make up substantially all of the members of the plaintiff class. Such an in-state class action exception could include consumer class action claims, such as fraud and breach of warranty claims. The second factor would apply to a class action in which plaintiff class members suffered personal injury or physical property damage within the state, as in the case of a serious environmental disaster. It would apply to all individuals who suffered personal injuries or losses to physical property, whether or not they were citizens of the state in question. The third factor recognizes that it may be appropriate to consider the relationship of the defendants to the forum state. Such consideration is not intended to embrace the term "primary defendants" (or a similar term), which language has been used in past and present class action bills as part of an exception to minimal diversity. Such a reading could extend minimal diversity jurisdiction to cases in which a single important defendant lacked in-state citizenship. While the relationship of the defendant to the forum may have some bearing on state adjudictory power, an insistence that all primary defendants maintain formal in-state citizenship is too limiting and may preclude in-state class actions where a defendant has sufficient contacts with the forum state, regardless of citizenship.

We would appreciate your consideration of these comments and the position of the Judicial Conference. Should you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Administrative Office of the U.S. Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy, Ranking Democrat
Members of the Senate Judiciary Committee

H.L.C.

AMENDMENT TO H.R. 1115

OFFERED BY Mr. Conyers

Page 19, strike lines 7 through 21 and redesignate the succeeding section accordingly.

Chairman SENSENBRENNER. Without objection, this material will appear in the Committee record immediately after the disposition of the current amendment.

Mr. CONYERS. Thank you.

Chairman SENSENBRENNER. The question is on Scott Amendment No. 4.

Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it, and the amendment is not agreed to.

Are there further amendments?

The gentleman from North Carolina, Mr. Watt?

Mr. WATT. I have an amendment at the desk.

The CLERK. The clerk will report the amendment.

Mr. WATT. It's AM 9.

The CLERK. Amendment to H.R. 1115 offered by Mr. Watt. Page 17, strike lines 8 through 11.

Mr. WATT. I ask unanimous consent——

Chairman SENSENBRENNER. Without objection, so ordered, and the gentleman is recognized for 5 minutes.

[Mr. Watt's amendment No. AM9 follows:]

AMENDMENT TO H.R. 1115

OFFERED BY MR. WATT

Page 17, strike lines 8 through 11 and insert the following:

1 "(2) by any plaintiff class member who is a rep-
2 resentative class member.

3 Page 17, line 13, strike ", except that" and all that
4 follows through "entered" on line 17.

Mr. WATT. Thank you, Mr. Chairman.

I have honestly tried to assess this bill in light of my own experiences and have tried to vote for or against amendments based on those experiences, and I'm offering this amendment based on an experience, based on my belief that it is just patently unfair to allow none named plaintiffs to come in and hijack a case after the case is way down the line.

If a class member can remove a case, an unnamed class member gives the opportunity to defend us, to collude with the class member and basically control the case. Removing a case from State to Federal Court is a huge procedural step. A class member should not be allowed to take this step and then basically relinquish all responsibility for the case.

Theoretically, the person who filed, the named plaintiffs, have some real interest in the case. Sometimes, quite often, individual unnamed plaintiffs are just along for the ride, which creates some problems, but that's the way the system is set up.

If a class member chooses to take the responsibility of removing a case to the Federal Court, that person should be required to make a showing that he or she is adequate to represent the class and will live up to the fiduciary obligations to that class that are implicit in bringing a class action.

The person should be required to explain to the court why he or she has come forward and what his or her interests in the case is. I think it is unfair to allow some person who wanders into the process late in the process to take over a case, and so this amendment would basically allow the case to be removed, it would allow defendants to continue to remove it. It would allow named plaintiffs to move it, but I think it is basically unfair to allow an unnamed plaintiff to take that kind of control over the case.

I will just read, in conclusion, Mr. Chairman, what I said about this the last time we talked about it. Maybe that'll keep me from having to think a lot about this, and I'll just tell you what I said before when I was thinking.

It says, "I practiced law for a number of years before I ever got to Congress, and I raised this basic fairness argument. If the plaintiff is injured, it goes and hires a lawyer. That lawyer cultivates, researches, puts together the case, decides where the appropriate place to litigate that case is, spends months and months preparing for the case, and then 2 days before he's getting ready to go and start the real processing of the case, somebody from outside a member of the class comes and hijacks that case, it seems to me that there is something basically unfair about that, and that's what this bill allows currently as it's drawn."

"This amendment would improve it, not enough for me to support the bill, but at least it would make this provision better, and I ask my colleagues to support the amendment."

Chairman SENSENBRENNER. Do you yield back?

Mr. WATT. I yield back, yes.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. I move to speak in opposition of the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman. I am opposed to this amendment, and the principle behind this bill is that one plaintiff is treated the same way as other plaintiffs in the action.

If you're an attorney, and you go out and recruit a particular plaintiff in the case, it could be the secretary in your law firm, and then the case can't be removed by any of the other hundreds of thousands of plaintiffs in the case because you've rigged it that way, that's wrong.

Any plaintiff who wants to remove the case to Federal Court should be able to do that if they meet all of the other requirements of the law and establish the necessary diversity to do so, and this would be a very bad precedent to limit that opportunity.

The other plaintiff may have a whole host of different reasons for wanting to do so, and it's unlikely somebody is going to do it unless they have a reason to do that. But, nonetheless, the principle should stand that if you don't want that other party in the case because you think they might have a difference of opinion with you about how the proceedings of the case should be conducted, don't make them a party to the case. That's the cure here—not to say that some plaintiffs have different rights than other plaintiffs, and I strongly oppose this amendment.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. GOODLATTE. I yield back.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Mr. Chairman, I'd like to ask the gentleman from North Carolina if one of these unnamed, out of the blue plaintiffs comes in, is there any requirement that that plaintiff, if it is removed, provide an attorney if the Federal Court is not convenient to the attorneys that are leading the case?

Mr. WATT. Nothing in this bill does that.

Mr. SCOTT. If it is removed, is there any requirement that this person provide any representation, representational leadership in the case?

Mr. WATT. Nothing in this bill does that.

Mr. SCOTT. If the plaintiff does not like being in the case in State Court, is there anything that prevents him from withdrawing from the class?

Mr. WATT. There's plenty of law that says you can opt out of class action any time you want to, and virtually every notice I've ever seen in a class action case gives class members that option.

Mr. SCOTT. Thank you, Mr. Chairman. I yield back.

Chairman SENSENBRENNER. The question is on the Watt amendment.

Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it. The amendment is not agreed to.

Are there further amendments?

The gentleman from North Carolina, Mr. Watt?

Mr. WATT. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. WATT. It's Number——

The CLERK. Amendment to H.R. 1115 offered by Mr. Watt. Strike Section 5 and——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from North Carolina will be recognized for 5 minutes.

[Mr. Watt's amendment No. AM8 follows:]

AMENDMENT TO H.R. 1115

OFFERED BY MR. WATT

Strike section 5 and redesignate the succeeding section accordingly.

Page 15, lines 11 and 12, strike "and section 1453 of this title".

Page 16, lines 6 and 7, strike "and subsections (b)(2) and (d) of section 1453".

Page 16, lines 8 and 9, strike ", and subsections (b)(2) and (d) of section 1453".

Mr. WATT. Thank you, Mr. Chairman.

Although proponents of H.R. 1115 say that they are only interested in changing the rules of diversity to create Federal jurisdiction over a majority of State class actions, the bill also changes the rules of removal of these cases. There is no jurisdiction for having different removal procedures for class actions than for other cases. In fact, a lack of uniform removal procedures would impose additional burdens on the already overworked Federal judiciary. So this basically strikes the section that does that.

The Federal Removal Statute provides that notice of removal must be filed within 30 days after defendant is served with a copy of the complaint. Essentially, the jurisdictional issue of which court is an appropriate forum is always resolved prior to discovery.

1115 allows removal to take place before or after certification of a class. Allowing removal after certification simply allows the defendant to learn the plaintiff's case during discovery and then remove the case right before the settlement to stall the proceedings or forum shop.

The Federal Removal Statute provides defendants with the ability to remove to Federal Court; 1115 actually allows any member of the plaintiff class, as well as defendants, to remove to Federal Court. That's unprecedented in diversity cases. By allowing any class member, not just the named class member, to remove the bill allows defendants to manipulate defendant's friendly class member to do their dirty work and stall out the State Court proceedings.

The Federal Removal Statute prohibits appellate review of a Federal District Court order remanding a removed case back to the State Court from which it was removed. H.R. 1115, in direct contrast, creates mandatory appellate review, thereby creating a new appellate right for class action cases which could result in a flood of class action cases to the Federal appellate courts. This appellate right is in addition to the right to appeal class certification orders also created by H.R. 1115. This amendment would basically correct those issues, and I ask my colleagues to support the amendment.

Chairman SENSENBRENNER. Do you yield back?

Mr. WATT. I yield back.

Mr. GOODLATTE. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, I speak in opposition of this amendment. This would have the effect of gutting the bill. It's been offered in this Committee in the 105th Congress, 106th Congress, 107th Congress, and the proponents of the amendment have offered nothing new to the Committee today. This would eliminate the ability of the party defendant to remove the case to Federal Court in these diversity actions.

If this amendment is adopted, H.R. 1115 would still expand Federal Court jurisdiction over an interstate class action, but the amendment would provide that this expanded jurisdiction be available only to the plaintiffs. That is wrong.

It is the intent that all parties that have traditionally enjoyed the opportunity to have diversity jurisdiction under other procedures, the usual $75,000-amount in controversy, either party can remove the case to Federal Court. That should apply here. We have a much larger amount that you have to allege, $2 million, in order to remove it, but it allows complex cases, involving plaintiffs and defendants, in a multitude of different jurisdictions, to bring those actions into Federal Court.

If you limit that to the plaintiffs and only the defendants can do so, you're going to have the effect of very much eliminating the fairness and the value of the legislation. I would urge my colleagues to oppose the amendment.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. GOODLATTE. And I yield back.

Chairman SENSENBRENNER. The question is on the Watt amendment.

Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it. The amendment is not agreed to.

Are there further amendments?

Ms. JACKSON LEE. I have an amendment at the desk that was originally called Mr. Conyers and Ms. Jackson Lee's.

Chairman SENSENBRENNER. The clerk will report the amendment.

Ms. JACKSON LEE. AM1.

The CLERK. Amendment to H.R. 1115 offered by Ms. Jackson Lee and Mr. Conyers.

Mr. GOODLATTE. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. The point of order is reserved.

Without objection, the amendment is considered as read, and the gentlewoman is recognized for 5 minutes.

[Ms. Jackson Lee's amendment AM1 follows:]

AMENDMENT TO H.R. 1115

OFFERED BY MR. CONYERS AND MS. JACKSON LEE

Page 16, line 10, strike the quotation marks and second period.

Page 16, insert the following after line 10:

1 "(10)(A) For purposes of this subsection and section
2 1453 of this title, a foreign corporation which acquires a
3 domestic corporation in a corporate repatriation trans-
4 action shall be treated as being incorporated in the State
5 under whose laws the acquired domestic corporation was
6 organized.
7 "(B) In this paragraph, the term 'corporate repatri-
8 ation transaction' means any transaction in which—
9 "(i) a foreign corporation acquires substantially
10 all of the properties held by a domestic corporation;
11 "(ii) shareholders of the domestic corporation,
12 upon such acquisition, are the beneficial owners of
13 securities in the foreign corporation that are entitled
14 to 50 percent or more of the votes on any issue re-
15 quiring shareholder approval; and
16 "(iii) the foreign corporation does not have sub-
17 stantial business activities (when compared to the
18 total business activities of the corporate affiliated

1 group) in the foreign country in which the foreign
2 corporation is organized.".

Ms. JACKSON LEE. I thank you very much, Mr. Chairman.

We have been using the word abscond over the last couple of weeks probably incorrectly as it relates to the 55 Texas legislators. This amendment is to avoid the absconding of corporations away from a legitimate case. The amendment simply states that if a U.S. corporation is acquired by a foreign corporation, the former U.S. corporation is from the State for purposes of Federal Court jurisdiction. This prevents U.S. corporations from dodging class action jurisdiction by going abroad.

A hypothetical would have been if the neighbor that I represented, Enron, would have been acquired by a foreign corporation and thousands of employees would have been voided in their opportunity for a class action on any matter.

This is an equalizing amendment. This is a fair amendment. This is an amendment that seeks to avoid the closing of the door of the courthouse, and certainly I think that we can be sympathetic in light of the fact that we have many more opportunities for corporations with more resources to remove their corporate bylaws and/or be bought by a foreign corporation.

And my point is that they can do it voluntarily or they can seek or they can be bought or they can seek to be bought to avoid a massive class action, legitimate class action lawsuits.

And I would ask my colleagues to support this amendment, and I believe that this would add a sense of fairness to this legislation.

[The prepared statement of Ms. Jackson Lee follows:]

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

Mr. Chairman, I propose this amendment to H.R. 1115, to prevent domestic corporations from escaping liability from class action lawsuits by incorporating abroad.

Under this amendment, "a foreign corporation which acquires a domestic corporation in a corporate repatriation transaction shall be treated as being incorporated in the State under whose laws the acquired domestic corporation was organized."

Simply put, if an American corporation is guilty of corporate crimes or malfeasance, and thereafter that American corporation is acquired by a foreign corporation, then the domestic corporation shall be deemed incorporated in the State where it was incorporated prior to the acquisition.

To see the benefit of this amendment one need only consider the hypothetical impact on Enron employees without this amendment. In the Enron collapse corporate executives criminally failed to disclosure of corporate decision-making in pension plans, and in other financial decisions. In the Enron case, executives and senior management staff were fraudulently encouraging employees to by company stock. At the same time, those same executives and senior managers were cashing out millions of dollars shortly before the company declared bankruptcy in December of 2001. As a result of the corporate executives crimes, 4,500 Enron employees lost their jobs in my home district alone.

Without my amendment, it would be possible for the bankrupt Enron corporation to agree to be acquired by a foreign company, relinquish their status as a company incorporated in the United States, avoid the jurisdiction of federal courts, and avoid liability for their corporate crimes.

A result this egregious would be a slap in the face to the 4,500 Enron employees who lost their jobs because of corporate wrongdoing and are undoubtedly entitled to damages. It would also be a slap in the face to the victims of tobacco companies, negligent automobile manufacturers, asbestos litigation clients, and any number of other class action plaintiffs who are opposed by well-financed, business and legal savvy defendants. This amendment would insure that potential corporate defendants are unable avoid liability.

Mr. Speaker, I urge the committee to accept my amendment to protect plaintiffs from evasive defendants.

[Ms. Jackson Lee's amendment follows:]

AMENDMENT TO H.R. 1115

OFFERED BY MS. JACKSON-LEE OF TEXAS

Page 6, line 12, strike "The" and insert "(a) IN GENERAL.—The".

Page 6, insert the following after line 17:

1 "(b) ATTORNEY'S FEES AND OTHER COSTS.—The
2 court may approve a proposed settlement under which any
3 class members is obligated to pay attorney's fees, travel
4 costs, court costs, administrative costs, or any other litiga-
5 tion-related fees to class counsel only if the court conducts
6 a hearing and makes a written finding that the total fees
7 paid to class counsel do not exceed 35 percent of the gross
8 value of the proposed settlement.".

Mr. CONYERS. Would the gentlelady yield?

Ms. JACKSON LEE. I would be happy to yield to the distinguished gentleman.

Mr. CONYERS. This is an important and usual amendment that we try to bring to this legislative proposal, and I'm glad that you did it this time. I've got a statement that complements what you've said, and I ask unanimous consent that we can insert it in the record.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

AMENDMENT ON CORPORATE FINANCIAL TRAITORS

This amendment is designed to help address the problem of domestic corporations reincorporating abroad to avoid U.S. taxes and legal liability. *As we fight terrorism at home and abroad, the last thing we should be doing is passing legislation that helps these corporate tax traitors.*

With increasing frequency, companies are setting up shell companies in places like Bermuda. The company continues to be owned by U.S. shareholders and continues to do business in the exact same U.S. locations. The only difference is that the new foreign company (1) escapes substantial tax liability and (2) under the bill could more easily avoid legal liability in state class action cases.

The actions of these companies are a slap in the face of every citizen who works hard and pays taxes in this country. This amendment responds to this egregious behavior by treating the former U.S. company as a domestic corporation for class action purposes.

Apologists for these financial traitors may attempt to argue that this amendment is unnecessary because the bill only deals with national class actions. Nothing could be further from the truth.

Under this bill, actions involving state consumer protection laws brought by residents who all reside in one state could be removable to federal court simply because a financial traitor has tried to abscond from the state. That is not a national class action, that is a state class action that belongs in state court. *The fact that a financial traitor engaged in a sham transaction should be irrelevant as far as legal liability in these cases is concerned.*

The bottom line is simple—as presently written, the bill give a liability windfall to these foreign tax traitors. *Today we have a chance to send a message that its wrong to pretend you're a U.S. corporation when you're incorporated in Bermuda. Its wrong to seek the benefits of corporate citizenship without the responsibility. Its wrong to engage in sham off shore transactions that leave hard working U.S. citizens hanging out to dry.*

Ms. JACKSON LEE. I thank the distinguished gentleman. I thank you for the work that you've done on this issue. And I would think in light of all of what we faced in the last 2 years on corporate responsibility and the issues dealing with some of the major companies like Enron and WorldCom, we know that there is no action that is beneath some corporate entities taking, and certainly one of them is to seek a foreign buyer to avoid possible massive litigation.

I believe, if we're going to be fair with class action legislation, we should make sure that they retain the former State of which they were incorporated.

With that, I yield back.

Chairman SENSENBRENNER. Does the gentleman from Virginia insist upon his point of order?

Mr. GOODLATTE. No, Mr. Chairman, I do not. I seek recognition in opposition.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, this amendment isn't just wrong; I don't think it makes any sense at all in the context of this legislation. Apparently, this purpose is to discourage companies from moving their parent entities off-shore to turn to them into foreign corporations in order to achieve tax advantages.

Thus, although this amendment doesn't seek to derail the enactment of the core provisions of the bill, it would preclude companies owned by foreign or off-shore companies from using that change. This effort to establish tax policy through procedural and jurisdictional rules applicable to civil litigation is truly out of place. I think it is very much a non sequitur.

It appears that the purpose of the amendment is to punish companies with off-shore owners by forcing them to litigate class actions brought against them in State Court, while companies that have U.S. parents may remove their cases to Federal Court under the expanded Federal jurisdiction provision of the bill.

Obviously, making this sort of distinction among companies based on foreign ownership is constitutionally suspect policy, but equally important is the fundamental premise of the amendment that forcing parties to litigate interstate class actions in State Courts constitutes a sort of punishment.

Although this amendment should be defeated, it does suggest agreement on the key predicate to H.R. 1115. State Courts are not an ideal place for parties to litigate class actions. This amendment should be defeated, but this amendment should be remembered as confirming the key reasons why the overall bill, the fundamental provisions of H.R. 1115 should be enacted.

I would also point out that there are good public policy reasons not to impose these kind of decisions because we have far greater concern with what legislatures in other countries do in establishing onerous provisions that they would apply to foreign corporations, particularly U.S. corporations operating in their countries, and this would set a very, very bad precedent in terms of how we write our Federal Rules of Civil Procedure, and I would urge my colleagues to oppose the amendment.

Chairman SENSENBRENNER. The question——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The question is on the Jackson Lee——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I yield to the gentlelady from Texas.

Ms. JACKSON LEE. I thank the distinguished gentleman from North Carolina.

My good friend from Virginia is absolutely wrong.

First of all, there was no mention of tax policies in my presentation of this particular amendment.

Secondarily, it is what it is, and the point of it is that if a corporation attempts to abscond by either being bought by a foreign corporation previously being incorporated in a State in the United States and litigation ensues, then that corporation will be assumed

to have had the incorporation of the prior State for basis of Federal Court jurisdiction.

It is only fair that if in a matter of weeks or months this corporation, because of its resources, has the ability to reincorporate in an off-shore and/or foreign country to be able to avoid Federal Court jurisdiction. But what I might say to my patriots who are here with me in this room, to avoid American court jurisdiction, to avoid the opportunity for Americans to redress their grievances, for whatever it might be, then I think it would be shame on us to not provide a provision that simply allows them to enter into the Federal Court with the previous State's jurisdiction.

It is simple. It is straight up. It has nothing to do with tax policies. It is written to this class action legislation, and I think that on its face it is fair, and I'd ask my colleagues to support it.

Mr. WATT. I yield back my time.

Chairman SENSENBRENNER. The question is on the Jackson Lee amendment.

Those in favor will say aye.

Opposed, no.

Ms. JACKSON LEE. I'd like a record vote.

Chairman SENSENBRENNER. The noes appear to have it.

A record vote will be ordered.

Those in favor of the amendment offered by the gentlewoman from Texas, Ms. Jackson Lee, will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Jenkins?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

[No response.]

The CLERK. Ms. Hart?

[No response.]

The CLERK. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Carter?
Mr. CARTER. No.
The CLERK. Mr. Carter, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mrs. Blackburn?
Mrs. BLACKBURN. No.
The CLERK. Mrs. Blackburn, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.

Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their vote?

The gentleman from North Carolina, Mr. Coble?
Mr. COBLE. No.
The CLERK. Mr. Coble, no.

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?

Mr. GREEN. No.
The CLERK. Mr. Green, no.

Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no.

Chairman SENSENBRENNER. The gentleman from Tennessee, Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Chairman SENSENBRENNER. The gentlewoman from Pennsylvania, Ms. Hart?

Ms. HART. No.

The CLERK. Ms. Hart, no.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Pence?

Mr. PENCE. No.

The CLERK. Mr. Pence, no.

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan?

Mr. MEEHAN. Aye.

The CLERK. Mr. Meehan, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their votes?

[No response.]

Chairman SENSENBRENNER. If not, the clerk will report.

The CLERK. Mr. Chairman, there are 13 ayes and 20 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

[No response.]

Chairman SENSENBRENNER. If not, a reporting quorum is present. The question occurs on the motion to report the bill H.R. 1115 favorably, as amended.

All of those in favor will say aye.

Opposed, no.

The ayes appear to have it.

Mr. GOODLATTE. Mr. Chairman, I request a recorded vote.

Chairman SENSENBRENNER. A recorded vote is demanded.

Those in favor of reporting H.R. 1115 favorably will, as your names are called, answer aye; those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye. Mr. Chabot?

Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye. Mr. Jenkins?
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye. Mr. Cannon?
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye. Mr. Bachus?
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus, aye. Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye. Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye. Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Carter?
Mr. CARTER. Aye.
The CLERK. Mr. Carter, aye. Mr. Feeney?
Mr. FEENEY. Mr. Feeney, aye. Mrs. Blackburn?
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn, aye. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman, no. Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no. Mr. Delahunt?
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no. Mr. Wexler?
Mr. WEXLER. No.
The CLERK. Mr. Wexler, no. Ms. Baldwin?
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no. Mr. Weiner?

Mr. WEINER. No.

The CLERK. Mr. Weiner, no. Mr. Schiff?

Mr. SCHIFF. No.

The CLERK. Mr. Schiff, no. Ms. Sánchez?

Ms. SÁNCHEZ. No.

The CLERK. Ms. Sánchez, no. Mr. Chairman?

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Further Members in the chamber wish to cast or change their vote?

The gentleman from Texas, Mr. Smith.

Mr. SMITH. I vote aye.

The CLERK. Mr. Smith aye.

Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. Aye.

The CLERK. Mr. Flake, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?

[No response.]

Chairman SENSENBRENNER. If none, the clerk will report.

The CLERK. Mr. Chairman, there are 20 ayes and 14 noes.

Chairman SENSENBRENNER. And the motion to report the bill favorably, as amended, is agreed to. Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substituting, incorporating the amendments adopted here today.

Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days, as provided by the House rules, in which to submit additional, dissenting, supplemental, or minority views.

The Committee has accomplished a lot today. The chair appreciates the perseverance of the Members of the Committee, and thanks them, and the Committee stands adjourned.

[Whereupon, at 4:22 p.m., the Committee was adjourned.]

ADDITIONAL VIEWS

I believe there are serious abuses of the consumer class action system in this country. Too often, abusive coupon settlements net lawyers large fees while victims are left with little more than discounts on future purchases. That is why I would support commonsense reforms if they were targeted at the abuses.

However, H.R. 1115 follows a scorched earth approach that targets every class action, including those brought to protect the environment, senior citizens and minorities. To understand the breadth of this so-called "reform," one must look no further than the groups lined up in opposition. They include Greenpeace, the Natural Resources Defense Council, the American Cancer Society, the Brady Campaign to Prevent Gun Violence, the Campaign for Tobacco Free Kids, the Lawyer's Committee for Civil Rights Under Law, the Leadership Conference on Civil Rights, the Alliance for Retired Americans, and the Violence Policy Center, among others. The Judicial Conference and the State Chief Justices also oppose this bill because of the havoc it plays on state and Federal courts.

But what is particularly offensive to my home State of California is that the scorched earth approach does not even stop at class actions. California, like many other States, has enacted strong consumer protection laws. See California Business and Professions Code section 17200, et seq. California has chosen to allow its District Attorneys, along with the California Attorney General, to enforce these laws in State courts. This bill usurps California's choice by forcing local prosecutors to bring state consumer protection actions in Federal courts.

Local prosecutors are not abusing the class action system. In one case, the San Francisco District Attorney's office successfully settled a major consumer protection action against Providian Financial Corporation that netted Californians $300 million. Under this bill, that case would have been forced into Federal court, where the District Attorney would have to comply with Federal Rule of Civil Procedure 23 or lose the case.

That is preposterous. The Federal Government should not be forcing local prosecutors to try state antitrust and consumer protection actions in Federal court. Nor should the Federal Government force local prosecutors to comply with Federal class certification requirements.

Put simply, H.R. 1115 is an overreaching attempt to chill State and local enforcement of consumer protection laws. That effort is contrary to long-standing legal doctrines of our nation. It will also adversely impact competition and business development in the high tech sector, which is vital to this nation's future. Unfortunately, the sponsors of this legislation again rejected an attempt to remove this language. Accordingly, I must oppose H.R. 1115.

ZOE LOFGREN.

DISSENTING VIEWS

We strongly oppose H.R. 1115, the so-called "Class Action Fairness Act of 2003." Although the legislation is described by its proponents as a simple procedural fix, in actuality it represents a major rewrite of the class action rules that would bar most forms of State class actions and massively tilt the playing field in favor of corporate defendants in both class action and non-class action cases. H.R. 1115[1] is opposed by both the State[2] and federal[3] judiciaries; consumer and public interest groups, including Public Citizen,[4] Consumers Union,[5] the Consumer Federation of America and U.S. PIRG;[6] a coalition of the most well known environmental advocates;[7] health advocates, including the American Heart Association, Campaign for Tobacco Free Kids, and the American Lung Association;[8] and civil rights groups, such as the Leadership Con-

[1] H.R. 1115 is the fourth time class action legislation has been offered in Congress. However, as discussed later, it is the most far reaching of any class action bill ever considered by the House, because it would apply to pending cases. During the 105th Congress, the Full Committee marked-up and reported out on a party line vote the "Class Action Jurisdiction Act of 1998," which was also similar in most other respects to H.R. 1115. The bill, however, was never considered by the Full House during the 105th Congress. In 1999, after a hearing and mark-up, the House Committee on the Judiciary reported out, by a 15–12 vote, the "Interstate Class Action Jurisdiction Act of 1999," which was similar in most other respects to H.R. 1115 under consideration today. On September 23, 1999 the House passed the legislation 222–207. It was never voted on in the Senate. During the 106th Congress, the House passed H.R. 2341, the "Class Action Fairness Act of 2001," (identical in most other respects to this bill) by a vote of 233 to 190. While the Senate Judiciary Committee held a hearing on the bill, it did not take any further action.

[2] *See* Letter from Annice M. Wagner, President, Conference of Chief Justices (March 28, 2002) [hereinafter Conference of Chief Justices letter] (calling the bill "an unwarranted incursion on the principles of judicial federalism") (on file with the minority staff of the House Judiciary Committee).

[3] *See* Letter from Leonias Ralph Mecham, Secretary, Judicial Conference of the United States (March 26, 2003) [hereinafter "Mecham letter"] (stating the conference's continued opposition to this legislation); Letter from Anthony J. Scirica, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States [hereinafter Scirica letter] (requesting that the Judiciary Committee withdraw provisions of the bill because they conflict with current rules of practice and procedure) (both on file with the minority staff of the House Judiciary Committee).

[4] *See* Testimony of Brian Wolfman, Staff Attorney, Public Citizen Litigation Group, before the House Judiciary Committee (May 15, 2003) [hereinafter "Wolfman"].

[5] *See* Letter from Sally J. Greenberg, Senior Product Safety Counsel, Consumers Union (May 14, 2003) [hereinafter Consumers Union Letter] (on file with the minority staff of the House Judiciary Committee).

[6] Letter from Rachel Weintraub, Assistant General Counsel, Consumer Federation of America, and Edward Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group (May 14, 2003) [hereinafter CFA/PIRG letter] (on file with the minority staff of the House Judiciary Committee).

[7] Letter from Joan Mulhern, Senior Legislative Counsel, Earthjustice Legal Defense Fund; Richard Wiles, Senior Vice President, Environmental Working Group; Debbie Sease, Legislative Director, Sierra Club; Eric Olson, Senior Attorney, National Resources Defense Council; Lexi Schultz, Legislative Director, Mineral Policy Center; Anna Aurillo, Legislative Director, U.S. Public Interest Research Group; Sara Zdeb, Legislative Director, Friends of the Earth; Rick Hind, Legislative Director, Greenpeace; Paul Schwartz, National Campaigns Director, Clean Water Action (April 2, 2003).

[8] Letter from M. Cass Wheeler, CEO, American Heart Association; John L. Kirkwood, President and CEO, American Lung Association; and Matthew L. Myers, President Campaign for Tobacco-Free Kids (March 10, 2003).

ference on Civil Rights[9] and the Lawyers' Committee for Civil Rights.[10] It is also opposed by some of the nation's most prestigious editorial boards.[11]

By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation. This legislation will undercut that important principle by making it far more burdensome, expensive, and time-consuming for groups of injured persons to obtain access to justice. Thus, it would be more difficult to protect our citizens against violations of fraud, consumer health and safety, civil rights and environmental laws. The legislation goes so far as to prevent State courts from considering class action cases that involve solely violations of State laws, such as State consumer protection laws.

In a marked affront to federalism, H.R. 1115 provides for the removal of State class action claims to Federal court in cases involving violations of State law where any member of the plaintiff class is a citizen of a different State than any defendant.[12] Any plaintiff or defendant could petition a State court to remove the class action to Federal court as a matter of right.[13] The only exceptions provided in H.R. 1115, directing Federal courts to abstain from hearing a class action, are: (1) when a "substantial majority" of the members of the proposed class are citizens of a single State of which the primary defendants are citizens and the claims asserted will be governed primarily by laws of that State ("an intrastate case"); (2) when all matters in controversy do not exceed $2,000,000 or the membership of the proposed class is less than 100 ("a limited scope case"); or (3) when the primary defendants are States, State officials, or other government entities against whom the district court may be foreclosed from ordering relief ("a State action case").[14] In the event the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Fed-

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[9] Letter from Leadership Conference on Civil Rights, Lawyers Committee for Civil Rights under Law, et al. (May 14, 2003) (on file with the minority staff of the House Judiciary Committee).

[10] *Id.*

[11] *See e.g.,* "The Class Action Unfairness Act," Editorial, *New York Times*, April 25, 2003; "Unfair Federal Fairness Act," Editorial, *Milwaukee Journal Sentinel*, April 10, 2003; "Threat to Class Actions," Editorial, *Los Angeles Times*, April 9, 2003; "Courts and torts: Citizens' rights suffer if Congress sends all class-action suits to Federal court," Editorial, *Philadelphia Inquirer*, May 16, 2003; "Dubious Class Actions," Editorial, *Salt Lake Tribune*, May 12, 2003; "'Fairness' to Whom? Congress Intrudes on State Prerogatives in Class-action bill," Editorial, *Columbus Dispatch*, May 8, 2003; "DECLASSE: Nominal Conservatives Assault Onmce Cherished Federalism," Editorial, *Houston Chronicle*, April 29, 2003; and "Class Action Unfairness," Editorial, *Palm Beach Post*, May 15, 2003.

[12] H.R. 1115, § 4(a). Current law requires there to be complete diversity (all of the plaintiffs must be citizens residing in different States than all of the defendants) before a State law case is eligible for removal to Federal court. *See Stawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Snyder* v. *Harris*, 394 U.S. 332 (1969), the Supreme Court held that the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.

[13] At markup, Mr. Watt offered an amendment, defeated by voice vote, that would have limited this right to a representative class member. This would have avoided the perverse result where a plaintiff, not at all involved in the day-to-day workings of the action, could derail an entire case by having it removed to Federal court.

[14] H.R. 1115, § 4(a). The legislation also excludes securities-related and corporate governance class actions from coverage and makes of number of other procedural changes, such as easing the procedural requirements for removing a class action to Federal court (i.e., permitting removal to be sought by any plaintiff or defendant and eliminating the 1-year deadline for filing removal actions) and tolling the statute of limitation periods for dismissed class actions.

eral Rule of Procedure 23, under the bill the court must dismiss the action,[15] effectively striking the class action claim.[16]

In an amazing act of Congressional arrogance, the legislation—unlike predecessor versions of the bill and unlike legislation pending in the Senate [17]—would apply to pending cases. As such, it would work to the benefit of corporate criminals and scam artists, like Enron, Adelphia and Tyco—by throwing pending lawsuits brought by defrauded investors out of State court, and by subjecting even pending Federal and State class actions to the new provisions encouraging delay by defendants (described below).

In addition, the bill goes far beyond class action jurisdiction issues and includes numerous additional provisions that favor corporate defendants over harmed consumers. Among other things, the bill gives class action defendants in all cases—Federal and State—new mechanisms to delay and frustrate justice for victims by allowing a defendant or a class member, as a matter of right, an appeal of any lower court decision to certify a class action.[18] While this appeal is pending, a victim cannot conduct discovery or otherwise move a case forward. This will result in unwarranted, expensive and wasteful interruptions of meritorious cases. The legislation also includes provisions that would preempt private attorney general actions and mass tort cases by treating them as class action claims which are funneled into Federal court.

Proponents of H.R. 1115 have attempted to deflect criticisms of the bill by incorporating a so-called "Consumer Class Action Bill of Rights," [19] which, upon closer inspection, contains provisions that either do not improve current law or work to the detriment of consumers. These provisions would supposedly improve the law for consumers with respect to coupon settlements and settlement notices, but, in fact, simply codify a Rule of Civil Procedure already scheduled to be implemented; and prohibit certain awards to named plaintiffs, which would actually create a massive disincentive for civil rights class actions.

H.R. 1115 will damage both the Federal and State courts. As a result of Congress' increasing propensity to federalize State crimes, the Federal courts are already facing a dangerous workload crisis.

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[15] H.R. 1115, § 4(a).

[16] While the class action may be refiled again, any such refiled action may be removed, thereby resulting in a "merry-go-round" in which class members revolve between State and Federal court on procedural grounds while never reaching a decision on the merits of their claim.

[17] Introduced on February 4, 2003, S. 274 was marked up and reported out on June 2, 2003. Two amendments were adopted by the Senate: Sen. Feinstein's amendment, which modifies that jurisdictional section of the bill to bring more certainty to the process, and to keep more cases in State courts if they belong there while still attempting to solve the forum shopping and other issues addressed by the underlying bill; and Senator Spector's amendment, which strikes the language in the bill that would strip courts of jurisdiction over private attorney general actions brought by citizens or organizations and over mass tort cases.

In addition, the House version has other provisions that are not included in the Senate legislation. First, H.R. 1115 provides for an automatic right to appeal orders granting or denying class certification and States that during the appeal process, all discovery will be stayed. This is a drastic expansion of Rule 23(f) and could result in wasteful interruptions in the judicial process. Second, the House legislation requires that mass torts be removed to Federal court, perhaps many miles from where the plaintiffs live. In addition, because mass torts that are not certified are not dismissed, these matter remain in limbo in the Federal court system.

Finally, a Boucher/Smith amendment was added during the House Judiciary markup that broadens the application of the legislation to both civil cases commenced on or after the enactment date and to civil actions commenced before the enactment date but certified on or after the enactment date.

[18] H.R. 1115, § 6.

[19] H.R. 1115, § 3.

By forcing resource intensive class actions into Federal court, H.R. 1115 will further aggravate these problems and cause victims to wait in line for as much as 3 years or more to obtain a trial. Alternatively, to the extent class actions are remanded to State court, the legislation effectively permits only case-by-case adjudications, potentially draining away precious State court resources. In many instances, individual actions will not be economically feasible and hurt victims will be left with no remedy at all.

In our view, it is time for more corporate responsibility, not less. This bill gives corporate defendants—including defendants in corporate fraud and civil rights cases—a huge leg up in class action cases. If we have learned any lessons from the Enron, Firestone, Dalkon Shield and other product liability and financial debacles it is that our citizens need more legal protections against such wrongdoers, not less. Yet this bill takes us in precisely the opposite direction. For these and the other reasons set forth herein, we dissent from H.R. 1115.

I. H.R. 1115 WOULD PREJUDICE PENDING CASES, INCLUDING CASES AGAINST NOTORIOUS CORPORATE CRIMINALS

This bill is the most extreme and far reaching class action reform bill ever considered by the House Judiciary Committee. Unlike predecessor versions of this bill, this legislation would apply to pending cases[20]—and thereby work to the benefit of corporate criminals and scam artists, like Enron, Worldcom, Adelphia and Tyco—by throwing pending lawsuits brought by defrauded investors out of State court. H.R. 1115 would disrupt these cases and add years of additional litigation. This means these defrauded victims will have to wait much longer to get their money back, while the corporate wrongdoers continue to enjoy the fruits of their ill-gotten gains.

This is a terrible precedent that will unfairly disadvantage plaintiffs in current class action lawsuits. It is especially troubling that the Committee took this course without first analyzing what and how many pending cases would be affected. It is quite possible that the retroactivity of this bill will cause tens of thousands of pending State cases to be moved to Federal court all at once, creating a totally unworkable and unmanageable litigation crisis. Indeed, the bill would cause a needless waste of resources, as State judges—who may have overseen a case for years—would have the case yanked from their docket and instead placed before a Federal judge, who would have to spend substantial time and resources acquainting himself or herself with the case.

Examples of pending cases impacted by this bill include the following:

- TRG Marketing sold fraudulent health insurance policies to more than 5,000 Floridians who were left with several million dollars in unpaid medical bills. According to the lawsuit, TRG was a scheme where premiums from new subscribers were used to pay the medical expenses of earlier subscribers. When enough subscriber dollars had been collected, the claims payments stopped and TRG took the money and ran.

[20] *See supra* note 17.

For Judy Harris, a named plaintiff, TRG abruptly stopped paying on claims for her cancer treatment in November 2001, leaving her family with $10,000 in unpaid medical bills. By using the class action system, the victims of TRG are banding together to hold TRG accountable for their fraud.[21]

- In April 2002, the bereaved families of victims of improper cremations filed a class action lawsuit to protect the interests of families similarly affected. For years, Tri-State Crematory (based in Georgia) had foregone cremations and instead, passed off wood chips, powdered cement and other substances as ashes to the grieving relatives. As of March 2003, there are at least 334 improperly handled bodies from the property. By preserving the interests of all of the families, the lawsuit gives families time to grieve and to decide what they want to do.[22]
- *Barnett* v. *Wal-Mart Stores, Inc.* is a pending lawsuit in King County Superior Court in Washington. It was filed in September 2001, on behalf of 40,000 present and former hourly employees at Wal-Mart stores in the State of Washington. Many make only $7.00 to $10.00 an hour. The lawsuit alleges and challenges Wal-Mart practices that have the effect of forcing employees to work without pay, or to work overtime at only their regular rates of pay, or to work through part or all of their rest and meal breaks, in violation of Washington statutory and contract law. Some claims go back to September 1998, and others go back to September 1995. The parties have taken the depositions of more than a hundred witnesses, and a great deal of other discovery has taken place. Plaintiffs have moved for class certification, the defendant has responded, and plaintiffs' reply is being held in abeyance while Wal-Mart produces computer files that will have to be analyzed. Almost all of the work to date has focused on meeting the standards for class certification under Washington law, and the parties are operating under scheduling orders issued by the Washington court.

II. FEDERALIZING CLASS ACTIONS WILL HARM CONSUMERS AND DAMAGE THE COURT SYSTEMS

A. H.R. 1115 Will Weaken Enforcement of Laws Concerning Consumer Health and Safety, the Environment and Civil Rights

H.R. 1115 will have a serious adverse impact on the ability of consumers and other harmed individuals to obtain compensation in cases involving widespread harm. At a minimum, the legislation will force most State class action claims into Federal courts where there will be far more victims to litigate cases and where defendants could force plaintiffs to travel long distances to attend proceedings.

It also will be far more difficult and time consuming to certify a class action in Federal court. In 1999, fourteen States, representing

[21] *Lavovere, et al.* v. *TRG*, CA02–14542A1 (Fla.)
[22] *Oden, et al.* v. *Taylor Funeral Home*, No. 02C–414 (Walker County, Ga)

approximately 29% of the nation's population, adopted different criteria for class action rules than Rule 23 of the Federal Rules of Civil Procedure.[23] In addition, with respect to those States that have enacted a counterpart to Rule 23, the Federal courts are likely to represent a far more difficult forum for class certification to occur. This is because in recent years a series of adverse Federal precedent has made it more difficult to establish the predominance requirement of Rule 23(b)(3) to establish a class action under the Federal rules.[24] The defense bar has as much as admitted this. To quote from a recent article written by two corporate class action attorneys: "As a general rule, defendants are better off in Federal court . . . there is generally a greater body of Federal precedent favorable to defendants."[25]

Further, the legislation will inevitably result in substantial delay before civil class action claimants are able to obtain a trial date in Federal court. Given the backlog in the Federal courts and the fact that the Federal courts are obligated to resolve criminal matters on an expedited basis before civil matters,[26] even when plaintiffs are able to successfully certify a class action in Federal court, it will take longer to obtain a trial on the merits than it would in State court.

The legislation also creates unique risks and obstacles for plaintiffs that they do not face under current law. Because the Federal courts are required to dismiss cases they choose not to certify, plaintiffs will be foreclosed from forming a reconstituted class in State court that would conform to the legislation's requirements.[27] While the class action may be refiled again, any such refiled action may be removed again to Federal court. Therefore, even if a State court would subsequently certify the class, it could be removed again, creating a revolving door between Federal and State court—hardly a desirable result.[28]

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[23] *See* Conference of Chief Justices letter, *supra* note 2.

[24] Federal courts have been narrowly construing Rule 23, thereby limiting the parties' ability to bring and certify class actions in Federal courts. For example, in *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), the Fifth Circuit prevented the certification of a nationwide class action brought by cigarette smokers and their families for nicotine addiction because it found there to be too wide a disparity between the various State tort and fraud laws for the class action vehicle to be superior to individual case adjudication. Similarly, in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert denied*, 516 U.S. 867 (1995), the Seventh Circuit held that where claims were immature, it is preferable that they be individually adjudicated. Also, in *Georgine* v. *Amchem Products, Inc.*, 521 U.S. 591 (1997), the Supreme Court overturned a consensual settlement between a class of workers injured by asbestos and a coalition of former asbestos manufacturers because uncommon issues, particularly the disparate levels of the class members' knowledge of their injuries, as well as each class member's relatively large amount at stake in the litigation, meant that class treatment was not superior to individual treatment of the plaintiffs' claims. Additionally, on June 23, 1999, in *Ortiz* v. *Fibreboard*, 527 U.S. 815 (1999), the Supreme Court again invalidated an asbestos settlement agreement on the grounds that mandatory limited fund class treatment under Rule 23(b)(1)(B) is not appropriate unless the maximum funds available are clearly inadequate to pay all claims.

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

[26] Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (1994).

[27] For example, if certification had been denied by the Federal court because a particular conflict among the class members made it impossible to meet the "adequate representation" requirement of Federal Rule of Civil Procedure 23(a)(4), the plaintiffs would likely be prohibited from narrowing the class in an effort to resolve that conflict.

[28] In this regard, it is unfortunate the Majority rejected an amendment offered by Representative Scott that largely would have eliminated the federalism problem. Mr. Scott's amendment would have allowed the Federal courts the first opportunity to certify a class action, but if the Federal court determined that the action did not meet Federal requirements, the State court from which it was removed would not have been denied jurisdiction over the class action. This would have responded to the most serious complaint leveled by corporate defendants—that class

As Consumers Union has stated about this feature of the bill, "This legal 'ping-pong' could well deprive consumers of access to their own State courts, and ultimately deny them their day in court through the class action process-in many cases their only effective remedy."[29] Moreover, even if the Federal court certifies the class, plaintiffs still face further delays because of the mandatory interlocutory appeal provision.[30]

The harm to civil rights cases, which are heavily reliant on class actions for access to justice, would be particularly problematic. As the Lawyers Committee for Civil Rights under the Law observed, "[t]he consequences of the [legislation] for class action practice in the Federal courts would be astounding and, in our view, disastrous. Redirecting State law class actions to the Federal courts will choke Federal court dockets and delay or foreclose the timely and effective determination of Federal cases already properly before the Federal courts, in addition to the newly directed cases."[31]

Moreover, as the Lawyers Committee noted, the principal motivation by the American Tort Reform Association in advocating this legislation would appear to be to remove the cases from jury pools that are composed largely of minorities and those with low incomes. Their report entitled "Bringing Justice to Judicial Hellholes 2002" identifies thirteen counties/jurisdictions that it describes as "hellholes," where it claims the rules are not applied fairly to defendants. Although no criteria is put forth to distinguish which jurisdictions may meet the "hellhole" threshold, almost all of the jurisdictions have populations in which people of color constitute majorities or near-majorities, and others have populations with disproportionately low incomes.[32]

In addition, the legislation includes provisions that allow any plaintiff in a class action case to seek to remove to Federal court, and that extend the time period for removal beyond that currently permitted. This means that any single party out of tens of thousands—conceivably even an employee of a defendant—could unilaterally seek to remove a case, throwing out thousands of hours or more of work that may have been spent pursuing a State claim. This again has the effect of making most efforts to obtain justice in State court simply too risky to pursue.

Consumers will also be disadvantaged by the vague terms used in the legislation. The terms "substantial majority" of plaintiffs, "primary defendants," and claims "primarily" governed by a State's laws[33] are new and undefined phrases with no precedent in the United States Code or the case law. It will take many years and conflicting decisions before these critical terms are sorted out. The vagueness problems will be particularly acute for plaintiffs—if they guess incorrectly regarding the meaning of a particular phrase,

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actions encourage a race to the court house—by permitting the Federal courts to use their powers to consolidate class actions into a single forum in the appropriate circumstances.

[29] *See* Letter from Sally J. Greenberg, Senior Product Safety Counsel, Consumers Union (March 5, 2002) (on file with the minority staff of the House Judiciary Committee).

[30] *See supra* note 18.

[31] *Class Action Fairness Act of 2003: Hearings on H.R. 1115 before the House Comm. on the Judiciary,* 108th Cong.(2003) [hereinafter "Henderson Testimony"] (written testimony of Thomas Henderson, Chief Counsel, Lawyers' Committee for Civil Rights Under Law).

[32] Lawyers' Committee for Civil Rights Under Law, *The Impact of the "Class Action Fairness Act" on Civil Rights Cases (2003).*

[33] H.R. 1115, § 4.

their class action could be permanently preempted and barred. However, if defendants guess wrong and jurisdiction does not lie in the Federal courts, the defendants will be no worse off than they are under present law, but rather will have benefitted from the additional time delays caused by the failed removal motion.

The net result of these various changes is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the State or Federal level. This means, as noted above, it will be far more difficult for consumers to bring class actions in State court involving violations of fraud, health and safety, and environmental laws.

The following are examples of important class actions previously brought at the State level, but which could be forced into Federal court under H.R. 1115, where the actions would be delayed or rejected:

- In the Baptist Foundation of Arizona case, a mirror image of the Enron scandal, the Foundation issued worthless notes and sold them in many Arizona communities. Approximately 1,300 investors lost millions of dollars in this scheme in "off the books" transactions with sham companies that were controlled by the Foundation and corporate insiders. The victims were able to bring a successful State class action suit against Arthur Anderson, which resulted in a $217 million settlement. If H.R. 1115 was law, this case would have been forced into Federal court because the legislation provides no exemption for State securities claims.[34]
- The proposed legislation would also make it far more difficult to maintain class action cases such as the Firestone/Ford Explorer tire liability case. A lawsuit was brought in South Carolina State court against Firestone and Ford charging that the two companies were "negligent and careless" in producing and distributing tires that went on Ford vehicles. On December 28, 2001, the Circuit Court in Greenville, South Carolina certified the lawsuit as a class action, allowing South Carolina residents to join the lawsuit against Firestone and Ford. If the proposed legislation was enacted, this case could have automatically been removed from State court to Federal court at the election of the defendant and would make it difficult to keep the lawsuit as a class action.
- Foodmaker Inc., a Delaware corporation and the parent company of Jack-in-the-Box restaurants, agreed to pay $14 million in a State class action settlement involving a violation of Washington's negligence law. The class included 500 people, mostly children and Washington residents, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli 0157:H7 bacteria. The victims suffered from a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died.[35]

[34] Craig Harris, *Andersen settles Baptist Suit*, azcentral.com (March 2, 2002), http://www.arizonarepublic.com; *Settlement Sum Revives Hope for Baptist Investors: Andersen to pay $217 million* (March 3, 2002), http://www.arizonarepublic.com.

[35] The settlement was approved on 25 September 1996 in King County, Washington Superior Court. "Last Jack in the Box Suit Settled," *Seattle Times*, October 30, 1997 at B3.

- Equitable Life Assurance Company, an Iowa corporation, agreed to a $20 million settlement of two class-action lawsuits involving 130,000 people filed in Pennsylvania and Arizona State courts. The class action alleged that Equitable misled consumers, in violation of State insurance fraud law, when trying to sell "vanishing premium" life insurance policies in the 1980's. Equitable sold the policies when interest rates were high, informing potential customers that after a few years, once the interest generated by their premiums was sufficiently high, their premium obligations would be terminated. However, when interest rates dropped, customers were still required to pay the premium in full.[36]
- On July 26, 1993, a California plant operated by General Chemical, a Delaware corporation with offices in New Jersey, erupted, leading to a hazardous pollution cloud when a valve malfunctioned during the unloading of a railroad tank car filled with Oleum, a sulfuric acid compound. The cloud settled directly over North Richmond, California, a heavily-populated community, resulting in over 24,000 residents needing medical attention. General Chemical entered into a settlement for violation of California negligence law with 60,000 North Richmond residents who were injured or sought treatment for the effects of the cloud, or were forced to evacuate their homes. Individual plaintiffs received up to $3,500 in compensation.[37]
- On April 21, 1999, Nationwide entered into a State class action settlement concerning a redlining discrimination claim with the Toledo, Ohio Fair Housing Center. The lawsuit had been brought in Ohio state court by residents living in Toledo's predominately black neighborhoods, and charged that Nationwide redlined African-American neighborhoods by discouraging homeowners in minority neighborhoods from buying insurance and by denying coverage to houses under a certain value or a certain age. As a result of the settlement, Nationwide agreed to modify its underwriting criteria, increase its agency presence, and step up its marketing in Toledo's black neighborhoods. Nationwide also agreed to place up to $2 million in an interest-bearing account to provide compensation to qualified class members, and agreed to deposit $500,000 with a bank willing to offer low-interest loans to residents buying homes in Toledo's black neighborhoods.[38]
- Under current law, class action claims against managed care must often distinguish between ERISA and non-ERISA patients. Non-ERISA patients have a full range of remedies available to them under State law. However, ERISA patients have a very limited set of remedies—the cost of the benefit denied, which in most cases is woefully inadequate. The

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[36] *See* David Elbert, "Lawsuits to Cost Equitable $20 Mill," *Des Moines Register*, July 19, 1997 at 12; "Cost of Settling Lawsuits Pulls Equitable Earnings Down," *Des Moines Register*, August 6, 1997 at 10.

[37] *See* Mealey's Litigation Reports: *Toxic Torts, $180 Million Settlement of Toxic Cloud Claims Wins Judges O.K.*, November 17, 1995 at 8.

[38] *See Toledo Fair Hous. Ctr.* v. *Nationwide Mut. Ins. Co.*, No CI93–1685, Ohio Comm. Pls, Lucas County; *see also* "Nationwide and Ohio Fairhousing Announce Attempt to Settle Class Action," *Mealey's Insurance Law Weekly*, April 27, 1998 at 3.

managed care reform debate in Congress includes the elimination of the ERISA preemption, which would allow patients who receive their health care from their employer to hold their HMO accountable if it denies care. However, legislation such as H.R. 1115 moves in the opposite direction by denying more patients access to justice in State court.[39]

- The regulation of funeral homes, cemeteries and crematoria should remain an issue best handled by State courts. However, federalizing such class actions under this bill likely would force harmed families to travel untold miles from their homes—in some cases into entirely different States—just to exercise their legal rights. For example, the largest operator of funeral homes in the United States is the defendant in a State class action in West Palm Beach, Florida. The action accuses Services Corporation International, a Texas Corporation and owner of Menorah Gardens, of breaking open burial vaults and dumping the remains in a wooded area, crushing vaults to make room for others, mixing body parts from different individuals, and digging up and reburying remains in locations other than the plots purchased.[40] As noted above, the Tri-State Crematory failed to cremate bodies and return remains to loved ones. Although the issues raised in these class actions are clearly State issues, they would be removable to Federal court under H.R. 1115.

B. H.R. 1115 Will Damage the Federal and State Court Systems

Impact on Federal Courts

Expanding Federal class action jurisdiction to include most State class actions, as H.R. 1115 does, will inevitably result in a significant increase in the Federal courts' workload. As the Judicial Conference has recently noted: "the provisions would add substantially to the workload of the Federal courts and are inconsistent with federalism."[41] Similarly, in previous Congresses, the Judicial Conference stated that they see no "hard evidence of the inability of State judicial systems to hear and decide fairly class actions brought in State courts."[42]

The workload problem in the Federal courts continues to be severely problematic. For example, in 2003, the situation of the Federal courts was as follows:

- As of May 28, 2003, 45 judicial vacancies existed, or over 5% of the Federal judicial positions.[43]

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[39] One example is *Kaitlin* v. *Tremoglie, et al.*, No. 002703 (Pa. Comm. Pls., Philadelphia Co. 1997). On June 23, 1997, Harold Kaitlin filed a class action in Pennsylvania State court against his psychiatrist, David Tremoglie, and Keystone Health Plan East Inc., his HMO, alleging that the psychiatrist had treated hundreds of patients without a medical license. The case was filed on behalf of himself and all other patients treated by Tremoglie at the Bustleton Guidance Center. The suit alleges that the class was treated by an unlicenced and fraudulent psychiatrist who unlawfully prescribed powerful medications not suitable for their illness and that the HMO failed to verify that Tremoglie was a licensed psychiatrist, failed to supervise him, and referred patients to him.

[40] Joel Engelhardt, *State Seeks Control of Menorah Gardens*, The Palm Beach Post, March 2, 2002 at 1A.

[41] Mecham letter, p.2.

[42] Conference of Chief Justices letter, *supra* note 2.

[43] *See generally* Judicial Nominations, Department of Justice, Office of Legal Policy, available at http://www.usdoj.gov/olp/judicialnominations.htm (last viewed May 28, 2003).

- On average, Federal district court judges had 494 civil filings pending last year.[44]

Because of these and other workload problems, Chief Justice Rehnquist took the important step of criticizing Congress for taking actions that have exacerbated the courts' workload problem:

> I also criticized Congress and the president for their propensity to enact more and more legislation which brings more and more cases into the Federal court system. This criticism received virtually no public attention. . . . [I]f Congress enacts, and the president signs, new laws allowing more cases to be brought into the Federal courts, just filling the vacancies will not be enough. We will need additional judgeships.[45]

H.R. 1115 would result in the removal of most State court class actions into Federal court. The Federal courts have fewer than 1,500 judges compared to more than 30,000 judges currently serving on State courts. The number of Federal civil cases pending for 3 years or more has *doubled* since 1999 to more than 34,000. While nobody knows the precise number, there are thousands of class action lawsuits pending in State courts around the country that would be added, even if temporarily, to the Federal docket under H.R. 1115.

Class actions are among the most complex and time-consuming cases that courts must decide. In fact, studies have shown that class actions on average consume almost five times more judicial time than the typical civil case. Adding thousands of resource-intensive State cases to the Federal courts would place additional stresses and demands on an already overburdened system. Compounding the federalism problem, these new Federal cases will involve issues of primarily State law, with which State court judges are familiar and Federal judges are not.

This would result in Federal judges having less time to devote to the additional class actions, as well as to their existing caseloads. Class action lawsuits and settlements would receive even *less* careful judicial supervision than they receive today, potentially leading to court approval of even *more* collusive settlements, not fewer. In addition, growing caseloads will delay justice in class actions as well as in other Federal court cases. Finally, overburdened judges may be more likely to dismiss class action claims in order to clear their dockets, even in meritorious cases.

Impact on State Courts

In addition to its impact on the Federal courts, the legislation will also undermine State courts. This is because in cases where the Federal court chooses not to certify the State class action, the bill prohibits the States from using class actions to resolve the underlying State causes of action. It is important to recall the context in which this legislation arises—a class action has been filed in

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[44] *See* Admin. Office of the U.S. Courts, Judicial Caseload Indicators, *available at* http://www.uscourts.gov/caseload2002/front/mar02txt.pdf (2002).

[45] Chief Justice William Rehnquist, An Address to the American Law Institute, *Rehnquist: Is Federalism Dead?* (May 11, 1998), in *Legal Times* (May 18, 1998). Rehnquist recently reiterated those concerns. 2002 Year End Report on the Federal Judiciary, *available at* http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html (2003).

State court involving numerous State law claims, each of which if filed separately would not be subject to Federal jurisdiction (either because the parties are not considered to be diverse or the amount in controversy for each claim does not exceed $2,000,000). When these individual cases are returned to the State courts upon remand, hundreds if not thousands of potential new cases may be unleashed.[46]

In addition to these workload problems, the legislation raises constitutional issues. H.R. 1115 does not merely operate to preempt an area of State law, it also unilaterally strips the State courts of their ability to use the class action procedural device to resolve State law disputes. As the Conference of Chief Justices stated, the legislation in essence "unilaterally transfer[s] jurisdiction of a significant category of cases from State to Federal courts" and is a "drastic" distortion and disruption of traditional notions of judicial federalism.[47]

In this regard, the courts have previously found that efforts by Congress to dictate State court procedures implicate important Tenth Amendment federalism issues and should be avoided. For example, in *Fielder* v. *Casey*[48] the Supreme Court observed that it is an "unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." Similarly in *Johnson* v. *Fankell*[49] the Court reiterated what it termed "the general rule 'bottomed deeply in belief in the importance of State control of State judicial procedure . . . that Federal law takes State courts as it finds them'"[50] and observed that judicial respect for the principal of federalism "is at its apex when we confront a claim that Federal law requires a State to undertake something as fundamental as restructuring the operation of its courts" and "it is a matter for each State to decide how to structure its judicial system."[51]

The Supreme Court's most recent decisions further indicate that H.R. 1115 is an unacceptable infringement upon State sovereignty. In *United States* v. *Morrison*[52], the court invalidated parts of the Violence Against Women Act, claiming that Congress overstepped its specific constitutional power to regulate interstate commerce. Despite vast quantities of data illustrating the effects that violence against women has on interstate commerce, the Court essentially

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[46] To counter this problem, Congressman Scott offered an amendment at the Judiciary Committee markup that provided for remand of the action to State court without prejudice if, after removal, the Federal court determines that no aspect of an action that is subject to its jurisdiction may be maintained as a Federal class action. By allowing the Federal court the first opportunity to certify the class action but not denying the State court jurisdiction over the action once the Federal court determines that the action does not meet Federal requirements, this amendment addresses a serious complaint leveled by class action defendants. The amendment was defeated by a voice vote.

[47] *See supra* note 2.

[48] 487 U.S. 131, 138 (1988).

[49] 520 U.S. 911 (1997).

[50] *Id.* at 919 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).

[51] *Id.* at 922. *See also Howlett* v. *Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954) (for the proposition that Federal law should not alter the operation of the State courts); *New York* v. *United States*, 505 U.S. 144, 161 (1992) (stating that a law may be struck down on federalism grounds if it "commandeer[s] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program"); *Printz* v. *United States*, 117 S.Ct. 2365 (1997) (invalidating portions of the Brady Handgun Violence Protection Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

[52] 529 U.S. 598 (2000).

warned Congress not to extend its constitutional authority to "completely obliterate the Constitution's distinction between national and local authority."[53] H.R. 1115 ignores the Court's admonition and subverts the Federal system by hindering the States' ability to adjudicate class actions involving important and evolving questions of State law.

These same constitutional concerns were highlighted by Professor Laurence Tribe in his testimony during the 105th Congress regarding the constitutionality of certain aspects of tobacco legislation, including a proposed Federal class action rule applicable to State courts. He observed, "[f]or Congress directly to regulate the procedures used by State courts in adjudicating State-law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism."[54]

Arguments that the bill is nonetheless justified because State courts are "biased" against out-of-State defendants in class action suits also lack foundation.[55] First, the Supreme Court has already made clear that State courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co.* v. *Shutts*,[56] the Supreme Court held that in class action cases, State courts must assure that: (1) the defendant receives notice plus an opportunity to be heard and participate in the litigation;[57] (2) an absent plaintiff must be provided with an opportunity to remove himself or herself from the class; (3) the named plaintiff must at all times adequately represent the interests of the absent class members; and (4) the forum State must have a significant relationship to the claims asserted by each member of the plaintiff class.[58]

Second, as fears of local court prejudice have subsided and concerns about diverting Federal courts from their core responsibilities have increased, the policy trend in recent years has been towards *limiting* Federal diversity jurisdiction.[59] For example, several years

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[53] *Id.*

[54] *The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary,* 105th Cong., (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School).

[55] Of course the entire premise of the argument would need to be based on bias by the judges, since the juries would be derived from citizens of the State where the suit is brought, whether the case is considered in State or Federal court.

[56] 472 U.S. 797 (1985).

[57] The notice must be the "best practicable, reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 812 (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950)).

[58] *See id.* at 806–10. These findings were reiterated by the Supreme Court in 1995 in *Matshusita Elec. Indust. Co.* v. *Epstein*, 516 U.S. 367 (1995) (State class actions entitled to full faith and credit so long as, *inter alia*, the settlement was fair, reasonable, and adequate and in the best interests of the settlement class; notice to the class was in full compliance with due process; and the class representatives fairly and adequately represented class interests).

[59] Ironically, during the 105th Congress, the Republican Party was extolling the virtues of State courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional State law convictions in Federal court. At that time Chairman Hyde stated:

> I simply say the State judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest . . . when the judge raises his hand, State court or Federal court, they swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, ipso facto, that a State

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ago Congress enacted the Federal Courts Improvement Act of 1996,[60] which *increased* the amount in controversy requirement needed to remove a diversity case to Federal court from $50,000 to $75,000. This statutory change was based on the Judicial Conference's determination that fear of local prejudice by State courts was no longer relevant[61] and that it was important to keep the Federal judiciary's efforts focused on Federal issues.[62] In this same regard, the American Law Institute has found "there is no longer the kind of prejudice against citizens of other States that motivated the creation of diversity jurisdiction."[63] And finally, the most recent Federal Courts Study Committee report on the subject concluded that local bias "is no longer a major threat to litigation fairness" particularly when compared to other types of prejudice that litigants may face, such as on account of religion, race or economic status.[64] Indeed, in 1978, the House twice passed legislation that would have abolished general diversity jurisdiction.[65]

Third, as the legislation is currently written, it assumes a defendant will be automatically subject to prejudice in any State where the corporation is not formally incorporated (typically Delaware) or maintains its principal place of business. In so doing, the bill ignores the fact that many large businesses have a substantial commercial presence in more than one State, through factories, business facilities or employees. For example, if General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees, it does not seem reasonable to expect the defendants to face any great risk of bias.[66] Similarly, if the Disney Corporation, one of Florida's largest employers, were to face a class action in a Florida court, it would make little sense to involve the Federal courts out of concern for local prejudice.[67] Yet under H.R. 1115, both of these hypothetical cases would be subject to removal to Federal court.[68]

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judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

142 Cong. Rec. H3604. (daily ed. April 18, 1996).

[60] 28 U.S.C. § 1332(a) (West Supp. 1998).

[61] The Judicial Conference of the United States, Long Range Plan for the Federal Courts, Recommendation 7 at 30 (1995).

[62] *Id.*

[63] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 101, 106 (1996).

[64] Federal Courts Study Committee, Report of the Federal Courts Study Committee 40 (April 2, 1990). *See also, Ball, Revision of Federal Diversity Jurisdiction,* 28 Ill. L. Rev. 356 (1988); Bork, *Dealing with the Overload in Article III Courts*, 1976, 70 F.R.D. 231, 236–237 (1976); Butler & Eure, *Diversity in the Court System: Let's Abolish It*, 11 Va.B.J. 4, (1995); Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 Brookings Rev. 34 (1992); Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 1–49 (1968); Feinberg, *Is Diversity Jurisdiction An Idea Whose Time Has Passed?*, N. Y. St. B. J. 14 (1989); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Corn. L. Q. 499 (1928); Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. Pa. L. Rev. 1097 (1931); Haynsworth, Book Review, 87 Harv. L. Rev. 1082, 1089–1091 (1974); Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. Rev. 347 (1978); Jackson, *The Supreme Court in the American System of Government*, 38 (1955); Sheran & Isaacman, *State Cases Belong In State Courts*, 12 Creighton L. Rev. 1 (1978).

[65] *See* 124 Cong. Rec. 5008 (1978); 124 Cong. Rec. 33, 546 (1978). The legislation was not considered in the Senate.

[66] General Motors and Ford both have their principal place of business in Michigan and are incorporated in Delaware.

[67] Disney's corporate headquarters are located in Burbank, California, and it is incorporated in Delaware.

[68] With increasing frequency, companies are setting up paper companies in places like Bermuda for a nominal fee. The company continues to be owned by the U.S. shareholder and continues to do business in the exact same U.S. locations. This allows the company to escape sub-

III. THE LEGISLATION INCLUDES NUMEROUS PRO-DEFENDANT PROVISIONS THAT HAVE NOTHING TO DO WITH CLASS ACTION JURISDICTION

In addition to federalizing State class actions on a retroactive basis, the legislation also includes a series of unrelated "give aways" that will harm injured victims and have nothing to do with the bill's purported subject matter—class action jurisdiction.

A. Interlocutory Appeals

Section 6 of H.R. 1115 provides defendants with a significant mechanism to delay and frustrate an injured plaintiff's pursuit of justice. The section provides a party the right, in every case, to an interlocutory appeal of a court's decision granting or denying class certification, if an appeal notice is filed within 10 days, and stays discovery while such an appeal is pending.

This is a marked departure from Federal Rule of Civil Procedure 23(f), adopted in 1998, which provides courts of appeals discretion to grant an interlocutory appeal of a class action certification and discretion to stay discovery. In describing the rationale for adopting a discretionary standard as opposed to granting such an appeal as a matter of right, Circuit Court Judge Anthony J. Scirica, Chairman of the Committee on Rules and Practice of the Judicial Conference has noted the following:

> [Rule 23(f)] addressed concerns expressed by many judges and lawyers that interlocutory appeals are often unnecessary and would be abused as a procedural tactic to delay proceedings and unfairly increase litigation expense in many class actions. . . . Interlocutory appeals in general have been traditionally disfavored because they can cause unwarranted, expensive and wasteful interruptions . . . Providing an appeal as of right [as H.R. 1115 does] might tempt a party to file an interlocutory appeal solely for tactical reasons.[69]

Section 6 is completely unnecessary because courts already possess the power to review significant or controversial class certification decisions and to stay lower court proceedings. The courts' discretion is important because many class certification decisions are clear and non-controversial. As the Supreme Court noted in *Amchem Products Inc. et. al.* v. *Windsor et. al.*, some key aspects of class certification are "readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." An interlocutory appeal of class certification decisions in those cases would only add unnecessary delay and cost to already complex lawsuits.[70]

In fact, Courts of Appeals accept Rule 23(f) appeals frequently. Since its inception, Rule 23(f) appeals have been accepted about 80 percent of the time they are requested. In that time, a circuit court has never reversed a district court's decision to deny class certifi-

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stantial tax liability and possibly avoid legal liability. To stop this abuse, Representatives Conyers and Jackson Lee offered an amendment at the Judiciary Committee markup which would allow former U.S. companies to be treated as domestic corporations for class action purposes. This amendment was defeated by a vote of 20–13.

[69] Scirica letter, p.2.

[70] 521 U.S. 591 (1997)

cation. There has been no showing that the Federal appeals courts have not granted review in enough cases, or that this rule has been unfairly applied to defendants.

If H.R. 1115 is enacted, it will retroactively affect pending cases that have not reached class certification and the innocent victims will have to wait at least another year to get their money back. And, if the defendants lose on appeal, they can seek certiorari to the Supreme Court, which rarely succeeds, but would tack an additional six to 9 months on the delay for the harmed victims. Enron shareholders have already endured a discovery delay of approximately 1½ years because of special rules that apply to securities lawsuits. In fact, it was during this delay that the accounting firm Arthur Andersen was caught destroying documents. H.R. 1115 would permit corporate wrongdoers like those in Enron, Worldcom, Tyco, Adelphia, etc. to delay justice for their victims even further.

B. Private Attorney General and Mass Tort Cases

H.R. 1115 federalizes more than class actions: Under proposed 28 U.S.C. § 1332(d)(9), this bill would also create Federal jurisdiction for two additional categories of cases: (1) private attorney general actions brought by any organization or citizen; and (2) groups of cases in which 100 or more individuals seeking monetary relief seek to try *any* common legal or factual issue together.

Section 4(a)'s proposed new section 1332(d)(9)(A) would define private attorney general actions as class actions and allow them to be removed to Federal court if filed in State court. The provision is obviously aimed at actions under section 17200 of the California Business and Professions Code, which has proved an important tool for victims of unfair and deceptive business practices. In section 17200, the California Legislature has decided to provide legal standing for organizations and individuals to act as private attorneys general; broader than the standing generally allowed in the Federal courts.

The California Legislature has decided to allow private parties to combat corporate fraud and other malfeasance on the theory that the California Attorney General simply does not have the resources to do it all. That policy choice, in our system of federalism, should be California's prerogative. H.R. 1115 would override that State policy choice and transfer California private attorney general actions to Federal court, where they would be automatically deemed class actions and be subjected to Federal Rule 23 certification criteria and Federal standing requirements. This is why the California League for Environmental Enforcement Now is so strongly opposed to the private attorney general provision, writing, "the Act targets the ability of local residents to bring environmental, public health, civil rights, and consumer actions on behalf of the public in State court. We are calling on you to defeat this legislation that threatens the ability of citizens to protect State environmental, civil rights, and consumer protection laws."[71]

[71] Letter from Michael Schmitz, Executive Director of California League for Environmental Enforcement Now (CLEEN) (April 24, 2003) (on file with the minority staff of the House Judiciary Committee).

California is not the only State that would be affected by this provision. In Michigan, for instance, the Michigan Consumer Protection Act (MCPA) gives private citizens the right to seek

To make matters worse, H.R. 1115's minor exclusions for Federal jurisdiction—for instance, where the aggregate value of the claims is $2 million or less, or where the number of affected people is fewer than 100—do not apply to its private attorney general action provision. In a State as large and transient as California, any private attorney general action seeking compensation for all victims of a corporation's instate misconduct will involve some significant number of out-of-State victims, virtually all 17200 actions seeking monetary relief will be removable to Federal court.[72]

H.R. 1115's federalization of individual joinder actions (e.g. mass tort cases) is equally problematic. Section 4(a)'s proposed new U.S.C. § 1332(d)(9)(B) would define damages suits filed in State court by individual plaintiffs as class actions if, at any time, 100 or more plaintiffs sought to try any common legal or factual issue.

Under current law dating back to the creation of the Federal courts, these individual actions could only be tried in State court. But under H.R. 1115, some of these cases could be deemed "individual joinder actions" and could be removed to Federal court, away from the trial and appellate courts with expertise in applicable State law, perhaps many miles from the town in which the injuries arose, and, if an appeal were ever filed, to a Federal court of appeals.

Moreover, once the case is in Federal court, the plaintiffs must meet the certification requirements of Federal Rule of Civil Procedure 23. However, unlike the bill's treatment of genuine class actions, these individual State law cases are not dismissed without prejudice to re-filing in State court if Rule 23's requirements are not met; rather, they remain in limbo in Federal court. This would require the Federal court to adjudicate dozens or even hundreds of garden-variety State tort claims on an individual basis—claims valued at far less than the $75,000 jurisdictional amount set by Congress for Federal court diversity cases under 28 U.S.C. § 1332(a).

IV. THE SO-CALLED "CONSUMER BILL OF RIGHTS" IS LARGELY MEANINGLESS OR COUNTERPRODUCTIVE

Finally, we would note that the much touted "Consumer Bill of Rights" includes precious few provisions that will actually benefit injured consumers. Instead, most of these provisions are either redundant of current law and practice, or will actually make it more difficult for victims to obtain justice.

The most highly touted portion of H.R. 1115 is Section 1711, which purports to address inequities in coupon settlements.[73] Proponents of the bill assert that there is widespread misuse of these settlements, allowing plaintiff's attorneys to recoup large fees while class members are left with nothing more than a coupon for the defendant's product. It should be noted at the outset that coupon settlements are traditionally favored by defendants.[74] More impor-

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damages for certain false, misleading, and deceptive business practices as a "private attorney general." Mich. Comp. Laws § 445.911 (1976).

[72] *See* proposed 28 U.S.C. § 1332(d)(9) (last sentence).

[73] H.R. 1115, § 3, proposed 28 U.S.C § 1711.

[74] Wolfman, pps. 18–19 ("[D]efendants love coupon settlements in which the coupon will have little or no value. The settlement provides a modest marketing gimmick for the defendants'

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tantly, section 1711 does *nothing* to address the problem. Under the legislation, a coupon settlement may be approved only after a court finds that the settlement is "fair, reasonable, and adequate" for class members.[75] This is identical to the universal settlement approval standard applicable to all cases, which requires a court to issue a written finding that a settlement is "fair, adequate, and reasonable."[76] Thus, in the area of coupon settlements—the area most cited by proponents to justify this legislation—the bill does nothing to alter or improve current law.

Nor does H.R. 1115's provision for "notice requirements" to class members improve current law. In fact, H.R. 1115 originally contained a long, detailed notice provision that would actually confuse consumers—not help them. According to the Judicial Conference Rules Committee, H.R. 1115's notice requirements would have "undermine[d] the bill's stated objectives by requiring notices so elaborate that most class members [would] not even attempt to read them."[77] Fortunately, the Committee accepted an amendment conforming the notice requirements to the Federal Rules of Civil Procedure, neutralizing yet another harmful provision of the bill. But again, the final net result is to simply codify current practice.

Section 1714 also contains a provision prohibiting "the payment of bounties," which is harmful to civil rights cases. In an employment discrimination case, there may be fewer employment slots denied than there are qualified applicants.[78] A plaintiff filing an individual action may obtain an order placing him or her in the job denied and receive back pay.[79] Such a remedy would, of course, be appropriate under current law for a named plaintiff in a class action. However, H.R. 1115 would bar such a remedy for named plaintiffs unless each and every other class member also receives the same. This may well be an impossibility and will certainly act as a deterrent to civil rights class actions in general, and becoming a class representative in particular.

Thomas Henderson, Chief Counsel of the Lawyers Committee for Civil Rights, has testified as to the damage this bounty provision would do to civil rights cases:

> The prohibition on approving settlements that involve named plaintiffs receiving amounts different from other members of the class is not a reasonable or practical limitation in all instances. In many employment discrimination cases there are fewer employment opportunities denied because of discrimination than there are qualified potential claimants. In those situations, a person who sues as an individual can receive a full award of back pay and in a proper case can obtain an order placing him or her in the job denied because of discrimination. A class member in such a situation must share in the total back pay award, and has only an opportunity to be one of the persons selected for hire or promotion because not all can be selected. If the price of trying to protect others is that he or

products, while ridding the defendants of potentially troublesome litigation for little more than the cost of attorneys fees.").

[75] H.R. 1115, § 3, proposed 28 U.S.C § 1711.

[76] Wolfman p. 19.

[77] Scirica letter, p. 3.

[78] Henderson Testimony.

[79] *Id.*

she must also lose the full measure of individual relief and take only the same percentage share as those who never took any action to challenge the employer, individuals would be deterred from becoming a class representative. Thus, rather than a reform, this provision would hinder civil rights class actions.[80]

CONCLUSION

H.R. 1115 will remove class actions involving State law issues from State courts—the forum most convenient for victims of wrongdoing and with judges most familiar with the substantive law involved—to the Federal courts, where the class is less likely to be certified and the case will take longer to resolve. In our view, this incursion into State court prerogatives is no less dangerous to the public than many of the radical forms of "tort reform" and "court stripping" legislation previously rejected by the Congress.

Contrary to supporters' assertions, H.R. 1115 will not prevent State courts from unfairly certifying class actions without granting defendants an opportunity to respond. This is already barred by the Constitution, and the few State trial court decisions to the contrary have been overturned.[81] H.R. 1115 also cannot be seen as merely prohibiting nationwide class actions filed in State court. The legislation goes much further and bars State class actions filed solely on behalf of residents of a single State and that solely involve matters of that State's law, so long as one plaintiff resides in a different State than one defendant—an extreme and distorted definition of diversity that does not apply in any other legal proceeding.

In addition, we are deeply troubled by provisions in the legislation that would apply the new rules to cases that have already been filed, and to provisions that will give corporate wrongdoers massive new abilities to delay meritorious class actions from proceeding. Also, we object to provisions in the bill that treat non-class action cases as class actions and subject them to these harsh, anti-victim rules, and to provisions in the so-called "Consumer Bill of Rights" that would limit the ability of civil rights victims to take the lead in seeking relief.

This legislation would seriously undermine the delicate balance between our Federal and State courts. It would threaten to overwhelm Federal courts by causing the removal of resource intensive State class action cases to Federal district courts while also increasing the burdens on State courts as class actions rejected by Federal courts metamorphasize into numerous additional individual State actions. It is one-sided and includes numerous provisions that have little if anything to do with the problem of class action jurisdictional lines. We therefore strongly oppose H.R. 1115.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.

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[80] *Id.*

[81] *See Ex Parte State Mut. Ins. Co.,* 715 So.2d 207 (Ala. 1997); *Ex Parte Am. Bankers Life Assurance Co. of Florida*, 715 So.2d 207 (Ala. 1997) (holding that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied).

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