CLASS ACTION FAIRNESS ACT OF 2001

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 2341

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CLASS ACTION FAIRNESS ACT OF 2001

WEDNESDAY, FEBRUARY 6, 2002

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

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

Chairman SENSENBRENNER. The Committee will come to order. Today, the Committee will conduct a legislative hearing on H.R. 2341, the "Class Action Fairness Act of 2001", introduced by Representatives Goodlatte and Boucher.

Class action lawsuits in America have raised a number of grave concerns. Currently, our rules foster a game where attorneys lump thousands and sometimes millions of speculative claims in one class action and race to any available State courthouse in hopes of a rubber-stamped settlement. It is a part of our civil justice system that has gone wild. Over the past 10 years State court class action filings have increased 1,000 percent. This creates an enormous economic drain on small businesses, big industries and insurers, and provides windfall attorney fees while individual class members usually receive a small fraction of any settlement award.

This bill addresses some of these problems by updating antiquated Federal jurisdictional rules which have led to a situation where State courts are left with jurisdiction over most class actions. Currently, the Federal Rules provide jurisdiction for disputes dealing with Federal laws and disputes based on complete diversity: a requirement that all plaintiffs and defendants are residents of different States and that every plaintiff's claim is valued at $75,000 or more. Naturally, few class actions meet these requirements.

H.R. 2341 would apply new diversity standards to class actions by changing those requirements for class actions where any plaintiff and any defendant reside in different States and where the aggregate of all plaintiff's claims is at least $2 million.

Article III of the Constitution empowers Congress to establish Federal jurisdiction over diversity cases: cases between citizens of different States. This authority was premised on concerns that States may discriminate against out-of-State citizens. These concerns have been realized in settlements where members of different classes and different State courts are pitted against each other in copycat class actions: identical lawsuits filed in a number of States. The first settled wins. Members of the other class actions must ei-

ther find a way to join the settled action, wherever it may be, or forgo pursuing their claim.

This practice highlights jurisdictions with lax class action procedural requirements such as Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida. In addition, many of these State court decisions have the effect of making national law, as was the case with auto insurance and the use of OEM replacement parts.

The bill also establishes a consumer's class action bill of rights to address ethical concerns raised in a variety of class action settlements. For example, an airline price fixing settlement that produced $16 million in attorneys fees and only $25 credit for class members if they purchased an additional airline ticket for more than $250; a Bank of Boston settlement over disputed accounting practices that $8.5 million in attorneys fees actually costing class members around $80. Later plaintiffs' attorneys in this case also sued the class members for an additional $25 million; an infamous Mississippi asbestos settlement rewarded class members from Mississippi as much as 18 times more than class members from other States; a settlement with Cheerios over food additives produced $2 million in attorneys fees and class members only received coupons for more Cheerios.

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

Now with regards to Enron, there are many investigations, and there will be many lawsuits. It is important to note that nothing in this bill—and that means nothing—will limit the rights of Enron employees to seek redress in court. Under current law, the lawsuits against the company will be heard in Federal bankruptcy court under the current bankruptcy law for the same reasons Federal courts should be able to resolve many of the other class actions: Federal courts protect the interests of all parties. Section 4 of H.R. 2341 specifically excludes a number of Federal securities and State-based corporate fraud lawsuits.

I reserve the balance of my time and after recognizing Ranking Member John Conyers I would like to go to the testimony because we will be having a vote at 11 o'clock and it is important that this hearing conclude by noon or thereabouts.

The gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman and Members of the Committee. I want to first of all indicate to the Chairman how much I appreciate the cooperation that has been flowing between our staffs in terms of many activities that have required the rooms and resources of the Judiciary Committee in the last several weeks. I appreciate it very much.

Now this is a hearing that is bringing us together at the same time that what may turn into one of the largest financial debacles in the history of America is taking place. The bottom line is that we are probably considering legislation that would make it easier

for corporations, their lawyers, and their accountants, to engage in questionable practices. That is the setting that brings us together.

Now my Chairman has observed that there is nothing, zero in this measure that deals with Enron so we may breathe easier while we are in room 2141. Well, maybe; maybe not. Because much of the damage has been done in earlier congressional sessions, which we may have a chance to allude to either at this hearing, or if it is as abbreviated as suggested, somewhere else. We have got to hook all this together. Why? Because everything is connected to everything. This hearing is not being held in isolation. We are not suspending our judgment on everything else that is going on on the planet and in the American economy.

Now I hate to go back to the Newt Gingrich Contract With America era, but it was at that time that a Republican-driven Congress decided to override President Clinton's veto of securities tort reform. The result is that at this moment, and as a direct consequence of that, it is much harder for the Enron employees—forgive me for referring to them publicly at this hearing where they are not involved—who were scammed, apparently, out of their retirement savings and will not get any relief as the top fellows walked away with hundreds of millions of dollars, maybe more.

I also have to put this in some slight historical context with reference to the savings and loans scandals of the 1980's in which Keating and company—and that was considered outrageous. Several billions of dollars went down there. That too was a result of a reduced—of regulations that were trimmed and cut and limited to make it very difficult for there to be any real recovery for the people who were the true victims.

Now to me this is an appropriate time to be considering things that we, as national policymakers, may do to create more corporate responsibility, not less. Our citizens need more protections against being swindled, not less. But if I understand this measure, and that is what we are here to do, this is the direction that we are being taken, into less corporate responsibility. I have got maybe 13,000 investors from the Baptist Foundation of Arizona who would say amen to that, who would have been barred from the courthouse from any civil judicial relief had the measure that we are examining today been the law of the land as is being proposed at this hearing.

Now maybe we will be drawn into a discussion of legal concepts and terms that will attempt to minimize this issue and take our minds off of one central fact: that at the heart of class action litigation are injured people, large numbers of them. So if a woman is injured by a faulty product like the Dalkon shield they will have to pay more money to get justice, jump through more hurdles to get their case heard, and wait months and sometimes years until there is something that could be described as a remedy. It is not uncommon for injured class members to die before their case is heard.

There will be, I hope, discussion about minimal diversity in named plaintiffs. Now that takes us real quickly to the sick smokers who sued tobacco companies for lying about whether cigarettes were addictive and would have never seen their day in court. We will talk about heightened pleading rules. What that means to me is that when scores of Americans are killed by faulty tires and hun-

dreds more maimed, that Congress in its wisdom would make it more difficult for them to obtain justice when their claims are joined together.

So in the end the question well may be whether this Congress, starting with this Committee, understands how easing the rules of civil liability makes it much easier for those in the business sector to defraud working Americans.

So I thank you for the additional time that you have given me to make my statement, Mr. Chairman.

Chairman SENSENBRENNER. Without objection, opening statements of other Members will be placed in record at this point.

[The statements follow:]

STATEMENT OF CONGRESSMAN RICK BOUCHER (VA - 9th)

BEFORE THE HOUSE JUDICIARY COMMITTEE

LEGISLATIVE HEARING ON H.R. 2341,

"THE CLASS ACTION FAIRNESS ACT OF 2001"

FEBRUARY 6, 2002

Thank you Mr. Chairman. During the last Congress, class action reform legislation, which I was pleased to join with my Virginia colleague Mr. Goodlatte in sponsoring, was reported from this Committee and approved with a bi-partisan majority in the House. Unfortunately, in the last Congress, the Senate did not take up the measure.

In the intervening years, the problems we are seeking to address have grown, and more voices have been raised in support of our modest remedy. For example, I have placed on each Member's desk a copy of a Washington Post editorial from August of last year which focuses on the injustices and abuses of current class action practice and urges the passage of our modest reform.

Cases which are truly national in scope are being filed as state class actions before certain favored judges, who employ an almost "anything goes" approach that renders virtually any controversy subject to certification as a class action.

In such an environment, defendants and even plaintiff class members are routinely

denied their range of normal rights as there is a rush to certify classes and then a rush to settle the cases.

Plaintiffs suffer a range of harms. In order to prevent removal of the case to federal court, the amount sued for is sometimes artificially kept below the $75,000 federal jurisdictional amount - even if individual plaintiffs are entitled to recover more than that threshold amount.

In another effort to avoid removal to federal court, the class action complaint sometimes will not assert federal causes of action that could legitimately be raised, denying the plaintiffs an opportunity for their claims to be heard.

Sometimes in the settlement of these cases, the plaintiffs get mere coupons while their lawyers make millions.

And in at least one case, the plaintiff class members at the end of the settlement had a deficit of $91 posted to their mortgage escrow account while their lawyers received $8.5 million for their services. The plaintiffs had a net loss because of the suit. They were worse off than before the case was filed.

Our legislation addresses these problems by permitting cases which are truly

national in scope to be removed to the federal courts 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 fact, we will hear this morning from Mrs. Bankston, who owned a pharmacy and has been sued hundreds of times - not because anyone expected to recover from her, but because her presence in the case kept it in Mississippi state court. She is a living example of the abuse and the injustice that is occurring.

Our reform is truly modest, and it would be effective in resolving the problems plaguing current class action practice. I appreciate the Chairman scheduling the hearing today and look forward to further action on this bill in this Committee and before the House.

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

Mr. Chairman, I would like to thank you for holding today's important hearing on the Class Action Fairness Act—legislation I have introduced along with my good friend, Rick Boucher—to ensure that truly interstate class actions are heard in federal court.

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

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

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

For example, some state courts routinely certify classes before the defendant is even served with a complaint and given a chance to defend itself. Other state courts

employ very lax class certification criteria, rendering virtually any controversy subject to class action treatment. There are instances where a state court, in order to certify a class, has determined that the law of that state applies to all claims, including those of purported class members who live in other jurisdictions. This has the effect of making the law of that state applicable nationwide.

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

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

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

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

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

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

This result is certainly not what the framers had in mind when they established federal diversity jurisdiction. Our bill offers a solution by making it easier for plaintiff class members and defendants to remove class actions to federal court, where cases involving multiple state laws are more appropriately heard.

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

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

I urge each of my colleagues to support this bipartisan legislation, and I look forward to hearing from the witnesses who will testify before us today.

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.

I oppose this legislation, H.R. 2341, for several policy reasons. A favorable vote on HR 2341 would take away the means by which innocent victims of corporate giants can find justice.

As a threshold matter, I believe that before even considering legislation, Congress should insist on receiving objective and comprehensive data justifying such a dramatic intrusion into state court prerogatives. This legislation potentially damages federal and state court systems. Expanding federal class action jurisdiction to include most state class actions, as H.R. 2341 does, will certainly result in a significant increases in the already overtaxed workload of our federal courts. For example, it no surprise that the 68 judicial vacancies that existed as of February 2, 2002 contributed to the average federal district court judge docket backlog of 416 pending civil cases. It is because of these and other workload problems that Chief Justice Rehnquist took the important step of criticizing Congress for taking actions which have exacerbated the courts' workload problem.

H.R. 2341 also has the ability to significantly impact 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.

Class actions were initially created in state courts based on equity and common law. It permits one or more parties to file a complaint on behalf of themselves and all other people who are "similarly situated" (suffering from the same problem). A class action is often used when a large number of people have comparable claims. It is an efficient means of seeking justice for a large group of people.

Class actions do help bring justice for many people—the innocent victims. Historically, class actions were brought against huge corporate giants who impact a large percentage of the population.

Take asbestos. They used it on ceilings of gyms and classrooms where our children played and learned. It is of no fault of our children that they unknowingly contracted cancer. Someone should be held accountable for causing irreparable damage, and death, to these innocent victims.

The paradoxical similarity in all of these class actions is that the corporate giant was aware that their actions could cause cancer. Evidence during litigation showed that the tobacco giants were aware that nicotine was addictive and caused cancer.

It is no different with Enron. The loyal employees of Enron that were terminated lost their life savings, their retirement, their child's college tuition, their second honeymoon, their first home. Top executives were aware of their declining financial situation and yet misrepresented themselves, or had their accounting firm do so, to their own stockholders—their employees. They barred these employees from selling their shares, while at the same time, allowing only top executives to sell any shares they wanted to. Enron gave out tens of thousands of retention bonuses, while also terminating the "rank and file".

I know this because these victims are my constituents and I have heard their stories and accounts. They have been robbed of savings that they were entitled to.

It is important to recall the context in which this legislation arises—a class action has been filed in 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 $75,000).

H.R. 2341 also has the potential to raise serious Constitutional issues. For one, it unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes. The courts have previously indicated 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

It is also important to note that as fears of local court prejudice have subsided and concerns about diverting federal courts from their core responsibilities increased, the policy trend in recent years has been towards *limiting* federal diversity jurisdiction

Thirdly, 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, it can be said 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.

In all, H.R. 2341 adversely impacts the ability of consumers and other victims to acquire compensation in cases concerning extensive damages. The bill possess the potential to force state class actions into federal courts resulting in expensive litigation and allowing defendants to potentially compel plaintiffs to travel distances to participate in court proceedings. Essentially, the extensive pleading requirements of the federal court will virtually make it impossible for individuals to bring a class actions case. 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. To meet this criteria is virtually impossible in most instances that the plaintiff is able to provide this information prior to discovery. If the pleading requirements are not met, the judge is required to dismiss the plaintiff's complaint.

Additionally, consumers under H.R. 2341 can be expected to have a far more complicated and time consuming problem in trying to certify 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.

Consumers 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, this bill is plagued with problems that cheat consumers form their rights under law and under the Constitution. I urge my colleagues to oppose it.

Chairman SENSENBRENNER. Our first witness is Mr. Peter Detkin, vice president and assistant general counsel of Intel Corporation. Mr. Detkin joined Intel in 1994; is a graduate of the University of Pennsylvania's Moore School of Electrical Engineering, and received a J.D. from the University of Pennsylvania Law School.

The Committee will then hear from Mr. John Beisner, a partner in the firm of O'Melveny & Myers, where he is responsible for the firm's class action practice group. Mr. Beisner specializes in class action defense and mass torts, and he has an extensive background in State and Federal class action practice. Mr. Beisner is an honors graduate of the University of Michigan Law School.

The third witness will be Mrs. Hilda Bankston, the former owner of Bankston Drugstore, which is the only pharmacy serving Fayette, Mississippi. Mrs. Bankston managed this drugstore with her husband from 1971 until 2000. She was born in Guatemala, moved to New York City in 1958, and served in the United States Marine Corps before moving to Mississippi where she currently resides.

The final witness is Mr. Andrew Friedman, partner in the law firm of Bonnett, Fairbourn, Friedman & Balint, where he heads the firm's class action, security fraud, and consumer fraud practice group. He is a graduate of the University of Rochester and received a J.D. from the Duke University School of Law.

Will all the witnesses please rise, raise your right hand, and taken an oath?

Do you and each of you solemnly swear that the testimony you are about to give this Committee shall be the truth, the whole truth, and nothing but the truth, so help you God?

[Witnesses sworn.]

Chairman SENSENBRENNER. Let the record show that all of the witnesses answered in the affirmative. Without objection, each of the witnesses' written statements will be included in the record as a part of their testimony. I would ask that the witnesses limit their oral presentations to 5 minutes or so so that there will be a maximum amount of time for Members of the Committee to ask questions of members of the witness panel.

Mr. Detkin, you are first.

TESTIMONY OF PETER DETKIN, VICE PRESIDENT AND ASSISTANT GENERAL COUNSEL, INTEL CORPORATION

Mr. DETKIN. Chairman Sensenbrenner, Congressman Conyers, distinguished Members of the House Judiciary Committee, thank you for inviting me here to testify before you today on behalf of both Intel Corporation and also the Semiconductor Industry Association. As Mr. Sensenbrenner mentioned, I am a vice president, assistant general counsel at Intel, and I'm also here on behalf of the Semiconductor Industry Association.

Most of you are familiar with Intel. Intel was co-founded by the person who was one of the inventors of the integrated circuit, and also is responsible for bringing the DRAM and the microprocessor to bear: two of the most important inventions of our age. The Semiconductor Industry Association, also known as the SIA, represents member companies responsible for 90 percent of the semiconductor output of the United States, and more than 280,000 employees here in the United States.

I am not going to parrot my written testimony. You all have it and had a chance to read it. Instead I am here to explain why the tech community supports class action reform; in particular to draw on Intel's experiences with class action litigation, and to respond in part to some of Congressman Conyers' criticisms of the bill.

At bottom, the class action system as it is currently comprised encourages forum shopping. It encourages an unseemly race to the courthouse to determine who will be lead plaintiff and which court will have jurisdiction over a particular matter, with no bearing whatsoever on the merits of the underlying claim.

Just drawing on two of Intel's experiences, in one instance we had 13 class actions filed in a few-week period in six different States. Thirteen different cases in six different States. These all involved the same facts, virtually the same claims, and the same alleged nationwide class of more than 100 million people. In the second instance we had five suits filed against us in just 9 days on two different coasts. Again, same basic facts, same basic claims, and the same nationwide class.

What we learned is that there are idiosyncratic local rules that favor the local counsel who are in front of the local elected judges. For example, in one instance we were constantly, on less than 48-hours notice, required to appear on these so-called emergency motions. I would estimate at three or four times a week, by this local counsel who would say, we have another emergency, Your Honor, so Intel has to appear before you, because we were not allowed to appear by phone. So we had to race halfway across the country to respond to these motions.

At the end of the day which court would have heard this nationwide class action was going to be determined by a race to the courthouse. It had nothing to do with traditional notions such as where should the claims be heard, where could we compel evidence, where are the witnesses, where are the facts? That is where the Federal court system would help, and that is where the minimal diversity aspects that the Chairman referred to would help. There are uniform procedures. You have staff who are experienced with complex litigation of this nature. And perhaps most importantly, you have the ability to consolidate.

Here is where I would like to respond directly to Congressman Conyers' criticism. Nothing in this bill would bar any plaintiff from any courthouse, or from the courthouse, I should say. Each of these plaintiffs that he refers to would still be allowed to bring claims. The key is that Enron people who have claims against Enron, had it not been in Federal bankruptcy court, or the BAF investors before them, would be ensured of being in the right court, in the right State.

For example, let us imagine, given the BFA situation, had there been two investors in Illinois. There is nothing to prevent a class action litigator from filing his claim in Illinois, getting the class certified there, and then Mr. Friedman's clients would be forced to have their claims heard by a State court in Illinois determining the rights of the people in Arizona. That is where the class would be heard. I do not think that is the result we want.

Similarly, with Enron it is quite possible that Enron employees in Illinois or in Palm Beach, Florida or in Texas could beat the Houston plaintiffs to the courthouse and end up having the class action heard there. I do not think that is an appropriate use of judicial resources.

So how would the proposed bill help? As I mentioned, the minimal diversity aspects would get the cases to Federal court where they can be consolidated and brought before the court where it would make—in the jurisdiction that would make most sense. In addition, there is a lot of consumer protection in there that also would prevent consumers from being swindled, to use Mr. Conyers' words.

There is a plain English requirement for the notices. Anybody who has ever received a class action notice knows that these things are impenetrable. I refer in my testimony to the one, the two-foot long receipt I got from Blockbuster, which I defy anybody to understand. There is scrutiny of the so-called coupon settlements, require heightened scrutiny by the judges of settlements involving coupons. There is a restriction on the use of bounties for lead plaintiffs. All of these will protect consumers at the end of the day. I think that is very important.

Mr. GEKAS [presiding]. Would the gentleman draw to a close, please?

Mr. DETKIN. I will. Finally, it allows for interlocutory appeal of the outcome determinative of class certification decision, and that helps both sides because if a case is denied certified then the plaintiffs want the ability to have that reviewed by an appellate court. If it is granted certification then it should be reviewed by an appellate court because at the end of the day that drives settlement.

So in summary, class actions are clearly a valuable tool. They are needed in our jurisprudential system. We are all for them. We have no intention of using this as a system to try to help corporations swindle anybody. But they are subject to abuse, and the proposed bill will eliminate the manipulation of the system that allows abuse, while still keeping, and in fact strengthening, meritorious claims.

Thank you for your time.

[The prepared statement of Mr. Detkin follows:]

PREPARED STATEMENT OF PETER N. DETKIN

Chairman Sensenbrenner, Congressman Conyers, and distinguished members of the House Judiciary Committee, thank you for inviting me to testify before you today on behalf of Intel Corporation and the Semiconductor Industry Association (SIA), on the subject of class action litigation reform. My name is Peter Detkin, and I am Vice President and Assistant General Counsel at Intel Corporation.

For more than three decades, Intel Corporation has developed technology contributing to the computer and Internet revolution that has changed the world. Founded in 1968 to build semiconductor memory products, Intel introduced the world's first microprocessor in 1971. Today, Intel supplies chips, boards, systems, software, networking and communications equipment, and services that comprise the building blocks of the Internet. Intel's mission is to be the preeminent building block supplier to the worldwide Internet economy.

The Semiconductor Industry Association is the premier trade association representing the U.S. microchip industry. SIA member companies comprise 90 percent of U.S. semiconductor production and employ a domestic workforce of more than 284,000. The SIA provides a forum for domestic semiconductor companies to work collectively to advance competitiveness of the $75 billion U.S. chip industry.

Intel, the SIA, and much of the rest of the technology community are hopeful that you will act during this Congress to address a growing problem in our legal system: abusive class action litigation. Recently, a broad array of technology companies, including Intel and other members of the SIA, came together as signatories of an open letter to members of Congress, encouraging your support for H.R. 2341, the Class Action Fairness Act of 2001. I want to thank Congressman Goodlatte and Congressman Boucher for sponsoring this bill, as well as its many Republican and Democratic cosponsors. The technology community supports H.R. 2341 because we believe that it represents a good faith, bipartisan approach to preserving what is useful and effective about the class action mechanism, while at the same time discouraging abuse and improving the class action process to make it simpler, fairer, and faster for all parties involved.

The class action device is intended to promote more efficient resolution of suits involving multiple plaintiffs or defendants with very similar claims. It can enable plaintiffs of limited means to pursue small but nonetheless significant claims. It also may, in rare cases, be the only practical method of litigating and resolving important social issues.

In recent years, however, there has been an increase in the number of abusive class action lawsuits filed in state courts. Of particular concern, we are seeing an aggressive move by a limited number of plaintiffs' attorneys to file class actions against technology companies in areas such as allegedly defective products. It is obvious that many of these suits are brought as class actions because the injury alleged is either trivial, highly speculative, or wholly nonexistent.

As most of you are aware, technology companies have long been a prime target in securities litigation. Quite often, these private securities suits are without merit and are designed simply to coerce settlements out of deep-pocketed defendants. Many of you joined to support enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA) and later the Securities Litigation Uniform Standards Act of 1998 (SLUSA), to address this problem. These narrowly tailored laws were designed to weed out frivolous "strike" securities suits without unduly impeding the ability of shareholders with legitimate claims to seek relief in federal court. The record suggests that a similar response is now needed to address other forms of abusive class action litigation.

I. THE PROBLEM

Until the last decade, virtually all national class actions were filed in federal court. In recent years, however, we have seen an explosion of class action filings in

state court. Although the absence of centralized data-keeping in the state courts makes it impossible to quantify the problem precisely, the available empirical and anecdotal evidence leaves no doubt in my mind that state court class actions against out-of-state defendants have increased many-fold since 1990. This point is not controversial. The migration of national class actions to state courts has been acknowledged by leading plaintiffs' lawyers,[1] noted by federal judges,[2] demonstrated by empirical studies,[3] and widely reported in the press. In fact, the Washington Post recently ran an editorial entitled "Actions without Class,"[4] which highlighted the seriousness of the problem.

The growing class action abuse phenomenon has had a number of serious, adverse consequences. The most troubling of these are: increased forum shopping; manipulation of procedural rules to avoid federal diversity jurisdiction; displacement of the laws of some states by local judges in other states; the resolution of class action cases by ill-equipped state courts; "strike" suits intended to coerce quick settlements from defendants; collusive settlements, where plaintiffs' lawyers receive large fees while accepting settlements of little or no value to class members; and grossly inflated "bounties" being paid to lead plaintiffs. I'll address some of these problems that we have seen at Intel.

Forum Shopping

Lax enforcement of certification rules in a few jurisdictions allows plaintiffs bringing national class actions to shop around for the most favorable forum, even when that jurisdiction has little connection to the underlying dispute. As a result, a few states—and a few local jurisdictions within those states—receive a disproportionate share of class action filings. Furthermore, if one of these states happens to crack down on class action abuses, the lawyers simply shift their business to other jurisdictions.

Intel has had first-hand experience with this phenomenon. In one instance, thirteen class actions were filed in a three-week period in state courts in Chicago, Detroit, Denver, Camden, and San Jose, as well as in the federal district courts in Colorado and California. All of these complaints alleged the same facts, asserted essentially the same claims, and purported to be class actions on behalf of the same nationwide class of consumers. In another instance, five class actions were filed against Intel in a nine-day period in the state courts in San Jose, Chicago, and Camden. Both of these situations are discussed in a little more detail later in my testimony.

In both of these litigation "clusters," the plaintiffs simultaneously pursued motions in several state courts, all of them seeking to certify a nationwide class. The cases were settled before any of the courts certified a class. Had this not been done, the decision as to where the class action would have been prosecuted and tried would have been decided on the basis of this unseemly race to the courthouse, and not based on traditional notions of judicial administration such as the convenience of the parties, the ability to compel testimony of witnesses, and the location of documentary and physical evidence.

Manipulation of the Rules to Avoid Federal Diversity Jurisdiction

Lawyers are often able to keep national class actions in federal court by manipulating the rules that govern federal jurisdiction. Under current law, a case may be removed from state to federal court if all of the plaintiff class representatives are citizens of a different state than all of the defendants, and if each plaintiff is seeking more than $75,000 in damages. To prevent removal, the class counsel may include a named plaintiff that has the same citizenship as one of the defendants, or may name a local "straw defendant" that has the same citizenship as one of the plaintiffs, or may "shave" claims by forgoing damages for class members in excess of $74,999.[5] These tactics may cause considerable expense and inconvenience for local defendants, and may severely disadvantage the class members whose lawyers have surrendered valuable claims.

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[1] See E.J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 13 Loy. L.A.L.Rev. 373, 368 (1998) ("[i]t is no secret that class actions—formerly the province of federal diversity jurisdiction—are being brought increasingly in state courts").

[2] See *David v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring) ("[p]laintiffs' attorneys are increasingly filing nationwide class actions in various state courts").

[3] See J. Beisner & J. Miller, *They're Making a Federal Case Out of It . . . In State Court*, Civil Justice Rep't No. 3 (Sept. 2001), to be reprinted in Harv. J. L. & Pol. (2001/2002).

[4] See *Actions Without Class*, Wash. Post, August 27, 2001, at A14.

[5] See *David v. Carl Cannon Chevrolet-Olds*, Inc., 182 F.3d 792, 793–794 (11th Cir. 1999).

Displacement of State Law

State courts hearing national class actions sometimes apply the law of the forum state to govern the claims of all class members, even when many members of the class live in states whose laws differ dramatically. A local court entertaining a national class action against an auto insurer, for example, recently held that the defendant insurance company acted illegally in using "non-OEM" parts (*i.e.*, parts not produced by the original equipment manufacturer) in preparing estimates for repairs—even though most states permit (and some states require) use of non-OEM parts in an effort to benefit consumers by keeping down repair costs.[6] In cases like this, local courts effectively override the considered policy choices of other states.

Moreover, idiosyncratic local rules also sometimes allow plaintiffs' counsel to manipulate the system to the disadvantage of the out-of-state defendant. We experienced that problem in a case in the Midwest, where plaintiffs' counsel repeatedly (but unsuccessfully) sought class certification and restraining orders of various kinds, each time petitioning the court on an "emergency" basis. Intel received less than 48 hours' notice of each new hearing, forcing us to run halfway across the country to meet each "emergency." I am aware of numerous other stories of abuse of state procedural rules, such as the so-called "drive-by-certifications," where class actions are certified before the defendant has a chance to respond. This is particularly pernicious because, as I discuss later, the decision to certify a class action is often decisive.

Ill-Equipped State Courts

In addition, many state courts have neither sufficient experience nor resources to handle complex class actions. They also lack any mechanism to consolidate related class suits that are brought in other jurisdictions, meaning that defendants often are required to defend against multiple class actions filed in state courts across the country. Intel has experienced this problem first-hand; as I mentioned earlier, more than once we have been forced at substantial expense to defend identical suits in jurisdictions from coast to coast. Federal courts, in contrast, have the expertise and resources necessary to deal adequately with multi-party litigation, and existing procedures allow related class actions to be consolidated into a single proceeding for pretrial purposes. At the same time, there is little doubt that local courts sometimes give favorable treatment to local plaintiffs, at the expense of out-of-state class action defendants; indeed, the Framers of the Constitution provided for diversity jurisdiction in the federal courts to guard against precisely that danger of bias against out-of-state parties.

"Strike Suits"

Class action litigation often involves lawyer-generated suits challenging asserted misconduct that caused no real injury. Although the amounts at stake in these cases for individual class members are small, the enormous size of the classes, along with the unpredictability of juries in some jurisdictions, makes such suits "bet the company" propositions for the defendant. This reality, combined with the substantial expense of litigating a massive class action (often on several fronts), can place significant pressure on the defendant to settle, regardless of the merits.

Intel has had experience with this problem. For example, one of the sets of suits I mentioned earlier involved Intel's original Pentium® processor. Despite extensive pre-production testing by Intel and major computer manufacturers, the initial version of the Pentium® processor contained an undetected flaw. Intel's scientists determined that the problem would arise approximately once in every nine billion random division operations, which was tantamount to once in 27,000 years for the average spreadsheet user. In fact, after millions of processors were shipped, there was only one confirmed instance of a user encountering the flaw: a mathematics professor who was doing theoretical analysis of prime numbers noticed reduced precision at the 9th place to the right of the decimal in specific, rare circumstances. His observation was posted on the Internet, drawing public attention in early November 1994.

On December 1, 1994, Intel announced a "lifetime replacement policy" whereby it would "supply an updated version of the Pentium® processor to replace the original version free of charge" for every user who wanted one, regardless of actual need. Intel widely publicized its replacement policy, distributed a computer program to enable users to determine whether their processors were flawed, expanded its toll-free telephone call center to handle inquiries, and established a nationwide network of local service centers to assist with replacements.

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[6] See *Snider v. State Farm Mut. Auto. Ins. Co.*, No. 97–L–114 (Ill. Cir. Ct., Williamson County).

On December 2—the day after Intel announced its lifetime replacement policy—the class action complaints began to appear.[7] In all, thirteen class actions were filed in a three week-period in state courts in Chicago, Detroit, Denver, Camden, New Jersey, and San Jose, California, as well as in the federal district courts in Colorado and California, all alleging the same facts, all asserting essentially the same claims, and all purporting to be class actions on behalf of the same nationwide class of consumers. When these multiple class actions were settled in March 1995, Intel confirmed only that it would continue to offer free replacements, maintain the service centers, operate the toll-free telephone numbers, and provide the diagnostic computer programs—all of which Intel was doing before the settlement. The plaintiffs' lawyers, meanwhile, received fees of $4,272,969 (in addition to costs of approximately $127,000). These sums do not include Intel's expenses in defending the litigation.

A similarly abusive set of class actions was triggered by an Intel press release, issued on January 5, 1996, announcing that, as a result of a single error in a prerelease ("beta") version of compiler software (the error essentially being one misplaced parenthesis among hundreds of thousands of lines of programming code), the results of one particular "benchmark" test on 100, 120 and 133 MHz Pentium® processors were incorrect. The performance yardstick affected was not widely used and was almost certainly not used by consumers in making purchase decisions. The erroneous benchmark results were never available in any consumer publication or on Intel's Web site, and at all times Intel's web site provided dozens of other benchmarks that were accurate and were of more relevance to consumers. A small article appeared in the New York Times on January 6, quoting an independent expert as saying that "[i]t was an innocent mistake."

Two business days later, however, the first class action was filed alleging that Intel had engaged in false and misleading advertising by releasing erroneous test results. Ultimately, seven class actions were filed, including five in a nine-day period, in the state courts in San Jose, Chicago and Camden. The cases eventually were settled, with class counsel receiving $1,489,000 in fees. Again, this number does not include Intel's own litigation costs in defending against suits.

Confusing Class "Opt-Out" Notices

Because class members are bound by the terms of a class settlement unless they affirmatively "opt out" of the class, it is essential that all members of the class receive a description of the settlement that is intelligible and comprehensive. Yet class members often are sent notices that are easily mistaken for junk mail and that, on examination, are virtually incomprehensible. I don't think I exaggerate when I say that most of us in this room have received such notices, and that many recipients find the notices impossible to understand. For example, if any of you rent movies at Blockbuster, you probably were handed a two-foot long receipt full of legalese at some point advising you of the proposed terms of a class action coupon settlement in Jefferson County, Texas. Here is an excerpt:

> If the proposed settlement is approved, class members will receive compensation in the form of certificates to be used toward certain rentals or non-food purchases, including some or all of: (1) $1.00 off any rental or non-food purchase; (2) free "Blockbuster Favorites" and five-day rentals; and (3) rent-one-get-one-free rentals. If class members paid extended viewing fees between April 1, 1999 and April 1, 2001 in an aggregate amount (1) equal to or lesser than $30; (2) between $30 and $60; or (3) over $60, they will receive certificates worth approximately $9, $13, and $20, respectively, upon the submission of a valid Class Settlement Claim Form (available at www.blockbuster.com or by calling 1.800.224.2703) by December 15, 2001 or upon the completion of a transaction in a Blockbuster company-owned or participating franchise store during the Certificate Period, which shall be a 120-day period to occur within 12 months of a final nonappealable judgment. Settlement Class members who did not pay extended fees to Blockbuster between March 1, 1998 and November 15, 2000 must submit a valid Class Settlement Claim Form by December 15, 2001, to receive certificate consideration. Class members must also submit a Class Settlement Claim Form to receive certificate compensation for fees paid to Blockbuster for the nonreturn of rental items. Nonreturn fees shall be treated as extended viewing fees for the purpose of determining which of the three certificate

[7] One class action was filed on November 29, but was withdrawn almost immediately on plaintiff's own accord and was not refilled. Thus, the class actions that were involved in the eventual settlement were all filed after the replacement policy was already announced.

levels a class member will receive. Members may use the certificates during the Certificate Period.

Although the notice advised customers "[t]his notice may affect your rights, please read carefully," I wonder how many ordinary Americans waded through it. I suspect a significant number did not. In fact, after receiving my receipt from Blockbuster, I posted it outside my office and challenged Intel's lawyers to try to understand it.

Disproportionate "Bounties" for Lead Plaintiffs

The class action problem is magnified by the growing practice of giving enhanced payments (or "bounties") to class representatives, offering them a share of the settlement award that is disproportionately larger than that provided to other class members. Such settlements lead to a divergence of interests between the class representatives—who will receive the bounty only if the settlement is approved—and the absent class members, who receive no bounty at all.[8] In such circumstances, class representatives cannot be expected to look out for the interests of other members of the class.

II. THE SOLUTION

Most of these problems could be either avoided altogether or substantially ameliorated if national class actions were moved to the federal courts, where uniform procedures that protect the rights of the parties could be applied; judges and their staffs would be, on the whole, better able to deal with complex, nationwide cases; and the courts could take steps to avoid duplicative litigation. We believe that H.R. 2341 goes a long way towards addressing all of the problems that I have mentioned.

H.R. 2341 Would Move Large, Interstate Class Actions to Federal Court, Where They Belong.

As I mentioned earlier, current law provides that federal diversity jurisdiction for class actions does not exist unless every member of the class is a citizen of a different state than every defendant, and unless each individual class member is seeking damages in excess of $75,000. To move the largest and most complex class actions into federal court, the bill would change the law to provide that federal jurisdiction exists whenever any member of a plaintiff class is a citizen of a different state than any defendant, so long as the aggregate amount at issue in the suit exceeds $2 million. The bill contains exceptions to keep class actions in state court when they primarily involve matters of local concern.

H.R. 2341 Would Establish Needed Consumer / Plaintiff Protections.

H.R. 2341 provides a number of new protections for plaintiff class members. It would establish a "plain English" requirement assuring that notices sent to class members are written in plain, easily understood language and present essential information in an easily digestible tabular format. The bill also seeks to address coupon settlements that are unfair or abusive: judicial scrutiny would be required for settlements that provide class members only coupons or other noncash benefits as relief for their injuries. The bill would bar approval of settlements in which class members suffer a net loss. It likewise addresses lead plaintiff "bounties" by precluding their payment when it would result in the interests of class representatives significantly diverging from those of absent class members. Finally, the bill provides assurance that out-of-state class members are not disadvantaged by settlements that award some class members a larger recovery simply because those class members live closer to the state court.

H.R. 2341 Would Establish Improved Pleading Requirements.

Before an action could be maintained as a class action, H.R. 2341 would require that the complaint specify the nature and amount of relief sought, the nature of injury to class members, and, if the defendant allegedly acted with a particular state of mind, the facts that will demonstrate that state of mind. The bill also would stay discovery during the pendency of a motion to dismiss on the pleadings. A similar pleading requirement was enacted as part of both the Private Securities Litigation Reform Act of 1995 and the Y2K Act.

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[8] See Benedict & Seidel, *Special Compensation to Named Plaintiffs in Securities Class Actions*, 24 Rev. of Sec. & Commodities Reg. 195, 200 (Nov. 13, 1991); Krislov, *Scrutiny of the Bounty: Incentive Awards for Plaintiffs in Class Litigation*, 18 Ill. B.J.286 (1990) ("[m]any commentators have said that awarding representatives any more than their proportionate amount of the class recovery creates unacceptable conflict between the class and representatives").

H.R. 2341 Would Permit Interlocutory Appeal of Class Certification Decisions.

Because the court's certification decision often is decisive—as a decision to certify may place insurmountable pressure on the defendant to settle, while a refusal to certify may force the plaintiffs to abandon their claims—the bill would permit immediate interlocutory appeal of certification decisions as a matter of right. This would help to stop strike suits based on insubstantial claims, while allowing legitimate class action litigation to proceed.

We should be clear on precisely what is at stake in this legislation. Intel and the SIA believe that the class action device is an essential part of the legal system, and one that has valuable uses. But the existence of serious abuses in the class action process is inarguable. Frivolous class action lawsuits impose substantial expense on defendants, sapping resources that could be used for productive purposes. They clog the judicial system. And they provide no real relief to consumers. Intel and the SIA therefore strongly support H.R. 2341 because it is thoughtfully crafted, taking a fair and balanced approach to fixing class action litigation for all parties involved.

I am happy to answer any questions that members of Committee may have. Thank you.

Mr. GEKAS. The time of the gentleman has expired. We turn to the next witness, Mr. Beisner.

TESTIMONY OF JOHN BEISNER, PARTNER, O'MELVENY & MYERS, LLP

Mr. BEISNER. Thank you very much. I appreciate the opportunity to appear before the Committee this morning to speak in support of H.R. 2341.

Every person in this hearing room this morning is a plaintiff in a lawsuit. Indeed, I think you may be surprised to find that each of us is a plaintiff in four or five different lawsuits. Did we ask anybody to file those lawsuits on our behalf? No. Did anybody ask us if we wanted to be part of those lawsuits? No. Do we even know the lawyers who supposedly filed those lawsuits on our behalf? No, probably not. Do we agree with the claims asserted in those lawsuits? Who knows. We do not even know what the lawsuits are about or where they were filed.

So how can attorneys who we do not even know file a lawsuit on our behalf without our permission, and indeed, without even telling us, asserting claims with which we may disagree? Well, welcome to the world of class actions. By making this observation I am not saying that class actions are inherently a bad thing or that they ought to be abolished. To the contrary, the device definitely plays an important role in our legal system.

But the class action is a very powerful legal device. It hands attorneys the right to file lawsuits on behalf of people without their consent and without their control. It is a lawyer's dream: a lawsuit in which you really do not need a client in the traditional sense. So the class action device needs to be controlled very carefully by our courts because it creates a source of significant abuses.

Unfortunately, those abuses are rampant in today's class action world. They are seriously injuring our economy. And worse yet, they are seriously injuring the consumers that class actions are supposed to benefit. As the Washington Post bluntly editorialized several months ago in urging the passage of this bill, "No portion of the American civil justice system is more of a mess than the world of class actions. None is in more desperate need of policymakers' attention."

So in what respects is the class action world a mess? What are the abuses? Let me just mention three of many. First, State courts are using class actions to federalize State laws. County courts are presiding over class actions that have little or no connection to their own States, deciding claims of people who live in other jurisdictions, and in the process, interpreting the laws and setting the policies for other jurisdictions.

The evidence on this point is not just anecdotal. I am the co-author of a study that is being published this week in the Harvard Journal of Law and Public Policy that analyzes hard data on this subject. For that study we pulled all of the class action files out of dockets in certain county courts in Illinois, Texas, and Florida. We found that very few of those class actions had any significant relationship to the counties in which they were filed. Most of the class actions were brought primarily on behalf of plaintiffs who did not live in those jurisdictions against defendants who did not reside there either.

And this phenomenon is worsening. The study found that the number of class actions filed in those county courts is growing by leaps and bounds, some up over 1,000 percent in the past 3 years alone.

Second, State courts are being inundated with copycat class actions. When one class action is filed, often many more class actions, each asserting the same claims on behalf of the same purported classes of people, are being filed in State courts all over the country. This phenomenon does not occur in the Federal courts because when multiple class actions are filed in the Federal system there is a process by which they can be all drawn together before a single judge.

This copycat class action phenomenon injures defendants because they end up defending exactly the same claims on behalf of the same people in 50 or 60 courts at the same time all over the country. And the phenomenon can injure class members as well because the lawyers who bring those cases can make money off of them only if they are the first to settle their claims, creating enormous incentives to sell out consumer interests.

That brings us to the third major problem. In recent years, multiple hearings before this Committee and its Senate counterpart have uncovered many circumstances in which counsels walk off with enormous attorneys' fees but the class members receive next to nothing.

As the Washington Post editorial that I mentioned earlier concluded, many of these problems would be eliminated if more interstate class actions could be heard in Federal court. That is not possible now because of a glitch in our Federal diversity jurisdiction statute. It allows Federal court simple slip-and-fall cases to be heard there, but cases that involve the most people, the most money, and the most interstate commerce implications cannot be heard there. That is the issue that this bill fundamentally is intended to address. I therefore urge this Committee to recommend its adoption.

Thank you.

[The prepared statement of Mr. Beisner follows:]

PREPARED STATEMENT OF JOHN H. BEISNER, ESQ.

Thank you for the opportunity to testify about the abuses of class actions that are presently occurring in our judicial system and about why enactment of H.R. 2341 would constitute an important step toward halting those abuses, which are challenging the basic legitimacy of the class action device.

My testimony today is based primarily on my experiences as an "in-the-trenches" class action litigator. Over the past two decades, I have defended more than 400 class action lawsuits on a wide variety of subjects in federal and local courts in 37 states. In the course of that work, I have observed the soaring numbers of class actions in state courts and the increasing abuse of the class action device, particularly in certain state court settings. I have also personally witnessed the enormous economic waste that this inexplicable situation imposes on targeted companies, diverting attention and resources from job-creating innovation efforts and diluting the profits available for shareholders, including both pension funds and individual investors. Today, I would like to share with you some thoughts about what has led to this class action crisis—and why H.R. 2341 would be a positive, effective response to these problems.

I. THE STATE COURT CLASS ACTION CRISIS IS WORSENING.

My testimony today is not a new song; it is an old refrain. Over the last several years, most policymakers—and indeed most Americans—have read or heard about the explosion in state court class actions and have developed at least a passing familiarity with the abuses occurring in many of those cases.

The problem is not new, and it is not going away. Congress has been considering legislation to address these problems for several years. But in each year that Congress has failed to act, the problem has worsened, creating a vicious cycle. As more and more interstate class actions are being filed in state courts, abuses are increasing. And as class action abuse becomes more prevalent, more lawyers seek to bring even more class actions in state court. As the *Washington Post* bluntly editorialized several months ago, "No portion of the American civil justice system is more of a mess than the world of class actions. None is in more desperate need of policymakers' attention."[1]

A. The Number Of State Court Class Actions Continues To Mount As Plaintiffs' Counsel Go To Great Lengths To Avoid Federal Court.

Over the years, several studies have attempted to quantify the growth of state court class actions. None, however, has been totally comprehensive because state courts do not keep accurate records of class action filings; it would be impossible to conduct a full statistical analysis of class action filings in the courts of all 3,066 counties nationwide. Still, despite these limitations, several studies have painted a reasonably clear picture of a growing problem that is concentrated in certain state courts. For example:

- A preliminary report on 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."[2]
- Another survey indicated that while federal court class actions had increased by 340 percent over the past decade, state court class action filings had increased 1,315 percent.[3] Typically, the new state court filings were on behalf of proposed nationwide or multi-state classes.[4]
- A study submitted to the House Judiciary Committee in 1999 indicated that the local courts of six small, rural Alabama counties were experiencing a tidal wave of class action filings, many seeking relief on behalf of purported nationwide classes concerning matters of national significance.[5]

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[1] *Actions Without Class*, Wash. Post, August 27, 2001, at A14.

[2] Deborah Hensler, *et al.*, Preliminary Results of Rand Study Of Class Action Litigation (1997).

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

[4] *Id.* at 2 (Figure 1).

[5] *Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998) ("1998 House Hearing"), at 140–53.

- 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."[6]

Recently, I co-authored an analysis of newer state court class action data yielded by research undertaken by the Center for Legal Policy at the Manhattan Institute.[7] That analysis, which will be published shortly in the HARVARD JOURNAL FOR LAW AND PUBLIC POLICY, examined data gleaned from the class action dockets of three state courts—Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida—that appeared to have a disproportional number of class actions based on an informal survey of newspapers, magazines and court reporters. By identifying all the purported class actions that were filed in these counties during the 1998–2000 timeframe,[8] and reviewing the dockets of each of those identified class actions, the study sought to determine whether the anecdotal reports about class action practice in these specific counties were borne out by the hard numbers—and whether they provided insight on general class action trends. The answer turned out to be "yes"—on both counts.

Among the study's most significant findings were the following points:

- *Class actions increased substantially during the survey period in each of the three counties.*[9] 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. In 1998, there were only two class actions filed there—not surprising, given its small size and relatively inconvenient location. During 2000, there were 39. And the upward trend appears to be continuing: During the first two months of 2001, 13 new class actions were filed. Assuming that trend continued through the end of the year, there was another 92 percent increase in class action filings during 2001. These findings confirmed the results of informal literature research, which suggested that Madison County has one of the highest class action filing rates in the country. Indeed, according to an article last year in the *St. Louis Post-Dispatch*, Madison County has developed a nationwide reputation as *the* place to file nationwide class actions,[10] even though it has only one-tenth of one percent of the U.S. population.
- *The number of class actions filed in each county was clearly disproportional to the size of the counties in the survey.* In order to understand the significance of the data collected in the three counties, the Manhattan Institute study considered the *per capita* filing rates for class actions in each of the three courts. Its findings were telling: if class actions were filed throughout the country at the same *per capita* rates as Jefferson County, for example, there would have been 22,331 class actions filed in state courts in 2000.[11] At the Madison County rate, the total number of class actions would have been 42,386.[12] Despite the lack of published data on the total number of class actions brought each year in state courts, it is clear that these states are accounting for far more than their proportional share of class action filings.

  A comparison with the federal court system is similarly revealing. Only about 2,000 class actions are filed in the entire federal court system each year.[13] That amounts to a *per capita* rate of about 7.6 class actions for every million residents. In Madison County in 1999, the rate of *per capita* state court class actions was nearly *nine* times higher—with about 61 class actions filed per million people. Even the most populous county surveyed (Palm Beach) has a *per capita* class action filing rate that is three times the rate in federal court.[14]

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[6] Deborah R. Hensler, *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS (Executive Summary 1999) ("ICJ/RAND Study") at 7.

[7] *See* John H. Beisner and Jessica Davidson Miller, *They're Making A Federal Case Out Of It . . . In State Court*, CIVIL JUSTICE REPORT NO. 3, Sept. 2001 ("Manhattan Institute Study").

[8] As detailed below, the researchers also looked at cases filed during the early months of calendar year 2001, to the extent possible.

[9] Manhattan Institute Study at 7–12.

[10] *See* Michael Shaw and Jim Getz, *Filing Of Class Action Suits Surges In Metro East Area; Tactics For Finding Clients Are Assailed*, St. Louis Post-Dispatch, June 19, 2000.

[11] Manhattan Institute Study at 8–9.

[12] *Id.* at 9.

[13] *See* Manhattan Institute Study at 9 (citing L.H. Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 REPORT OF THE DIRECTOR 405 (2001) (Administrative Office of the U.S. Courts).

[14] Manhattan Institute Study at 9.

- *The majority of class actions in all three counties were brought on behalf of nationwide classes.*[15] In Madison County, for example, 81 percent of the cases filed during the survey period sought to certify nationwide classes. In Jefferson County, 57 percent of the class actions were brought on behalf of nationwide classes.
- *The class actions filed in the three counties sought to challenge a broad array of industry practices that touch on most Americans' everyday lives.*[16] In Madison County, lawyers have sought to certify classes over the last three years that included: (1) all Sprint customers nationwide who have ever been disconnected on a cell phone call; (2) all RotoRooter customers nationwide whose drains were repaired by allegedly unlicensed plumbers; (3) all consumers who purchased "limited edition" Barbie dolls that were later allegedly offered for a lower price elsewhere; and (4) private owners of wells in 16 states where a gasoline additive may have seeped into the groundwater. In Jefferson County, the proposed classes included: (1) all individuals nationwide who have paid late fees for video rentals from Blockbuster; (2) all individuals nationwide who have purchased a computer from the Best Buy retail chain with an extended warranty; and (3) all individuals who sought reimbursement for medical expenses or wrecked vehicles from a number of insurance companies that use a common method of assessing such claims (there were a number of similar, overlapping class actions involving these insurance practices in Madison County as well). In Palm Beach County, the proposed classes included: (1) all individuals nationwide who purchased a dietary supplement that the company claimed would eliminate cellulite; (2) all healthcare providers and consumers nationwide who participate in United HealthCare health plans based on the company's interpretation of "medically necessary" treatment; and (3) all holders of seasons tickets to the Florida Marlins who were allegedly defrauded when the team owner reneged on his promise to field a "World Class Baseball Team." Thus, these three county courts have been asked to adjudicate cases that could affect the daily of lives of millions of Americans throughout the country—from what water they drink to how much they pay for their next insurance policy or telephone bill.
- *The class action dockets of the three county courts are monopolized by a small cadre of out-of-county plaintiffs' counsel.*[17] In Madison County, the same five firms appeared as counsel in approximately 45 percent of the cases on the class action docket. Similarly, in Jefferson County, five firms seem to be driving a large percentage of the local class action industry, cumulatively appearing in 32 percent of the class action lawsuits included in the survey. Moreover, most of these firms are not located in the counties where they are choosing to sue; rather, they are distant law firms that travel to these counties for what they perceive as a more favorable forum. In Madison County, the law firms that filed the purported class actions generally were not based in that locale. Of the 66 plaintiffs' firms that appeared in the Madison County case files, 56 (or 85 percent) listed office addresses *outside* Madison County. Similarly, in Jefferson County, Texas, 58 percent of the law firms appearing on complaints listed addresses *outside* the county.
- *Many of the class actions in the three counties were clearly initiated by creative lawyers, not injured consumers.*[18] This was best evidenced by the large number of "cut-and-paste" complaints in which attorneys brought numerous, nearly identical complaints against a number of different defendants in the same industry, criticizing standard industry practices. For example, within a one-week period early this year, six law firms filed nine nearly identical class actions in Madison County, alleging that the automobile insurance industry is defrauding Americans in the way that it calculates claims rates for "totaled" vehicles.[19] Another group of law firms filed two class actions against

[15] *Id.* at 12, 19.
[16] *Id.* at 13–25.
[17] *Id.* at 10–11.
[18] *Id.* at 10.
[19] *Schoenleber v. Prudential Prop. & Cas. Ins. Company*, No. 01–L–99 (filed Jan. 18, 2001); *Lancey v. Country Mut. Ins. Co.*, No. 01–L–113 (filed Jan. 29, 2001); *Richardson v. Progressive Premier Ins. Co. of Illinois*, No. 01–L–149 (filed Feb. 6, 2001); *Edwards v. Mid-Century Ins. Co.*, No. 01–L–151 (filed Feb. 6, 2001); *Knackstedt v. St. Paul Fire and Marine Ins. Co.*, No. 01–L–153 (filed Feb. 6, 2001); *Bordoni v. CGU Ins. Group*, No. 01–L–157 (filed Feb. 6, 2001); *Huff v. Hartford Ins. Co. of Illinois*, No. 01–L–158 (filed Feb. 6, 2001); *Billups v. GEICO Gen. Ins. Co.*, No. 01–L–159 (filed Feb. 6, 2001); *Moore v. Shelter Ins. Co.*, No. 01–L–160 (filed Feb. 6, 2001).

automobile insurers (one of which lists 20-plus defendants) involving reimbursement for replacement vehicle parts.[20] A third group of lawyers filed five class actions in Palm Beach County challenging companies that sell interests in the life insurance policies of critically ill patients (in one of these "viatical settlement" class actions, the plaintiffs' firm was also the named plaintiff).[21] Needless to say, when large numbers of very similar lawsuits attacking many players in the same industry coalesce before the same court and involve the same counsel, the situation does not appear to be mere happenstance. Consistent with this finding, the *St. Louis Post Dispatch* interviewed named plaintiffs in a number of Madison County class actions last year and found that for the most part, their lawyers found them—and not vice versa. One named plaintiff in a case against an insurance company said, "I didn't know anything about it until they came to me."[22] According to a recent *Washington Post* editorial, the "clients" in many class actions are "something of a fiction" because the lawyers are essentially "representing themselves;" this lack of accountability, the Post opined, is one of the reasons that "class actions are unusually prone to abuse."[23]

In this regard, it is instructive to glance at some of the web sites of the plaintiffs' counsel involved in the cases included in the Manhattan Institute study. One firm boasts on its website that it has filed 24 nationwide class actions in Madison County, challenging a broad array of practices in a number of industries. The firm's website advertises that it specializes in class actions that seek less than $500 in damages on behalf of consumers and that it is currently involved in a number of class actions, many of which turned up in the Manhattan Institute study, including: (1) lawsuits against ten automobile insurance companies over the standard "medical payment" provisions in automobile insurance policies; (2) lawsuits against three automobile manufacturers over allegedly defective paint processes; (3) a lawsuit against UPS for its policies for excess value insurance; (4) a suit against the manufacturers of air purifiers; and (5) a suit against Sprint on behalf of everyone who ever got disconnected on a cell phone call.[24] Another firm that is involved in ten of the class actions identified by the research in Palm Beach County advertises on its website that "more claimants mean greater potential liability for defendants. Because there is greater potential liability, these lawsuits become worthwhile for lawyers to prosecute on a contingent-fee basis."[25]

- *The vast majority of the cases had no real nexus to the county in which they were brought.*[26] For example, in Madison County, *none* of the companies listed as defendants was based inside Madison County, and about 37 percent of the named plaintiffs were not county residents. Similarly, in Jefferson County, just 13 of the 173 defendants named in class actions between 1998 and early 2001 were based inside the county, and about 35 percent of the named plaintiffs lived outside the county. In fact, many of the companies targeted in the Madison and Jefferson county cases do not even have a retail presence in the counties where they were sued. Even in Palm Beach County, which had the largest number of suits against local companies, about half of the defendants sued were based outside the county. As the *Washington Pos*t recently noted in an editorial criticizing class action abuses, "Having invented a client, the lawyers also get to choose a court. Under the current absurd rules, national class actions can be filed in just about any court in the country."[27]
- *Many of the county court cases were "copy cat" class actions, duplicative of other pending litigation.*[28] As both the Senate and House Judiciary Committees have noted in recent reports, the jump in the number of state court class

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[20] *Hobbs v. State Farm Mut. Ins. Co.*, No. 99–L–1068 (filed Nov. 2, 1999); *Kelly v. Progressive Premier Ins. Co.*, No. 00–L–277 (filed Apr. 3, 2000).

[21] *Schachter v. Mut. Benefits Corp.*, No. 98–4490 AI (filed July 28, 1998); *Thum v. Accelerated Benefits Corp.*, No. 98–9389 AN (filed Oct. 21, 1998); *Schwartz v. Dedicated Res., Inc.*, No. 98–9393 AD (filed Oct. 21, 1998); *Chancellor v. Future First Fin'l Group, Inc.*, No. 99–4429 AE (filed May 6, 1999); *Brackman v. Dedicated Res., Inc.*, No. 99–9361 (filed Sept. 30, 1999).

[22] *See Filing Of Class Action Suits Surges In Metro East Area, supra* n.10.

[23] *See Actions Without Class, supra* n.1.

[24] *See* The Lakin Law Firm, Class Actions, *at http://www.weblinecommunications.com/practice/* class-action/index.htm.

[25] Berman DeValerio Pease Tabacco Burt & Pucillo: About Class Action Lawsuits: FAQ, *at http://www.bermanesq.com/content/classaction-faq.asp* (cases filed by Burt & Pucillo prior to merger).

[26] Manhattan Institute Study at 9.

[27] *Actions Without Class, supr*a n.1.

[28] Manhattan Institute Study at 11.

> actions has resulted in part from the increasingly common practice of filing "copy cat" class actions—duplicative class actions that assert the same claims on behalf of essentially the same people in a number of different courts.[29] Sometimes these class actions are brought by attorneys vying to take the lead role in any potential lucrative settlement with the defendant. In other cases, the strategy is to go fishing in a number of ponds—to file many identical lawsuits before many different courts, hoping to land the big one with a favorable judge somewhere. Not surprisingly, all of the counties surveyed in the study were sites for "copy cat" class actions. There were even "copy cat" cases within the survey itself. For example, a number of automobile insurance cases filed in Jefferson County sought to certify the same nationwide classes as cases filed in Madison County.

In sum, the Manhattan Institute study found that a small cadre of plaintiffs' counsel are bringing an increasing number of nationwide class actions against a wide range of industries in a small number of courts where they believe that they possess a tactical advantage. These facts tend to confirm what has long been suspected—that the impetus for filing class actions often comes from lawyers eager for substantial attorneys' fees and not individual consumers seeking redress for what they perceive to be real grievances.

B. Plaintiffs' Counsel Are Attracted To State Courts Because Those Forums Provide An Avenue To Manipulation.

While the abuses that draw plaintiffs' counsel to state court are numerous and are documented at great length in the report issued by the Senate Judiciary Committee last year, I would like to focus today on the two forms of abuse that in my view are the most dangerous.

1. State Courts Are Federalizing Substantive And Procedural Law.

The most dangerous trend in state court class actions—and one that has had the biggest impact on the proliferation of "nationwide" lawsuits—is that many state courts are "federalizing" class actions. When I say "federalizing" I am talking about "false federalism"—the current situation in which one state court goes around telling the other 49 state courts what their laws should be. When state courts preside over class actions involving claims of residents of more than one state (especially nationwide class actions) as they are increasingly inclined to do, they often end up dictating the *substantive* laws of other states, sometimes over the protests of officials in those other jurisdictions.

The best-known example of this is the case of *Avery v. State Farm Mut. Auto Ins. Cos.*, which involved allegations that an automobile insurance company had breached its contracts with all of its policyholders nationwide by requiring the use of less expensive non-original equipment manufacturer parts—a standard industry practice.[30] In that case, an Illinois county court (not Madison County) 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, which 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]

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[29] *The Class Action Fairness Act of 2000*, S. REP. NO. 106–420, 106th Cong. (2000) ("Senate Report") at 19 ("Yet another common abuse [of the class action device in state courts] is the filing of 'copy cat' class actions (*i.e.*, duplicative class actions asserting similar claims on behalf of essentially the same people)."). As noted in the Senate Report, "sometimes these duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers, [and] in other instances, the 'copy cat' class actions are blatant forum shopping—the original class lawyers file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class." *Id.* When these cases are filed in state courts, there is no way to coordinate or consolidate the cases; the cases must be litigated in an "uncoordinated, redundant fashion." *Id.* "The result is enormous waste—multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people." *Id.* at 19–20. "As a result, State courts and class counsel may 'compete' to control the cases, often harming all the parties involved." *Id. See also Interstate Class Action Jurisdiction Act of 1999*, H.R. REP. NO. 106–320 (1999) at 9.

[30] 746 N.E.2d 1242 (Ill. Ct. App. 2001).

encourage competitive price control." [31] According to the appellate court, this testimony was irrelevant because of the trial court's finding that the parts were inferior.[32] As *The New York Times* reported at the time, 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."[33]

The impact of the *Avery* decision is already apparent in the growing number of class actions that have been filed in Illinois state courts, including Madison County, challenging standard insurance industry practices. One case that turned up in the Manhattan Institute study that was brought against State Farm and 19 other insurance companies making exactly the same allegations as the *Avery* case. The Complaint seeks to certify a class consisting of State Farm customers who purchased policies too late to be included in the *Avery* class, as well as customers of 19 other insurance companies. Plaintiffs' counsel in this case were apparently so sure of their ability to extract a settlement based on the *Avery* decision that they did not even bother to pay lip service to the fundamental rules governing class actions by finding representative plaintiffs who hold policies with each of the defendant insurance companies; rather, the case is brought by one named plaintiff with one car insurance policy against 20 insurance companies.

All told, the Manhattan Institute study turned up 26 nationwide class action law suits in Madison County targeting the insurance industry, including cases challenging the way the insurance industry determines when to reimburse medical expenses resulting from car accidents and how the industry calculates the value of wrecked vehicles. This swelling in insurance class actions has clearly resulted from the willingness of certain Illinois state courts to serve as free-roving insurance commissioners by issuing edicts affecting the way insurance companies can do business in 49 other states.

The danger posed by these efforts to federalize state law extend far beyond insurance. The dockets of the three surveyed counties in the Manhattan Institute study included numerous cases in which plaintiffs' counsel sought to have locally elected judges in county courts set policies in areas as diverse as warranties, land use rights, plumbing licenses, environmental protection, advertising campaigns, bank billing practices, employee investment plans, and numerous other broad-ranging issues for 49 other states—and 3,065 counties—in addition to their own. While some of the class actions pending in these jurisdictions may seem trivial (*e.g.*, movie rental late fees, the price of Barbie dolls), even these cases (particularly if they are decided incorrectly) could have a dramatic impact on commerce by limiting how companies can market and charge for their products.

The resulting question is a simple one: Who should be charged with responsibility for handling such types of large-scale, interstate class actions involving issues with significant national commerce implications—federal judges who are selected by the President and confirmed by the U.S. Senate or state court judges who are elected by a few thousand voters in a rural county? As the Senate Judiciary Committee has noted, "[c]learly, a system that allows State court judges to dictate national policy from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism."[34]

In addition to federalizing substantive law, state courts are also federalizing *procedural* class action law. Even though only a minority of state courts are routinely failing to exercise sound judicial judgment on class action issues, those courts have become magnets for a wildly disproportionate share of the interstate class actions that are filed. In short, attorneys file their class actions in the minority of courts that are most likely to have a *laissez-faire* attitude toward the class device. By establishing themselves as the lowest common denominator, that distinct minority of state courts are essentially setting the national norm; they are effectively dictating national class action policy.

A dramatic example of this phenomenon was provided in the testimony of Dr. John B. Hendricks at the March 1998 House hearing. He offered a docket study of state court class actions in one jurisdiction showing (a) that class actions had become disproportionately large elements of the dockets of some county courts, (b) that many of the class actions were against major out-of-state corporations lacking any connection with the forum county, and (c) that the proposed classes in those cases typically were not limited to in-state residents and often encompassed residents of

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[31] *Id.* at 1254.

[32] *Id.*

[33] *See* Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. Times, Sept. 27, 1998, § 1, at 29.

[34] Senate Report at 20.

all 50 states. Dr. Hendricks identified one state court judge who had granted class certification in 35 cases over the preceding two years. As Dr. Hendricks stated, "[t]hat's a huge number of cases when one considers that during 1997, all 900 federal district court judges in the United States combined certified a total of only 38 cases for class treatment." The study failed to uncover any instance in which that judge had ever denied class certification. Clearly, that court alone was playing a radically disproportionate role in setting national class action policy.[35]

2. State Courts Are Approving Settlements That Benefit Only Lawyers: Class Attorneys Receive Excessive Fees With Little Or No Recovery For The Class Members Themselves.

A second form of abuse that has resulted from the explosion in state court class actions is the approval of settlements that provide only nominal benefits to the people who are ostensibly being represented—the class members themselves—while offering a bonanza in attorneys' fees for the plaintiffs' lawyers. According to the Institute for Civil Justice/RAND study, class counsel in state court consumer class action settlements (*i.e.*, non-personal injury monetary relief cases) frequently walk off with more money than all of the class members combined.[36] Last year, an editorial in the *Tampa Tribune* referred to this phenomenon as "jackpot justice"—settlements that provide little, if any relief, to the class members, make their lawyers rich, and ultimately result in higher prices for consumers.[37]

In the now infamous *Bank of Boston* settlement,[38] an Alabama state court judge approved a settlement that awarded up to $8.76 to individual class members, while the class counsel received more than $8.5 million in fees. 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. 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."[39]

While the *Bank of Boston* settlement is the best-known (and perhaps the most egregious) example, other settlements that provided millions to the lawyers—but only pennies to the class members—abound:

- In a case in Madison County involving cable late fees, the customers received no compensation for billing problems; the cable operator was required to change its late fee policies prospectively; and plaintiffs' counsel received $5.6 million for their efforts.[40]
- The settlement in a suit involving souvenirs and merchandise sold at NASCAR Winston Cup stock car races gave consumers coupons toward the purchase of more merchandise; their lawyers were eligible to receive more than $2 million.[41]
- In a California state court case regarding the size of computer monitor screens, the court approved a settlement that offered $13 rebates to consumers who purchased new monitors. Their lawyers received approximately $6 million in fees.[42]
- Customers in a suit against a telephone company in Texas state court received three optional phone services for three months or a $15 credit if they already subscribed to those services. The lawyers pocketed $4.5 million in fees.[43]

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[35] The Alabama Supreme Court finally issued several rulings in 1999 that have dampened this behavior, and the Alabama legislature has established restrictions as well. But when such action is taken in one state, counsel simply move the class action show to another jurisdiction where the courts have shown a lax attitude toward regulating the class device; many believe that is why so many class actions are sprouting in Jefferson County, Texas and Madison County, Illinois.

[36] ICJ/RAND Study at 21–22.

[37] Patrick Slevin, *Class-Action Lawsuit Abuse Threatens Quality Of Life For All Floridians*, Tampa Tribune, Sept. 16, 2000.

[38] *Kamilewics v. Bank of Boston*, 92 F.3d 507 (7th Cir. 1996).

[39] "Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary," 105th Cong. (1997) (statement of Martha Preston).

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

[41] Robert D. Mauk, *Lawyers Win Big In Class-Action Suits: Is It Justice Or Greed*?, Charleston Daily Mail, June 19, 2001

[42] Jerry Heaster, *Enough Already With Lawsuits*, Kansas City Star, July 10, 1999, at C1.

[43] Editorial, *We All Pay Dearly For Costly Class Actions*, Corpus Christi Caller-Times, January 8, 2001.

One of the cases cited in the Manhattan Institute study involved a recent settlement in a case alleging that a video rental company improperly assessed late fees. Under the proposed settlement (which has reportedly received preliminary approval from the Jefferson County court), customers would get varying amounts of benefits.[44] For example, a customer who claimed payment of $30 in late fees would get two free movie rentals and five $1 coupons good toward the purchase of non-food items.[45] Initially, the video rental company announced that the various coupons to be issued would have a face value of $460 million, but the company has now acknowledged that fewer than 10 percent of the coupons will be used and that it will not be changing its late fee policy.[46] Plaintiffs' class counsel proposed that they be paid $9.25 million in fees and expenses. One commentator has observed that "the real winners in the settlement are the lawyers who sued the company," who will be paid "in cash, not coupons."[47]

A report about the video rental settlement in the *Washington Post* prompted the following letter to the editor from one reader:

> [This] class-action settlement illustrates the need for common-sense legal reform in our country, particularly in regard to class-action lawsuit abuse. . . .
>
> What a sham! Class action lawsuits have become a cottage industry for personal injury lawyers looking to make millions in legal fees, on behalf of consumers who receive token damages as best. From cases involving video rentals to managed care, consumers are being used simply as pawns in big-money schemes by some sanctimonious, greedy lawyers.
>
> It is far past time to curb the abuses of class-action lawsuits.[48]

II. H.R. 2341 IS A MODEST STEP THAT WOULD BOTH REDUCE CLASS ACTION ABUSE IN STATE COURTS AND FULFILL THE FRAMERS' CLEAR INTENT REGARDING THE PROPER JURISDICTION OF FEDERAL COURTS.

While the growing number of state court class actions and the related increase in class action abuse have raised serious and troubling questions for our nation's economy and judicial system, a key source of the problem—the exclusion of most class actions from federal court—is quite easily remedied. Currently, class actions are excluded from the category of so-called "diversity" cases—cases involving citizens from different states and substantial sums of money—that are included in the jurisdiction of federal courts. As a result, most class actions are relegated to state court even though they are subject to the same prejudices and have the same economic significance as other large commercial cases that are afforded the protections of federal court. By correcting this anomaly, Congress could ensure that interstate class actions receive the same protections as other cases implicating interstate commerce—*i.e.*, that they are adjudicated by federal judges who "operate[] according to reasonable rules and [are] accountable to the entire country."[49] That is the aim of H.R. 2341—and why it is an important step toward class action reform.

A. The State Court Class Action Problem Results From An Anomaly In Federal Jurisdictional Law That Keeps Most Class Actions Out Of Federal Court.

Article III of the U.S. Constitution establishes that federal courts can hear not only cases presenting federal law issues (that is, lawsuits asserting constitutional or federal statutory claims, or involving the federal government as a party), but also so-called "diversity" cases, defined as suits "between Citizens of different States." In establishing such "diversity" jurisdiction, the Framers sought to address concerns that local biases would infect state courts proceedings involving disputes between in-state plaintiffs and out-of-state defendants.[50] In short, they feared that non-local

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[44] *See* David Koenig, *Blockbuster tried to settle class-action lawsuits over late fees*, ASSOCIATED PRESS, June 6, 2001.

[45] Wendy Wilson, *Blockbuster to settle suits on late fees*, Daily Variety, June 4, 2001, at 10.

[46] Cynthia Corzo, *Blockbuster Settles Class-Action Lawsuit in a Smart Business Move*, Miami Herald, June 10, 2001.

[47] Monica Roman, *A Blockbuster of a Legal Bill*, Bus.Week, June 18, 2001, at 46.

[48] Phillip D. Bissett, *Letter to the Editor*, Wash. Post, June 8, 2001, at A28.

[49] *Actions Without Class, supra* n.1.

[50] *See Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) ("The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal] courts . . . jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant[ ] resides."); *Pease v. Peck*, 59 U.S. (18 How.) 518, 520 (1856); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 307 (1816). *See also* THE FEDERALIST NO. 80, at 537–38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities

Continued

defendants might be "hometowned." Diversity jurisdiction was designed not only to diminish this risk, but also "to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents."[51] The Framers reasoned that some state courts might discriminate against interstate commerce activity and out-of-state businesses engaged in such activity and that federal courts therefore should be allowed to hear diversity cases so as to ensure the availability of a fair, uniform and efficient forum for adjudicating interstate commercial disputes.[52] Thus, since the nation's inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. Constitutional scholars have argued that "[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts."[53]

Class actions are a type of lawsuit strongly implicated by these concerns, since they: (1) typically involve interstate commerce; (2) clearly have strong national economic implications; and (3) are particularly vulnerable to local prejudice. However, the law governing diversity jurisdiction, 28 U.S.C. § 1332, has been interpreted by courts in two ways that have essentially eliminated the exercise of such jurisdiction over the vast majority of class actions.

First, as applied to class actions, the "diversity" element of Section 1332 has been interpreted to require "complete diversity"—*i.e.*, to bar federal jurisdiction over class actions if any of the named plaintiffs are citizens of the same state as any of the named defendants. Thus, plaintiffs' counsel often seek to keep their cases out of federal court by finding a plaintiff who comes from the state where a defendant corporation is incorporated or has its main place of business, or by suing one local subsidiary or retailer to defeat the complete diversity requirement. It is not atypical, for example, to come across nationwide class actions against major automobile manufacturers that also name as a defendant one individual automobile dealer in the state where the plaintiff is suing.

Second, the "amount-in-controversy" threshold of Section 1332 has been traditionally interpreted to require that *each and every* member of the proposed class assert separate and distinct claims exceeding $75,000.[54] Although some federal courts have questioned the breadth and current vitality of this rule (suggesting that only one plaintiff must meet the $75,000 minimum),[55] this difficult-to-satisfy prerequisite still bars most interstate class actions from federal court. This too has led to careful pleading by plaintiffs' lawyers to stay out of federal court.

Not surprisingly, the Manhattan Institute study found that most of the complaints in the three counties surveyed were carefully drafted to take advantage of these two loopholes and thereby evade federal jurisdiction. For example, a number of complaints sought to cap damages for the class members at $74,999 each. (These kinds of "claims-shaving" tactics raise disturbing issues of adequacy-of-representa-

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to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles [up]on which it is founded.").

[51] *See The Class Action Fairness Act of 1999: Hearing before the Subcomm. On Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, S. HRG. NO. 106–465, 106th Cong. (1999) at 100 (prepared statement of Prof. E. Donald Elliott, Yale Law School). *See also* James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEX L. REV. 1, 16 (1964). *See also Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) ("[Even if] tribunals of states will administer justice as impartially as those of the nation, to the parties of every description, . . . the Constitution itself . . . entertains apprehensions of the subject . . . , [such] that it has established national tribunals for the decision of controversies between . . . citizens of different states.").

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

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

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

[55] *See, e.g. Rosmer v. Pfizer Corp.*, 263 F.3d 110, 114–18 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001); *In re Abbott Labs.*, 51 F.3d 524, 526–27 (5th Cir. 1995), *aff'd sub nom., Free v. Abbott Labs.*, 120 S. Ct. 1578 (2000) (per curiam; affirmance on tied vote); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930–34 (7th Cir. 1996).

tion and due process. While a single plaintiff suing in his own name may limit his claims in order to stay in state court, counsel seeking to represent a class have a fiduciary obligation to the absentee member of the class, making it improper to unilaterally "waive" claims with no authorization from the claimants.)

Other complaints brought against out-of-state defendants used the tactic I mentioned previously—naming one in-state dealer or subsidiary in order to defeat the complete diversity requirement. The inherently fraudulent nature of this tactic is obvious: although all putative class members may conceivably have a claim against the defendant corporation, few (if any) of the putative class members have had any dealings with the token in-state defendant(s), meaning that there is no basis for a classwide judgment against those defendants. The corporation is the only real defendant; the others are there simply to prevent removal of the action to federal court.

In short, the combination of the "complete diversity" and "amount in controversy" limitations on diversity jurisdiction have been interpreted in a way that keeps class actions out of federal courts while allowing in smaller cases with far fewer repercussions on interstate commerce. As the Senate Judiciary Committee observed last year, the current state of the law

> leads to the nonsensical result under which a citizen can bring a "federal case" by claiming $75,001 in damages for a simply slip-and-fall case against a party from another State, while a class of 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 run-of-the-mill State law-based tort 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 [claimants] from multiple States, and hundreds of millions of dollars—cases that have significant implications for the national economy.[56]

B. A Growing Body Of Lawyers, Judges And Scholars Has Recognized That Congress Should Correct This Anomaly And Enable More Class Actions To Be Heard In Federal Court.

Over the last few years, there has been a growing recognition that the jurisdictional laws that are keeping most class actions out of federal court should be corrected:

- The leading treatise on federal civil procedure has declared that current principles governing federal diversity jurisdiction over class actions make no sense: *"The traditional principles in this area have evolved haphazardly and with little reasoning. They serve no apparent policy. . . ."*[57]
- In a 1999 decision, the U.S. Court of Appeals for the Eleventh Circuit *"apologi[zed]"* for its "seemingly arbitrary" and "anomal[ous]" ruling sending a large 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."[58] 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 section 1332 would have had in mind."[59]
- In that same case, Judge John Nangle, for many years the chair of the federal Judicial Panel on 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

[56] Senate Report at 14.

[57] 14B Charles A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE, § 3704, at 127 (3d ed. 1998) (emphasis added).

[58] *See Davis v. Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999) (emphasis added).

[59] *Id.*

counsel. . . . *[T]he present [jurisdictional] case law does not . . . accommodate the reality of modern class action litigation and settlements.*"[60]

- Similarly, in an opinion by Judge Anthony Scirica (chairman of the federal Judicial Conference's Standing Committee on Rules and Procedure), the U.S. Court of Appeals for the Third Circuit observed that *"national (interstate) class actions are the paradigm for federal diversity jurisdiction* because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises," but that "at least under the current jurisdictional statutes, such class actions may be beyond the reach of the federal courts."[61]
- In 1999, former Solicitor General Walter Dellinger testified before the House Judiciary Committee, if Congress were to start over and write a new federal diversity jurisdiction statute, interstate class actions would be the first category of cases to be included within the scope of the statute.[62]
- Even attorneys and scholars associated with the plaintiffs' bar have voiced support for expanding 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."[63] Similarly, Elizabeth Cabraser, a leading plaintiffs' class action attorney, opined that "much of the confusion and lack of consistency that is currently troubling practitioners and judges and the public in the class action area could be addressed through the exploration, the very thoughtful exploration, of legislation that would increase federal diversity jurisdiction, so that more class action litigation could be brought in the federal court."[64]

There are several bases for the conclusion reached by all of these authorities—that more interstate class actions should be subject to federal court diversity jurisdiction.

First, because these cases clearly have significant interstate commerce ramifications, federal supervision and management of such cases is desirable. As Chief Justice Marshall recognized, the Commerce Clause reflects the substantial federal interest in regulating "that commerce which concerns more States than one" (as opposed to "the exclusively internal commerce of a State").[65] Clearly, that federal interest is implicated by interstate class actions, which typically involve more money, more people in more states, and more interstate commerce ramifications than any other type of lawsuit.

Second, the rationales underlying the constitutionally established concept of diversity jurisdiction apply fully to interstate class actions. Such cases typically involve in-state plaintiffs suing out-of-state defendants, thereby raising the specter of local court biases against the out-of-state defendant.

Third, unlike state court judges who are elected to office and subject to political pressure, federal judges are selected by the President of the United States and are constitutionally insulated from political pressure because of their tenure and salary protection. Consider this: In the most recent judicial election in Jefferson County, approximately 55,000 people voted for the judge who was elected to the 60th Judicial District.[66] That amounts to just one-tenth of one percent of the 50.4 million people who voted for the President who was elected in the same election[67] and who is

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[60] *Id.* at 798–99 (emphasis added).

[61] *In re Prudential Ins. Co. America Sales Practice Litig.*, 148 F.3d 283, 305 (3d Cir. 1998) (emphasis added). Agreement with this view can also be found in *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1079 (11th Cir. 2000) (noting that there are "persuasive reasons" for viewing the class action in its totality for purposes of determining the existence of federal jurisdiction).

[62] *The Interstate Class Action Jurisdiction Act of 1999: Hearing on H.R. 1875 and H.R. 2005 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Hon. Walter E. Dellinger), *available at http://www.house.gov/judiciary/dell0721.htm.*

[63] *See* Federal News Service Transcript, *Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts, House Comm. on the Judiciary* (March 9, 1998), at 19 ("FNS Transcript").

[64] *Id.* at 33–34.

[65] *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194–195 (1824).

[66] Jefferson County Election Results, *available at www.co.jefferson.tx.us/cclerk/election—2000.htm.*

[67] 2000 Official Presidential General Election Results, *available at http://fecweb1.fec.gov/pubrec/ 2000presgeresults.htm.*

responsible—under the U.S. Constitution—for nominating judges to the federal bench. While the Jefferson County judge will face re-election in just four years, the federal judge has tenure and salary protection for life. Which of these judiciaries should be charged with responsibility for handling large-scale, interstate class actions involving issues with significant national commercial implications?

Fourth, on the whole, federal courts are better equipped to deal with the substantial burdens of presiding over the sprawling, complex proceedings that are often triggered by the filing of an interstate class action. While our federal courts are facing substantial burdens, state courts are as well. The civil caseload in state courts has grown much more rapidly than the federal court civil caseload.[68] Federal courts have more resources to meet this challenge.[69] Virtually all federal court judges have two or three law clerks on staff; state court judges often have none.[70] Federal court judges are usually able to delegate some aspects of their class action cases (*e.g.*, discovery issues) to magistrate judges or special masters; such personnel are usually not available to state court judges. And federal courts are authorized to transfer and consolidate similar class actions from various states before a single judge in the interest of efficiency;[71] state courts lack such consolidation authority and therefore must engage in the wasteful exercise of separately handling such overlapping cases.

Fifth, federal courts have significant institutional advantages over state courts in adjudicating interstate class actions. For example, both the Senate and House Judiciary Committees have noted in recent reports that the jump in the numbers of state court class actions has resulted in part from the increasingly common practice of filing "copy cat" class actions—duplicative class actions that assert the same claims on behalf of essentially the same people in a number of different courts.[72] Sometimes these class actions are brought by attorneys vying to take the lead role in any potential lucrative settlement with the defendant. In other instances, the "copy cat" cases are part of a strategy is to go fishing in a number of ponds—to file many identical lawsuits before many different courts, hoping to land the big one with a favorable judge somewhere. When such "copy cat" class actions are filed in federal courts, the federal judiciary can address this problem by establishing a multi-district litigation ("MDL") proceeding pursuant to 28 U.S.C. § 1407; however, there is no analogous multi-state procedure to address the duplication and waste caused by multiple class action filings in different states.

Similarly, the congressional record reflects cases in which counsel have effectively asked state courts to overrule the denial of class certification by federal courts.[73] This strategy, which takes forum shopping to the extreme, is generally unavailable to the extent that class actions are pending in the federal courts because, as noted previously, "competing federal court class actions can be consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation."[74]

Sixth, federalism principles dictate that interstate class actions be heard by federal courts because 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). What business does a state court judge elected by the several thousand

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[68] Civil filings in state trial courts of general jurisdiction have increased 28 percent since 1984 (versus an increase of only 4 percent in the federal courts). *See* B. Ostrom & N. Kauder, *Examining the Work of State Courts*, STATE JUSTICE INSTITUTE, 1997, at 15 (Court Statistics Project 1998). Most tellingly, in most jurisdictions, each state court judge is assigned an average of 1,000 to 2,000 new cases each year. Id. In contrast, each federal court judge was assigned an average of 500 cases last year. *See* L.H. Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 REPORT OF THE DIRECTOR 20, 22 (2001) (Administrative Office of the U.S. Courts) The federal court trend is downward. Since 1997, there has been an eight percent decrease in the number of pending civil cases in our federal courts nationwide. *Id.* at 22.

[69] Senate Report at 16.

[70] *Id.*

[71] *See* 28 U.S.C. § 1407.

[72] Senate Report at 19 ("Yet another common abuse [of the class action device in state courts] is the filing of 'copy cat' class actions (*i.e.*, duplicative class actions asserting similar claims on behalf of essentially the same people)."). As noted in the Senate Report, "sometimes these duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers, [and] in other instances, the 'copy cat' class actions are blatant forum shopping—the original class lawyers file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class." *Id.* When these cases are filed in state courts, there is no way to coordinate or consolidate the cases; the cases must be litigated in an "uncoordinated, redundant fashion." *Id.* "The result is enormous waste—multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people." *Id.* at 19–20. "As a result, State courts and class counsel may 'compete' to control the cases, often harming all the parties involved." *Id. See also* House Report at 9.

[73] Senate Report at 21.

[74] Advisory Comm. Memo at 14.

residents of a small county in Illinois have in telling the state of Massachusetts what its laws mean? Why should a Jefferson County state court judge be rendering interpretations of Massachusetts law that are binding on Massachusetts residents and that cannot be appealed to or reviewed by Massachusetts courts? Such matters of interstate comity are more appropriately handled by federal judges appointed by the President and confirmed by the Senate. Further, federal courts have the authority (which they frequently exercise[75]) to use "certified questions" to ask state courts to advise how their laws should be applied in uncharted situations.

Finally, as I noted previously, some state courts have shown a tendency to approve settlements that generously compensate the class counsel while giving little or nothing to the people on whose behalf the action supposedly was brought—the unnamed class members.[76] In contrast, a Federal Judicial Center study found that "[i]n most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys' fees by substantial margins."[77] In this same vein, the Senate Judiciary Committee report documented numerous problems that it identified with the adjudication of interstate class actions in state courts (not federal courts)—including the failure to carefully apply class certification requirements (some of which have due process underpinnings), the use of the class device as "judicial blackmail" (giving class counsel leverage to obtain unwarranted settlements), and denials of defendants' due process rights (denying the opportunity to contest plaintiffs' claims).[78]

C. H.R. 2341 Would Address These Concerns By Ensuring That Large Interstate Class Actions Can Be Heard In Federal Court And Protecting Consumers From Common Forms Of Class Action Abuse.

H.R. 2341 offers a simple, commonsense solution to the jurisdictional anomaly that prevents federal courts from hearing most class actions, and the continued and growing class action abuse that is taking place in a number of state courts. Moreover, as drafted in H.R. 2341, this solution would be implemented without undesirable side effects. The bill would not alter any party's substantive legal rights. The bill would not permit removal of truly local disputes; such matters would remain within the exclusive purview of the relevant state courts. And the bill would not preempt state courts' authority to hear class actions of any sort; if the parties prefer to litigate a particular interstate class action before an appropriate state court, they may do so.

Instead, H.R. 2341 would simply amend current law by extending federal diversity jurisdiction to cover any class action that involves a substantial amount of money (*i.e.*, with an aggregate amount in controversy in exceeding $2 million) in which there exists "partial diversity" between plaintiffs (including all unnamed members of any plaintiff class) and defendants—an approach wholly consistent with Article III of the Constitution and one that would enable federal courts to hear class actions that are truly interstate in nature.[79] This expanded jurisdiction would not encompass disputes that are *not* interstate in nature—cases in which a class of citizens of one state sue one or more defendants that are citizens of that same state would remain subject to the exclusive jurisdiction of state courts. Further, federal courts would be required to abstain from hearing certain local cases and state action

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[75] *See* American Judicature Society (State Justice Institute), CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 28, 34–35 (1995) (noting that over a several year period, federal appeals and trial courts had certified hundreds of state law questions to state appellate courts for resolution).

[76] *See* Senate Report at 16–17 (citing numerous examples).

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

[78] Senate Report at 15–22.

[79] *See, e.g., State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) ("in a variety of contexts, [federal courts] have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens"). In *State Farm*, the Court noted that the concept of "minimal diversity" providing the basis for diversity jurisdiction in the class action context had already been discussed in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). On several subsequent occasions, the Court has reiterated its view that permitting the exercise of federal diversity jurisdiction where there is less than complete diversity among the parties is wholly consistent with Article III. *See, e.g., Carden v. Arkoma Associates*, 494 U.S. 185, 199–200 (O'Connor, J., dissenting) ("Complete diversity . . . is not constitutionally mandated."); *Newman-Green, Inc. v. Alfonzo-Larrian*, 490 U.S. 826 (1989) ("The complete diversity requirement is based on the diversity statute, not Article III of the Constitution."); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978) ("It is settled that complete diversity is not a constitutional requirement."); *Snyder v. Harris*, 394 U.S. 332, 340 (1969) (in a class action brought under Fed. R. Civ. P. 23, only the citizenship of the named representatives of the class is considered, without regard to whether the citizenship of other members of the putative class would destroy complete diversity).

cases. Thus, contrary to what has been argued by some critics, the bill would not move all class actions into federal court. Consistent with existing diversity jurisdiction precepts, it would preserve exclusively to state court jurisdiction what are primarily local controversies.

H.R. 2341 would also amend the laws governing removal of cases to federal court to enable the removal of any purported class action that falls within the additional grant of federal diversity jurisdiction over class actions described above—and to prevent plaintiffs' counsel from trying to game the system in order to stay out of federal court. To that end, the bill would:

- Amend 28 U.S.C. § 1441(b) to confirm defendants' ability to remove all purported class actions qualifying for federal jurisdiction under the revised section 1332 (as discussed above) regardless of the state in which the action was originally brought;
- Amend 28 U.S.C. § 1446(b) to provide that a defendant could remove a putative class action at any time (even at a date more than one year after commencement of the action), so long as the action is removed within 30 days after the date on which the defendants may first ascertain (through a pleading, amended pleading, motion order or other paper) that the action satisfies the jurisdictional requirements for class actions (as set forth in the proposed section 1332(b)). This provision is intended to prevent parties from filing cases as individual actions and then recasting them as purported class actions (or as broader class actions) after the one-year deadline for removal has passed;
- Amend 28 U.S.C. § 1446(a) to allow any class action defendant to remove an action. At present, an action typically may be removed only if *all* defendants concur. This provision is intended to address situations in which local defendants with little at risk or defendants "friendly" to the named plaintiffs may preclude other defendants with substantial exposure from gaining access to federal court; and
- Authorize *unnamed class members* (not just defendants) to remove cases. This even-handed change would allow class members to move cases to federal court (within a reasonable time after notice is given) if they are concerned that the state court has not or will not adequately protect the absent class members' interests.

To avoid leaving cases in federal court that do not warrant the attention of the federal judiciary, the legislation would also require a federal court to dismiss any case (that is in federal court solely due to the expanded diversity jurisdiction provisions) that it has determined may not be afforded class treatment. However, the bill specifies that an amended action may be refiled in state court. Further, the bill also protects the interests of the unnamed class members by specifying that federal tolling law will apply to the limitations periods on the claims asserted in the failed class action.

In addition to these jurisdictional provisions, the bill also contains a "consumer class action bill of rights," which seeks to help consumers understand their rights when they become members of a class action and to protect consumers from abusive settlements. Under this section of the bill:

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

In urging Congress to enact legislation to address the class action problem, a recent *Washington Post* editorial stated:

The focus of tort reform should be to inject the world of class actions with more accountability to real clients and with some consequences to lawyers who file frivolous claims. The first step is to make it easier to shift state court cases into the federal system. This would ensure that national classes get handled by a court sys-

tem that operates according to reasonable rules and is accountable to the entire country. A bill to do that is pending in Congress. Passing it would be a place to start.[80]

The bill referred to in that editorial is, of course, H.R. 2341. I respectfully add my voice to that of the *Washington Post* and numerous others in urging this Committee to act favorably on the bill and in urging Congress to pass it forthwith.

Chairman SENSENBRENNER [presiding]. Thank you, Mr. Beisner. Ms. Bankston.

TESTIMONY OF HILDA BANKSTON, FORMER SMALL BUSINESS OWNER, JEFFERSON COUNTY, MISSISSIPPI

Ms. BANKSTON. It is an honor and a privilege for me to be here today. Thank you, Mr. Chairman and Members of the Committee. I am pleased today to testify about a subject with which I have become all too familiar: class action lawsuit abuses in Jefferson County, Mississippi.

While I understand that class actions are not allowed under Mississippi State law, what is permitted is the consolidation of lawsuits. These consolidations involve Mississippi plaintiffs or defendants who are included in cases along with plaintiffs from across the country. While I am not a lawyer, they seem like class actions to me. I understand the legislation you are considering would cover the kinds of cases we have in Mississippi as well.

I would like to discuss the consequences of these unchecked abuses, both to businesses and the community as a whole, that have turned my American dream into an American nightmare. I am not your typical Southern belle.

I was born in Guatemala and moved to New York in 1958 in search of a future and to be with my brother who was my legal guardian. After a few years of working factory jobs and at the local automat—my English was not that good—I decided to serve my new homeland. Wanted to travel, I enlisted in the United States Marine Corps. The travel between South and North Carolina was not quite as exciting as I expected, but it did come with some perks. Two and-a-half years into my tour I met my husband, Navy Seaman Fourth Class Mitchell Bankston at Camp Lejeune.

My husband had a dream, to own and run a small pharmacy. After graduation from Ole Miss, an internship in Vicksburg, and jobs in Greenville and Meridian, he found a drugstore he could call his very own in Fayette in 1971. Through long hours and hard work, Mitch built a solid reputation as a caring, honest pharmacist in Fayette; the town we called home and where we raised our two sons.

Then in 1999, our world and dreams were shaken to their foundation. Bankston Drugstore was named as a defendant in the national Fen-phen class action lawsuit. Why were we singled out as a defendant in a massive suit against one of the Nation's largest drug companies? We filled prescriptions of this FDA-approved drug for patients in Jefferson County. We kept accurate records of prescriptions dispensed as required by law for 5 years, providing the trial lawyers with a database of potential clients, and we were the only drugstore in Jefferson County. By naming us as a defendant, the trial lawyers were able to keep the case in the county.

[80] *Actions Without Class, supra* n.1.

Mitch was mostly concerned about what our customers would think. In a small town like Fayette news travels fast, and Mitch had worked hard to gain the trust and respect of the community. But at that time we did not understand the size and scope of the mountain that had been planted in front of us. Our life's work became a way for trial lawyers to cash in on lucrative class actions; a back door into the Jefferson County court system.

Sadly, within 3 weeks of being named in the lawsuit, my husband, a 58-year-old in good health, died suddenly of a massive heart attack. The shock had barely subsided in December when I was called to testify in the first Fen-Phen trial. By January 1, 2000, I was out of the pharmacy business, having sold the drugstore but still deeply mired in lawsuits.

Bankston Drugstore has been named as a defendant in hundreds of lawsuits brought by individual plaintiffs against a variety of pharmaceutical manufacturers: Fen-Phen, Propulsid, Rezulin, Baycol. The book work has become so extensive that I have lost track of the specific cases. Today, even though I no longer own the drugstore I still get named as a defendant time and again.

Jefferson is a poor county and the attorneys handling these claims have aggressively marketed their actions as the same as winning the lottery. Nor are their efforts hurt by rumors that five plaintiffs in the first Fen-Phen case split $150 million. The lawsuit frenzy has done more harm than good to our community. Businesses will not relocate to Jefferson County because of fear of litigation, and the county's lawsuit-friendly environment has driven liability insurance rates through the roof giving small business owners all over Fayette additional headaches they do not need.

No small business should have to endure the nightmares I have experienced. Class action attorneys have caused me to spend countless hours retrieving information for potential plaintiffs. I have been dragged into court on numerous occasions to testify. I have endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And I have spent many sleepless nights wondering if my business will survive with all the weight of lawsuits cresting over it.

These lawsuits continue to this day, 2 years after I sold my business. I am not a lawyer, but to me something is wrong with our legal system when innocent bystanders are used by lawyers seeking to strike it rich in Jefferson County, or anywhere else. I urge you to pass legislation that reforms our legal system and prevents lawsuit abuses such as those that have plagued my business and my family for the past 3 years.

Thank you for your attention. I would be happy to answer any questions you may have.

[The prepared statement of Ms. Bankston follows:]

PREPARED STATEMENT OF HILDA BANKSTON

Thank you Mr. Chairman and Members of the Committee. I am pleased today to testify about a subject with which I have become all too familiar: class action lawsuit abuses in Jefferson County, Mississippi.

I would like to discuss the consequences of these unchecked abuses—both to businesses and the community as a whole—that have turned my American dream into an American nightmare.

I am not your typical Southern belle. I was born in Guatemala and moved to New York in 1958 in search of a future and to be with my brother who was my legal

guardian. After a few years of working factory jobs and at the local automat—my English wasn't as good in those days—I decided to serve my new homeland. Seeking travel and expanded horizons, on the advice of a friend, I enlisted in the Marines. The travel—between South and North Carolina—wasn't quite as exciting as expected, but it did come with quite a few perks. Three-and-half years into my tour, I met my husband, Navy Seaman Fourth Class Mitchell Bankston, at Camp Lejeune.

My husband had a dream—to own and run a small pharmacy. After graduation from Ole Miss, and stints in Vicksburg, Greenville and Meridian, he found a drugstore he could call his very own in Fayette in 1971.

Through long hours and hard work, Mitch built a solid reputation as a caring, honest pharmacist in Fayette—the town we called home and where we raised our two sons.

Then, in 1999, our world and dreams were shaken to their foundation. Bankston Drugstore was named as a defendant in the national Fen-Phen class action lawsuit. Why were we singled out as a defendant in a massive suit against one of the nation's largest drug companies? We filled prescriptions of this FDA-approved drug for patients in Jefferson County. We kept accurate records of prescriptions dispensed—as required by law—for five years, providing the trial lawyers with a virtual database of potential clients. And, we were the only drugstore in Jefferson County. By naming us as a defendant, the trial lawyers were able to keep the case in the county.

Mitch was mostly concerned about what our customers would think. In a small town like Fayette, news travels fast, and Mitch had worked hard to gain the trust and respect of the community. He had always taken the utmost caution and care with his patients, and his honesty and ethics were what mattered most to him.

But at that time, we didn't understand the size and scope of the mountain that had been planted in front of us. Our life's work was merely a means to an end for trial lawyers seeking to cash in on lucrative class actions—a back door into the Jefferson County court system.

Sadly, within three weeks of being named in the lawsuit, my husband, a 58-year-old in good health, died suddenly of a massive heart attack. The shock had barely subsided in December when I was called to testify in the first Fen-phen trial. By January 1, 2000, I was out of the pharmacy business—having sold the drugstore—but still deeply mired in lawsuits.

Bankston Drugstore has been named as a defendant in hundreds of lawsuits brought by individual plaintiffs against a variety of pharmaceutical manufacturers. Fen-phen. Propulsid. Rezulin. Baycol. Initially, some customers questioned whether prescriptions had been filled incorrectly. The bookwork has become so extensive that I've lost track of the specific cases, but still I get named as a defendant time and again.

Jefferson is a poor county, and the attorneys handling these claims have aggressively marketed their actions as tantamount to winning the lottery. Nor are their efforts hurt by rumors that five plaintiffs in the first Fen-phen case split $150 million between them.

But I believe that the lawsuit frenzy has done more harm than good to our community. Businesses will not relocate to Jefferson County because of fear of litigation. And, the county's lawsuit-friendly environment has driven liability insurance rates through the roof, giving small business owners all over Fayette additional headaches they don't need. Business is hard enough without having to constantly look over your shoulder wondering where the next lawsuit is coming from.

No small business should have to endure the nightmares I have experienced. In using Bankston Drugstore as a springboard into the Jefferson County courts, class action attorneys have caused me to spend countless hours retrieving information for potential plaintiffs. I have been dragged into court on numerous occasions to testify. I have endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And, I have spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it.

These lawsuits continue to this very day, two years after I sold my business. I'm not a lawyer, but to me, something is wrong with our legal system when innocent bystanders are little more than pawns for lawyers seeking to strike it rich in Jefferson County—or any other county in the United States where lawsuits are "big business." I urge you to pass legislation that reforms our legal system and prevents lawsuit abuses such as those that plagued my business and my family for the past three years.

Thank you for your attention. At this time, I would be happy to answer any questions you may have.

Chairman SENSENBRENNER. Thank you, Mrs. Bankston.
Mr. Friedman.

TESTIMONY OF ANDREW FRIEDMAN, PARTNER, BONNETT, FAIRBOURN, FRIEDMAN & BALINT, PC

Mr. FRIEDMAN. Good morning, Chairman Sensenbrenner, Congressman Conyers, and other Committee Members. I want to thank you for inviting me here to testify this morning on H.R. 2341. I am not a policymaker. I am not an academic. I am an attorney with a medium-sized law firm in Phoenix, Arizona, who represents class members in an action pending in Arizona arising out of the financial collapse of the Baptist Foundation of Arizona. It involves 13,000 investors who lost their life savings as a result of the financial collapse.

Mr. Beisner mentioned that class action lawyers do not need clients. The reality is, we do have clients. I have two here with me today, Ann and Joe Cacase. They live in Sun City, Arizona. They are victims of the Ponzi scheme that was known as Baptist Foundation of Arizona.

Baptist Foundation was a faith-based organization that raised hundreds of millions of dollars from faithful. It has collapsed now in bankruptcy and it is the largest non-profit bankruptcy in the history of this country. Like many of the other investors, the Cacases have lost their life savings as a result of the Baptist Foundation collapse. Mrs. Cacase is 67-years-old, Joe is 83-years-old. She had to come out of retirement to go back to work because they lost their life savings in this collapse. And they are typical of the other investors who have lost their life savings in the Baptist Foundation scandal.

In many respects, Baptist Foundation is the first Enron. In all respects, it is the Arizona Enron. BFA, like Enron, hid its losses in a maze of corporate subsidiaries. Just like Enron, BFA created off-balance sheet transactions to hide losses in companies that were controlled by BFA. And just like Enron, BFA was audited by Arthur Andersen who issued clean audits right up to the verge of the collapse. We allege that Andersen is guilty of the same wrongdoing in the BFA case that is alleged in the Enron scandal: ignoring whistleblowers, destroying or doctoring documents, and ignoring red flags that were passed on to mid-level management, some of the same mid-level management whose names have surfaced in the Enron scandal.

The Baptist Foundation case belongs in State court. Unlike Enron, the Baptist Foundation securities were not traded on the public markets. They were not registered under the Federal securities laws. The Baptist Foundation was an Arizona company, its directors and officers were Arizona residents, its offices were located in Arizona, it invested in properties in Arizona, and an overwhelming majority, 80 percent of the BFA investors live in Arizona. It was audited by the Arizona office of Arthur Andersen. It was the subject of regulatory and criminal proceedings all pending in the Arizona State courts, brought by the Arizona regulatory officials.

Every claim we have alleged in this case is a claim that arises out of Arizona law. This case belongs right where it was filed, in Arizona State court. If H.R. 2341 were the law, the BFA would be

inevitably dragged into Federal court, even though it alleges claims on behalf of Arizona citizens against Arizona entities for a fraudulent scheme that was born and perpetrated in Arizona.

If we were dragged into Federal court under this legislation it would have devastating consequences to the BFA investors. This legislation would impose onerous pleading standards, much like those of the PSLRA, requiring us to plead facts without the benefit of any discovery. This legislation would have imposed a stay of all discovery.

More importantly, this legislation would have resulted in enormous delays. If we were relegated to Federal court it would take, under this legislation, a minimum of 5 to 8 years to get to trial. In Arizona State court we will be in trial in 2 years. The first BFA trial is scheduled to go forward in early March, only 18 months after the case was filed.

If we were in Federal court we would lose protections that exist under existing Arizona law. We would lose priority trial settings. We would lose some of the toughest disclosure rules in the country. We would lose the benefits of accelerated discovery. We would lose the ability to coordinate our case with the pending regulatory proceedings brought by the Arizona attorney general's office, the Arizona Board of Accountancy, and the BFA Liquidation Trust. We would lose our ability to have Arizona law interpreted by Arizona courts, who know it best. And we would lose the right to a non-unanimous jury trial.

In short, this is an anti-investor, anti-consumer piece of legislation. Now is not the time to weaken the protections available to investors or to close the courthouse doors to investors. Now is the time, in the wake of Enron and BFA, to strengthen those protections. I would urge the Committee to defeat and not pass H.R. 2341 out of Committee.

I would be happy to answer any questions.

[The prepared statement of Mr. Friedman follows:]

PREPARED STATEMENT OF ANDREW FRIEDMAN, ESQ.

Good morning Mr. Chairman and Members of the Committee.

I am Andy Friedman. I am a lawyer from Phoenix, Arizona and am a founding member of Bonnett, Fairbourn, Friedman & Balint. Our law firm represents businesses and professionals in litigation matters. I have extensive experience prosecuting and defending commercial cases in both federal and state courts. For the past twenty-three years, my practice has been in the commercial arena. Most recently, I have focused on helping victims of fraud attempt, through class actions in federal and state courts, to recover money stolen from them.

I was one of the lawyers who represented the defrauded bondholders in the Charles Keating/Lincoln Savings & Loan/American Continental Corporation case. As you doubtless will recall, Keating's victims included 23,000 Californians and Arizonians—mostly seniors—who were deceived into believing they were making insured deposits at Lincoln S&L's Southern California branches but were fraudulently sold uninsured bonds in another Keating entity. The bonds were worthless and many lost their lives' savings. That case went to trial in 1992 in Tucson. All told, we obtained a total recovery of over $250 million, and have recovered more than seventy cents on the dollar of the victims' losses after payment of attorneys' fees. I also have served as class counsel in state and federal court class actions to recover losses on behalf of victims of deceptive sales practices perpetrated by life insurance companies during the 1980s. In total, these cases, which we brought in both federal and state courts, have recovered over *$15 billion* for life insurance purchasers.

I appreciate the chance to offer my comments on the class action legislation pending before you. H.R. 2341 would "federalize" most class actions. If enacted, this legislation will impose onerous requirements that inevitably will create delays, in-

crease litigation costs, erect barriers to recovery by victims, and reduce or eliminate recoveries for those who have been victimized by fraudulent and deceptive corporate practices.

To illustrate the difficulties of H.R. 2341, I would like to explain how it would apply to a current case that occupies much of my time. This case was the subject of a front-page article in the Arizona Republic just last week, a copy of which has been submitted to the Committee. The article notes the parallels between the Arizona case and the Enron case, which I will address shortly.

My case involves a fraudulent scheme perpetrated by an Arizona religious organization that called itself the Baptist Foundation of Arizona ("BFA"). The Arizona Attorney General has called the BFA scandal "one of the largest affinity fraud cases in U.S. history." Our lawsuit charges that the defendants, with their auditors' knowledge and assistance, maintained a "Ponzi" scheme to bilk faithful churchgoing people of their retirement income and life savings. BFA issued worthless notes and pedaled them in many Arizona communities. All told, approximately 13,000 investors in BFA lost approximately $590 million in this scheme.

Many, if not most, of the BFA victims are elderly and retired. Twenty-five percent of the BFA investors are 70 years of age or older. Two thousand of these investors are 80 years of age or older! One of our class representatives, Mrs. Ann Cacace is 67 years old. She lives in Sun City, Arizona with her husband Joe, who is 83 years old. Mr. Cacace has significant health problems that prevent him from working. The Cacaces are both here with me today. After the Cacaces invested and lost their lives' savings with BFA, Mrs. Cacace was forced to go back to work to support her family. Tragically, the Cacaces are typical of the other thousands of investors who mortgaged their homes or invested their life savings both because they were assured the investments were "safe" and because they wanted to support their charitable causes. Various offering circulars touted these investments as a good way of "protecting capital," while supporting 'stewardship ministries" and other religious causes. They were promoted as appropriate "to achieve your retirement dreams" and "prudent, profitable, and protected."

The BFA tragedy is a mirror image of the Enron scandal. Like Enron, the Baptist Foundation hid millions and millions of dollars in losses in "off the books" transactions with sham companies that were controlled by BFA and corporate insiders. Like Enron, BFA operated through a complex maze of corporate subsidiaries and falsely portrayed itself as financially sound when, in reality, BFA was a financial house of cards. And, like Enron, BFA collapsed even though the company had received an unbroken string of supposedly "clean" audits by its outside accountant.

But the similarities to the Enron meltdown do not end there. The outside auditor who gave BFA a clean bill of health virtually up to the time the company collapsed was none other than Arthur Andersen. Andersen's conduct with respect to BFA is eerily reminiscent of its actions in the Enron scandal. The facts that have emerged show that, just as in Enron, Andersen ignored a parade of whistleblowers, including a BFA accountant, who described to Andersen auditors the ongoing financial fraud involving hundreds of millions of dollars in losses hidden in overvalued assets and off-book companies. Just like Enron, reports of BFA's improprieties were circulated to Arthur Andersen's management and lawyers at its Chicago offices. Just like Enron, the evidence suggests that high-level Andersen personnel destroyed documents and sanitized work papers. And just like in Enron, the Andersen audit partner in charge of the BFA engagement has invoked the Fifth Amendment to avoid answering questions about Andersen's conduct. It is no small irony that the Arthur Andersen audit partner in charge of the Baptist Foundation account was the same Andersen audit partner who worked on Charles Keating's books!

The BFA Ponzi scheme collapsed in August 1999. While Enron is the largest for-profit bankruptcy in our nation's history, BFA is the largest *not-for-profit* bankruptcy in this nation's history. After the Ponzi scheme collapsed, we brought a class action lawsuit for investors in Arizona state court against a number of the perpetrators and Arthur Andersen. We filed our suit under state securities statutes and consumer fraud laws. Fortunately for the investors, because BFA securities were not registered or traded on a national stock exchange, we were not required to file our case in federal court under the onerous provisions of the Private Securities Litigation Reform Act. The PSLRA would have imposed tremendous hurdles to recovery, including heightened pleading requirements and a crippling discovery stay; it would have abrogated the investors' ability to hold Andersen jointly and severally liable for their enormous losses; and (since an amendment to the PSLRA to restore aiding and abetting liability was defeated) it would have prevented investors from holding Arthur Andersen accountable as an aider and abetter of the BFA insiders.

So, we filed a state court class action under the state securities laws. That action is one of several BFA-related cases that are currently pending in Arizona state

court. Those actions include cases brought by the BFA liquidation trustee, the Arizona Attorney General's office, the Arizona Board of Accountancy, and criminal proceedings. All of the civil cases have proceeded in a coordinated fashion, with common discovery and depositions. Because the Arizona civil rules provide for expedited trial settings in hardship cases, the first of these cases is scheduled to go to trial in early March, 2002, only 18 months after it was filed.

H.R. 2341, the so-called Class Action Fairness Act of 2001, would not be "fair" in any sense of that word. If it were law in our case, it would raise substantial hurdles for us to recover from the defendants. It would force cases into federal court that belong in state court; it would provide no exemption for companies that do substantial business in the state but are not headquartered or incorporated there; and it would cause unconscionable delays for the victims of wrongdoing.

Our case belongs in state court. Four of six of the "lead plaintiffs" live in Arizona. The Baptist Foundation of Arizona was an Arizona corporation with its headquarters in Arizona. Most, but not all or substantially all, of the 13,000 individuals and entities who invested close to $600 million with the BFA were Arizona residents. The for-profit subsidiaries of the Baptist Foundation were Arizona corporations. The individual defendants were all Arizonians.

And, Arthur Andersen has a substantial office in Phoenix, Arizona, although it is headquartered in Chicago, Illinois. It receives audit fees, consulting fees, and otherwise does business within the state of Arizona and is certainly eligible to sue and be sued in the state of Arizona.

In short, the State of Arizona has an overriding interest in this case. That local interest is reflected not only in the overwhelming contacts between the BFA fraud and Arizona, but also in the pending criminal and civil enforcement proceedings brought by Arizona officials.

I file many cases in Federal court when that is the proper forum. I am currently prosecuting a number of Federal class action cases under the Civil Rights Act on behalf of African-Americans who were charged more for life insurance based on the color of their skin. Those cases belong in Federal court. But in the BFA case, we are seeking to enforce Arizona laws against Arizona defendants for the benefit of a predominately Arizona class against defendants who either live in Arizona or that do a substantial amount of business in Arizona. How in the world is a Federal court more qualified to hear those claims than an Arizona court?

Why would Congress pass legislation to benefit corporate defendants such as Arthur Andersen at the expense of innocent and elderly victims like the BFA investors? I think it is extraordinary in light of Enron that Congress would even consider this move.

The Arizona judicial system is perfectly capable of fairly judging the rights of a business such as Arthur Andersen. The argument that class actions are complex and therefore must go into Federal court is to me extremely questionable. State courts routinely hear and resolve complex commercial disputes between corporations. State courts routinely handle cases involving product defects, construction defects and other complex cases. We charge state courts with complex determinations on matters of life or death—capital murder cases frequently involve complicated evidence about the sanity of those charged with crimes and, ultimately, whether the death penalty is warranted. State courts are perfectly capable of affording fair treatment to consumers and victims and those who are alleged to have perpetrated fraudulent schemes.

HOW WOULD H.R. 2341 HURT THE VICTIMS IN THE BFA CASE?

H.R. 2341 permits any defendant or any absent class member to "remove" the case to federal court. If the law were to apply in the BFA case, it could have devastating consequences to the BFA investors.

First, H.R. 2341 is a prescription for delay. Once a defendant opts to pull the removal trigger and the case is automatically removed to Federal court, cases will be bogged down with collateral litigation to determine whether the case was properly removed and should stay in Federal court or should be remanded back to state court. Then, any consideration of the merits will be stalled in the face of motions to dismiss and the class certification motion practice. Moreover, in addition to the stay of the proceedings during the motion to dismiss, the bill would permit an immediate appeal of the class certification decision and another stay of the proceedings during that appeal. All the while, plaintiffs will be precluded from obtaining discovery to prove their case.

More importantly, the Federal courts are clogged and backlogged with criminal cases. Federal judges have long complained that they are overwhelmed and understaffed. For this very reason, Congress has consistently *increased* the minimum

amount in controversy requirements for Federal diversity jurisdiction. As a result of these practical realities, cases filed in Federal court on average take far longer to reach trial than cases filed in the Arizona state court system. H.R. 2341 runs directly counter to ongoing efforts to decrease the workload of the Federal courts.

The inevitable delays resulting from removal of the BFA action to Federal court would have devastating consequences for the investors. As noted, thousands of the BFA investors are elderly and many of them are infirm. Thousands of the BFA investors have lost their lives' savings and their retirement incomes. Time is not on their side; for the BFA investors, justice delayed will be justice denied. Based on these circumstances, one of the BFA cases was assigned priority status and the trial was accelerated under the Arizona rules. The Federal rules contain no counterpart.

Second, if H.R. 2341 applied to the BFA case, it would erect additional obstacles to certification of a class of BFA investors. In addition to federalizing class actions, H.R. 2341 adopts some of the most onerous provisions of the Private Securities Litigation Reform Act. For example, like the PSLRA, it requires that the plaintiff plead the defendants' state of mind with particularity. It states:

> In any class action in which a claim is asserted on which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or failure to act alleged to give rise to liability, state with particularity facts which, if proven, will demonstrate that the defendant acted with the required state of mind.

In many cases, pleading with particularity that a defendant acted with a certain state of mind at the beginning of a case, before discovery is taken, is extremely difficult, if not impossible.

At the same time, the statute imposes a "stay of discovery" during the pendency of any motion to dismiss. This is a Catch-22. In order to defeat a motion to dismiss and obtain discovery, the plaintiff must plead specific facts with no opportunity to discover them. Class actions are the primary vehicle for recovery by victims of fraud and deception. By its very nature, this sort of wrongdoing is self-concealing and the true facts are simply not available to the defrauded victims. This pleading requirement sets a standard that is often impossible for victims of fraudulent conduct to satisfy, as experience with the PSLRA has proved. Professor John Coffee, the Adolf Berle Professor of Law at Columbia School, has cited these pleading requirements as among the chief causes of creating an atmosphere of laxity that led to the Enron scandal. Indeed, Arthur Andersen was busy destroying documents while the discovery stay was in place in the Enron case.

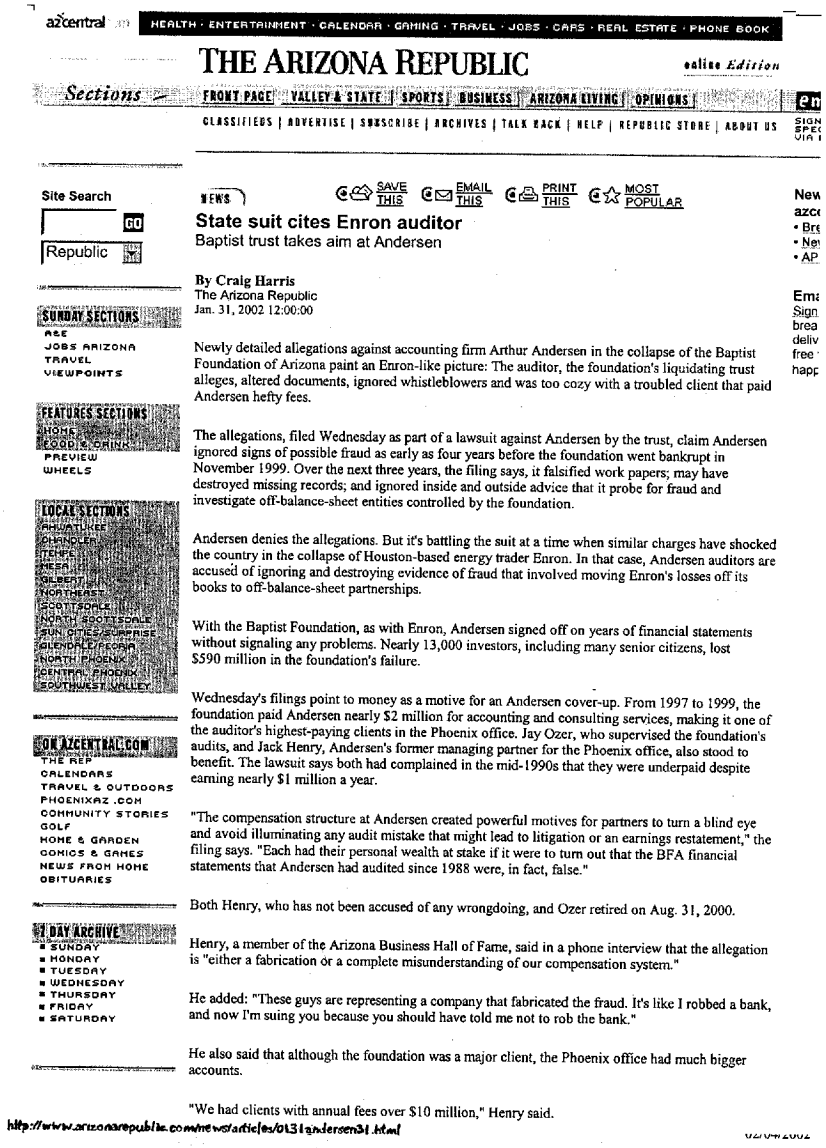
In fact, the same sort of draconian pleading standard that H.R. 2341 seeks to impose in all class actions directly impacted some BFA investors. A group of approximately 100 investors filed a separate individual action in Federal court under the PSLRA. They alleged facts that were similar to those alleged in our state court class action. The Federal case was dismissed because it failed to meet the onerous PSLRA pleading standard. Similar motions to dismiss the action in State court were rejected. The contrast is clear: In our case, our class has a shot of recovering $590 million based on a Ponzi scheme. If this case were brought in Federal court, the chances of recovery would be far less. If H.R. 2341 were the law, Arizona investors seeking redress for an Arizona scheme against Arizona defendants under Arizona law would be hauled into Federal court to face potentially insurmountable hurdles.

Third, if H.R. 2341 applied to the BFA case, the elderly BFA investors would lose a host of procedural and substantive protections that they now have in the Arizona state court. In Arizona state court, defendants (and plaintiffs) must make extensive disclosures about the facts and documents bearing on the case and the existence of insurance coverage to protect victims; the same detailed disclosures are not required in Federal court. The Arizona court system provides procedures for the parties to appeal important decisions on Arizona law directly to the Arizona appellate courts. The Arizona state court has rules allowing for the coordination and consolidation of related cases, such as the BFA investor class action and the pending civil enforcement proceedings brought by the Arizona Attorney General; there is no formal system to coordinate or consolidate cases in Federal court with cases pending in the state courts. In the Arizona state court, the BFA victims will obtain a successful verdict if 75% of the jurors conclude that Arthur Andersen is guilty; in Federal court the verdict must be unanimous. And, as I stated earlier, the Arizona rules provide for an accelerated and early trial in hardship cases brought by elderly investors; the Federal system has no directly comparable rule.

All of these protections would be lost if H.R. 2341 were the law. So, who would H.R. 2341 protect? Cigarette companies, Enron types, huge powerful wrongdoers. Who would it hurt? Investors, consumers, your constituents. Congress tinkered with the class action device with respect to securities in 1995 when it enacted the PSLRA

over President Clinton's veto. As Professor Coffee has testified, that law contributed directly to the Enron debacle. Why would Congress now essentially extend the disastrous PSLRA to the rest of class litigation?

Congress should reject H.R. 2341.



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State suit cites Enron auditor

Baptist trust takes aim at Andersen

By Craig Harris
The Arizona Republic
Jan. 31, 2002 12:00:00

Newly detailed allegations against accounting firm Arthur Andersen in the collapse of the Baptist Foundation of Arizona paint an Enron-like picture: The auditor, the foundation's liquidating trust alleges, altered documents, ignored whistleblowers and was too cozy with a troubled client that paid Andersen hefty fees.

The allegations, filed Wednesday as part of a lawsuit against Andersen by the trust, claim Andersen ignored signs of possible fraud as early as four years before the foundation went bankrupt in November 1999. Over the next three years, the filing says, it falsified work papers; may have destroyed missing records; and ignored inside and outside advice that it probe for fraud and investigate off-balance-sheet entities controlled by the foundation.

Andersen denies the allegations. But it's battling the suit at a time when similar charges have shocked the country in the collapse of Houston-based energy trader Enron. In that case, Andersen auditors are accused of ignoring and destroying evidence of fraud that involved moving Enron's losses off its books to off-balance-sheet partnerships.

With the Baptist Foundation, as with Enron, Andersen signed off on years of financial statements without signaling any problems. Nearly 13,000 investors, including many senior citizens, lost $590 million in the foundation's failure.

Wednesday's filings point to money as a motive for an Andersen cover-up. From 1997 to 1999, the foundation paid Andersen nearly $2 million for accounting and consulting services, making it one of the auditor's highest-paying clients in the Phoenix office. Jay Ozer, who supervised the foundation's audits, and Jack Henry, Andersen's former managing partner for the Phoenix office, also stood to benefit. The lawsuit says both had complained in the mid-1990s that they were underpaid despite earning nearly $1 million a year.

"The compensation structure at Andersen created powerful motives for partners to turn a blind eye and avoid illuminating any audit mistake that might lead to litigation or an earnings restatement," the filing says. "Each had their personal wealth at stake if it were to turn out that the BFA financial statements that Andersen had audited since 1988 were, in fact, false."

Both Henry, who has not been accused of any wrongdoing, and Ozer retired on Aug. 31, 2000.

Henry, a member of the Arizona Business Hall of Fame, said in a phone interview that the allegation is "either a fabrication or a complete misunderstanding of our compensation system."

He added: "These guys are representing a company that fabricated the fraud. It's like I robbed a bank, and now I'm suing you because you should have told me not to rob the bank."

He also said that although the foundation was a major client, the Phoenix office had much bigger accounts.

"We had clients with annual fees over $10 million," Henry said.

http://www.arizonarepublic.com/news/articles/0131andersen31.html

Ozer referred calls to his attorney, Richard Drooyan, who said Ozer disputes that he and Andersen did anything wrong with the audits.

The liquidating trust made the filing in its effort to convince Judge Edward Burke of Maricopa County Superior Court that Andersen is liable for punitive damages in a trial that begins March 4. Andersen faces two other civil suits for its role in auditing the foundation, and the state is seeking to revoke the licenses of Ozer and two other Andersen accountants, Al Hague and Ann McGrath, who audited the foundation.

Although Andersen issued "clean" audit opinions to the foundation from 1986 to 1997, the foundation has been accused of running a Ponzi scheme, where money from new investors was used to pay off others, and of misstating its financial health by hiding its debt.

The foundation also made questionable real estate loans and investments and had substantial administrative costs, according to court documents.

In the foundation case heading to trial, the new filing also alleges that:

• In 1995, Ozer concluded that the Baptist Foundation was much higher than the "high risk" assigned by a computer. And another Andersen employee had marked "red flags" for the foundation. But its books were not scrutinized more closely.

• In early 1997, a former foundation accounting manager, Karen Paetz, told Andersen's McGrath that the foundation was improperly transferring assets to entities controlled by the foundation to hide losses. McGrath recommended Andersen look into the matter, but nothing was done, the filngs say.

• Also in 1997, Andersen ignored warnings of a Ponzi scheme within the foundation despite a tip from a chief financial officer of an Andersen client in Dallas. The warning was referred to Andersen's headquarters in Chicago, and after six months, the firm questioned foundation officials but took no action.

• McGrath prepared two memos to describe the Dallas client's tip, one mentioning the Ponzi scheme and the other not. The latter was placed in Andersen's work-paper files.

"Despite the mounting evidence of fraud taking place under its very nose, Andersen knowingly opted for years of a 'see no evil, hear no evil and speak no evil' approach that drove BFA deeper into insolvency," court records say.

But Ed Novak, a Phoenix attorney for Andersen, said, "The implications the plaintiffs seek to have drawn from these allegations are not accurate and are meritless."

Reach the reporter at craig.harris@arizonarepublic.com or (602) 444-8995.

Chairman SENSENBRENNER. Thank you very much, Mr. Friedman.

Because of the limited amount of time and the interest of Members of the Committee, the chair will waive his 5 minutes and recognize the gentleman from Texas, Mr. Smith.

Mr. SMITH. Mr. Chairman, thank you.

First of all, Mr. Detkin, thank you for your testimony about a very good piece of legislation introduced by Congressman Goodlatte and Congressman Boucher. I would like to start off by reading what I think is the most important sentence in your written testi-

mony where you list the abuses under current law and say that the most troubling of these are "increased forum shopping, manipulation of procedural rules to avoid Federal diversity jurisdiction, displacement of the laws of some States by local judges in other States, the resolution of class action cases by ill-equipped State courts, strike suits intended to coerce quick statements from defendants, collusive settlements where plaintiffs lawyers receive large fees while accepting settlements of little or no value to class members, and grossly inflated bounties being paid to lead plaintiffs."

I would like to squeeze in four questions, if I can, in my time. The first of these is this. Do you feel that the bill under consideration would lead to the dismissal of meritorious class action claims?

Mr. DETKIN. Absolutely not. This is primarily procedural in nature and any meritorious claim, such as those that Mr. Friedman refers to, would absolutely still go forward.

Mr. SMITH. Would the current bill lead to, in your judgment, an increase in any destruction of documents?

Mr. DETKIN. Absolutely not. I cannot imagine that would happen.

Mr. SMITH. Why not?

Mr. DETKIN. For one thing, even though there is a stay on discovery, in the judge's discretion they can still issue—allow discovery to go forward while the stay is in place if they believe that there is any possibility of there being a destruction of documents. Moreover, there is nothing to prevent the judge from issuing an order saying, stop—do not destroy any documents if there is any suggestion that that is happening. Personally, I do not know of too many cases—I recognize—I am fully cognizant of the Enron situation, but I think that is the exception, not the rule.

Mr. SMITH. The legislation that we are considering, would it lead to—it makes it easier to get into Federal court. We acknowledge that. Is that going to lead to overburdening the already overworked Federal courts?

Mr. DETKIN. I do not believe it will. No, I do not believe that there will be—what you will do is consolidate judicial resources. Where you now have six or seven courts, or possibly even more in the case of some insurance cases, up to 50 hearing the same class action, it will be consolidated before a single judge. So I do not think that will be a problem.

Mr. SMITH. Would it not really lead to a relief of overburdening of State courts?

Mr. DETKIN. Absolutely.

Mr. SMITH. Why is that?

Mr. DETKIN. Again, you will have, instead of 50 cases proceeding in parallel with the same claims and same facts and same class, you will have one case in front of a court, in front of a system that has the resources to handle it. Most State courts do not have the resources to handle the kinds of class action that we are talking about here.

Mr. SMITH. Plus you have the multiple filings in a number of State courts as well that will be avoided.

Mr. DETKIN. Absolutely.

Mr. SMITH. Lastly, let me read a statement from Mr. Friedman's testimony and ask you to respond to that. He says that H.R. 2341 would federalize most class actions. If enacted, this legislation will impose onerous requirements that inevitably will create delays, increase litigation cost, erect barriers to recovery by victims, and reduce or eliminate recovery for those who have been victimized by fraudulent and deceptive corporate practices. I gather you do not agree, but why do you not agree?

Mr. DETKIN. I do not agree, and actually I think the PSLRA, the Securities Reform Act is instructive here. According to the New York Times article which did an exhaustive study, the number of cases filed—securities cases has increased since that was filed, and the settlement value of those cases has increased. So while this might weed out the frivolous claims, the meritorious claims will get even better consideration.

I would also like to point out that while Mr. Friedman is eloquent in his defense of his case belonging in Arizona State court, and I agree it does appear to belong in Arizona, I imagine he would be singing a very different tune had he been beaten to the courthouse by a plaintiff's attorney in Illinois who got his case certified in Illinois before Mr. Friedman did, thereby preventing him really from going forward with any real relief in Arizona State courts.

Mr. SMITH. Mr. Detkin, thank you for your answers.

Mr. Chairman, thank you.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I thank the witnesses.

This should be an all-day hearing, should it not, lawyers? But we get 5 minutes.

First of all, Mrs. Bankston, I sure want to welcome you here.

Ms. BANKSTON. Thank you, sir.

Mr. CONYERS. So nice of you to be here. You are retired now. You sold your business. You are still being hassled by lawyers. But what are you doing here? I mean, why did you come?

Ms. BANKSTON. I came because if I can help in any way for somebody not to go through what I have gone through, and with you all's help, that would be terrific.

Mr. CONYERS. But this is about lawsuits, the kind that you do not even have in Mississippi. That is another problem you have got there.

Ms. BANKSTON. They do not call them class action lawsuits but they call them consolidations. But in Mississippi——

Mr. CONYERS. Didn't the U.S. Chamber of Commerce help you with that testimony?

Ms. BANKSTON. No, the firm of Clausen and—Guter, Clausen.

Mr. CONYERS. Are they here today?

Ms. BANKSTON. Yes, sir.

Mr. CONYERS. I am happy you came anyway——

Ms. BANKSTON. Thank you, sir.

Mr. CONYERS [continuing]. Because I am going to read your testimony very carefully.

Ms. BANKSTON. I hope so.

Mr. CONYERS. Now Mr. Detkin, I hardly know where to start with you. You have been involved in so much here. I mean, here

Intel is large or larger than Microsoft. You are the world's largest chip maker on the planet Earth, and here you are explaining to us how we can make class actions better. Your company's history of doing a very good job at blocking litigation that seeks to help consumers and the public, sir, is well known to at least some Members of the Congress.

We have reports about how you handled antitrust cases already. Namely, the relationship between an Intel employee, probably former, Steve McGeedy, and it is in public. All we do is pull this off the wire, where you threatened to fire him if he agreed to an interview by the Government in the Microsoft antitrust case. Here we are now listening to your sound and cogent advice about how we ought to make the laws of this subject matter more favorable to corporations.

But at least you differ from the lawyer sitting to your left because as I hear it he is against class actions altogether. You support Federal class actions, so that puts you up—in my little hierarchy of corporate lawyers you go up over Mr. Beisner.

But there are disturbing—let me ask you. Let's get to it. Cayman Island shell companies by Intel. What are you guys doing down there? Where we have funds being hidden. We have so many people from FBI, securities, all over, searching, scouring for all of these offshore non-reporting banks, and here you, Mr. Detkin, your company, do you know how many people, how many companies you have got down there? Some with different names. Well, I do not either. You may not know.

So I want to commend you——

Chairman SENSENBRENNER. The gentleman's time has expired with that commendation.

Mr. CONYERS. Could I ask you to write your answers back to me, sir?

Mr. DETKIN. I would like the opportunity to briefly respond to these attacks on both myself and the company.

Chairman SENSENBRENNER. The witness will respond, and all of the witnesses may submit written answers to questions by Members of the Committee which will be included in the record. Mr. Detkin.

Mr. DETKIN. With all due respect, I take umbrage, both on behalf of myself and the company, at these attacks. Intel has been investigated. We are a large company. We are the world's largest semiconductor company. We believe our practices are both lawful and fair. We understand that various Government entities have an obligation to investigate the antitrust—whether there has been any violation of antitrust laws. We have been investigated twice by the FTC, twice by the European Community, once by the Taiwan FTC. Every single time we have been cleared, most recently by the EC as reported in the New York Times over the weekend.

As for your personal attacks on me with respect to Mr. McGeedy, you are relying, I believe quite improperly and inappropriately on hearsay accounts in a book by a reporter for Wired magazine that have no basis in factual reality.

The Cayman Islands issue that I believe you were referring to is a minor nit with respect to purchasing of patents. I cannot imagine that has anything to do with the merits of whether the class action

system needs reform, and I defy you to find any connection between the two.

Mr. CONYERS. No, there probably are not. But I am talking about other practices, sir.

Chairman SENSENBRENNER. The time of the gentleman from Michigan has expired. Are you complete with your answer, Mr. Detkin?

Mr. DETKIN. I am complete with how I would like to defend my honor in front of this Committee. A written response will follow.

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

Mr. GOODLATTE. Thank you, Mr. Chairman, and thank you for holding these hearings on this important issue. This is legislation that has, in a very similar form, passed the last House of Representatives, and I thank you for giving consideration to it again. I understand that my opening statement will be made a part of the record.

I would also ask that this editorial of the Washington Post entitled, Action Without Class, that has been made available to everybody be made a part of the record.

Chairman SENSENBRENNER. Without objection.

[The information referred to follows in the Appendix]

Mr. GOODLATTE. I also have a letter signed by 87 executives of high tech companies that are supportive of this legislation for the same reasons that have been expressed by the gentleman representing Intel, be made a part of the record as well.

Chairman SENSENBRENNER. Without objection.

[The letter follows in the Appendix]

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, there are two compelling reasons why this legislation should pass. First, to end the egregious practice of forum shopping in the environment of having literally 4,000 local court jurisdictions to choose that one favorite judge that they think are the most lenient in certifying class actions, even if they have no merit. Secondly, to give due respect to our Federal courts, created for the purposes of determining these very types of lawsuits regarding thousands or hundreds of thousands, or millions of parties from, in any instances, all 50 States.

The gentleman from Michigan said that citizens need more protections against being swindled, not less. I agree, and that is exactly what this legislation will do, because it will not take away the rights of anybody to bring a meritorious class action lawsuit. However, it will take care of some of the cases cited by the Chairman in his opening remarks. It will take care of the great case in which the plaintiffs' attorneys received millions of dollars in attorneys fees and the plaintiffs' class, not only did they not receive anything, but they received the privilege of paying $91 each for those attorneys fees. That is a swindle if there ever was one.

Mr. Friedman, why in cases of national importance impacting the rights of thousands, perhaps millions of people in many different States, should they be tried in a single State? Why should one local court judge rule on law in the other 49 States? Why is that not exactly the kind of case that was intended under our Constitution and our Federal court system to be heard in the Federal courts?

Mr. FRIEDMAN. Congressman, the cases that we bring in State court are cases which are focused in that particular case. When a State, like the BFA case of Arizona has an overriding interest in applying its own State laws to protect its own citizens, that case belongs in State court, not in Federal court.

Mr. GOODLATTE. But what about a case involving plaintiffs in all 50 States spread out across the country where each one has a claim for $100? That cannot possibly be brought in Federal court, even though if there are 1 million plaintiffs. That is a $100 million lawsuit that cannot be brought in Federal court. Why should that not be corrected?

Mr. FRIEDMAN. Because, Congressman, if that same case were brought in Federal court you would have a single court and a single judge also applying the law of all 50 States, applying State law, not Federal law. My experience has been that State judges are very sensitive to the need to properly apply the law of their own States and laws of other States, and do so only when it can be accommodated in the context of proper jury instructions. So you would have the same phenomenon of a single court.

Mr. GOODLATTE. My time is going to run short here. So you are saying that if a woman has a slip-and-fall injury and she resides in Maryland and the case occurs in Virginia and she alleges damages of $75,000, that that is perfectly fine for that case to be brought in the United States District Court. But if you have a case involving one million plaintiffs each claiming $1,000, or a $1 billion lawsuit, involving plaintiffs in all 50 States, that that should be excluded from Federal court as it is under our current Federal rules?

Mr. FRIEDMAN. No. What I am saying is that the diversity of citizenship laws were not passed to deal with the amount in controversy as the overriding factor. They were passed in parochial times to prevent discrimination against out-of-State parties. My experience has been that corporate defendants have the ability to defend themselves in my State court system without discrimination. The jurisdictional limits that have been imposed, $75,000 for example, were imposed to reduce the number of cases going to Federal court, not to define those cases that properly belong in Federal Court.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. As my friend and colleague Mr. Goodlatte indicated, during the last Congress the bill that would contain this modest litigation reform that he and I put forward was passed in the House with a bipartisan majority. Since that time more voices have now been raised in support of the reform effort, including the Washington Post. I would call the Members' attention to the copy of the Washington Post editorial which has been placed on every Members' desk.

We are achieving broad cosponsorship in the House of this measure, and I want to thank Chairman Sensenbrenner for scheduling the hearing this morning and giving us another opportunity to make the case for why this reform is necessary.

Mr. Beisner, I would like to get you to respond to the question of harm that current practices and the abuse of class action litigation cause, not just for defendants but for the plaintiff class mem-

bers also, and to talk about what our bill does in order to address those harms and provide remedies. Let me just mention a couple of the harms to plaintiffs that appear obvious to me.

Sometimes the State class action suits are filed without claiming as much for recovery as could potentially be received by individual plaintiffs within the class. These amounts claimed are artificially kept below the $75,000 Federal jurisdictional amount simply for the purpose of keeping the case from being removed to Federal court. In other instances, Federal causes of action that could be asserted on behalf of the plaintiff class are simply not asserted. Simply, again, for the reason that if they were asserted that case could be removed to Federal court. So the plaintiff class members are deprived of the opportunity to have these Federal causes of action heard.

As Mr. Goodlatte indicated, there are instances in which upon a settlement of the State class action cases the plaintiff class members wind up getting coupons while their lawyers get millions. And then that one notorious case, the plaintiff class members were actually worse off after the case had been settled because they had a debit of $91 per plaintiff class member posted to their mortgage escrow accounts. I am told that in that case their lawyers received payment of $8.5 million.

So plaintiff class members often are harmed as well as the defendants by the misuse of class action litigation in the States.

Tell us, if you would, how the bill addresses these particular problems, and why would the plaintiff class members themselves be better off when this bill is passed into law?

Mr. BEISNER. The bill does a number of things. With respect to a number of abuses, Mr. Boucher, that you mentioned, the bill has specific provisions with respect to coupon settlements or non-cash settlements. It requires a Federal court to give special scrutiny to those to make sure that a real benefit is being given to class members.

With respect to potential net loss situations, the Bank of Boston case that you mentioned, the court is required to give special scrutiny to those cases before approving settlements like that, and to decline to approve, if it determines that there would indeed be a net loss situation.

The bill also deals with the bounty situation; instances where the named plaintiff, the person who is actually supposed to be making decisions for the class may end up being paid more than the class members. The court is required to give special scrutiny in those circumstances.

So the bill culls out those sorts of particular abuses that this Committee has been hearing about for the last several years and directly addresses those by requiring the court to give special scrutiny to those sorts of situations.

Mr. BOUCHER. Thank you, Mr. Beisner.

Ms. Bankston, let me get you to tell the Committee, if you would, why the practice of having you sued more than 100 times simply for the purpose of having a local defendant to defeat complete diversity of jurisdiction and keep the case out of Federal court has caused harm to you. Talk about the kinds of harm that have occurred to you as a consequence of being sued in this capacity with-

out any expectation that recovery would be obtained from you, more than 100 times.

Ms. BANKSTON. It has been a tremendous amount of paperwork; going to court so many times. And being that it is such a small county, about the people trying to figure out why is it that we are involved in so many—what did we do wrong to be involved in so many different lawsuits. Jefferson County is a place where everybody knows each other. The rumor that Mitch had filled these prescriptions incorrectly. And out of all of these prescriptions that have been looked into by the trial attorneys and everything, there has not been one that was filled incorrectly. Not that he did not make mistakes, but that was a very good record.

And people have a very good feeling—we were there for 28 years. He practiced pharmacy for 28 years there, and these people had no idea that they were suing us because the trial lawyers never did tell them that they were suing us until we went to court. My attorney asked them, did they know they were suing the Bankstons? They said, I had no idea that this was happening. Mr. Bankston was nothing but good to me through these years. He always talked to me and tried to lead me to where I was supposed whenever I needed.

So it just is not the people in Jefferson County. It is the trial attorneys that talked to them into anything. It is mostly elderly people that are just talked into these things, and they do not really know what they are being talked into.

Mr. BOUCHER. Thank you, Ms. Bankston.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. Thank you, Mr. Chairman. I appreciate the testimony from the witnesses. Particularly appreciate the Cacases for traveling all the way from Arizona. For those who spend time in Arizona in February they know it is a particular burden to travel to the East Coast at this time of year. But thank you for the testimony.

Mr. Friedman, you are obviously involved deeply in the BFA case. It has been a tragic story in Arizona for a lot of investors. It would, under this law, you could simply go to Federal court. You say it is not so simple. That the rules of discovery are different and everything else. But I would first be interested in the other panelists in their assessment of your claim that you would be or your clients would be disenfranchised somehow for going to Federal court, and then for you to respond to them. Mr. Beisner or Mr. Detkin, either one, if you want to respond to that.

Mr. BEISNER. I would respond to a couple of points there. One that concerns me the most is a concern about delay. If you look at statistics, if you look at the hard data it doesn't support the idea that a case like this is going to get to trial substantially faster in State court than in Federal court. You can compare two in a particular circumstance and there may be an instance like that, but if you look at statistics on this there has been an 8 percent decrease in the number of cases pending in our Federal district courts since 1997. The number of new diversity jurisdiction cases has decreased almost 5 percent since 1997.

And I think the most telling statistic, that the number of cases of general jurisdiction filed in the State courts since 1984 has increased 28 percent versus only 4 percent increase in the number of cases filed in Federal courts. Each State court judge nationwide is assigned an average of 1,000 to 2,000 cases, new cases each year, compared to fewer than 500 new cases in Federal court each year.

I have a real question. You can say, the Federal courts are busy. That is true. But the State courts are busy as well and I am just not sold on the idea that you are going to get to trial a lot faster in a State court.

Mr. FLAKE. Mr. Detkin?

Mr. DETKIN. I would echo Mr. Beisner's comments. I would point out that, as you know, I am sure, Intel has a fairly substantial presence in Arizona and we have a familiarity with the Arizona Federal court system and have had generally very positive experiences there. Never had a case take 8 years to go to trial, as Mr. Friedman mentioned, so I do not believe that would be a problem.

Again, I would point out that I am sure Mr. Friedman would be singing a very different tune had a nationwide class been certified before his class, or allowed to go to trial in Illinois or in Palm Beach, Florida, thereby preventing him from getting real relief in Arizona State courts. That would be precluded from happening for all the reasons that Congressman Goodlatte so eloquently mentioned, under this bill.

Mr. FLAKE. Before you respond, Mr. Friedman, have there been any copycat cases or are you the only lawyers handling the BFA case?

Mr. FRIEDMAN. No. In fact I would like to address that in the context of the question, Congressman. There was another case in Arizona, and you know what, it was filed in Federal court in Arizona under the PSLRA. A lawyer from California advertised and encouraged people to opt out of the class and file separate litigation. WHAT happened to that case in terms of delay? We are going to trial in March, 18 months after filing. That case, a motion to dismiss was filed and it was not resolved until a year later, and that case was thrown out because of the same onerous pleading standards that now would apply under this legislation.

So you have the very delay I am talking about in our very case, the BFA scandal, and you have the results. The investors who went to Federal court were given nothing. They were thrown out. They are now tied up in the Ninth Circuit Court of Appeals while Mrs. Cacase and the class I represent will have their trial and their day in court before they die. So there is a significant difference in our experience in this very case.

Mr. FLAKE. Mr. Friedman, do you concede that there are abuses, and what would you suggest, if not this legislation, to address them? First, are there abuses? We have heard——

Mr. FRIEDMAN. I have read stories, the same newspaper articles that you have read. I have not had personal experience with those abuses, so I have to take at face value what I read. There are instances, which if what I read is true, there are instances which results occur which would appear to be bad results. But that is not a reason to further victimize all victims and take rights away from all victims because there are a few problems.

I can tell you that in the cases in which I represent class members we obtain substantial recoveries. You may or may not know, Congressman, I was one of the lawyers who represented the Lincoln Savings, Charlie Keating bondholders. We recovered 78 cents on the dollar for those people.

So I have not had personal experience with the abuses, but to the extent the abuses exist State judges have the ability to deal with those abuses in the specific facts under which they arise. It is not a reason, I think, to overhaul the entire system to the detriment of all victims.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I wanted to also express my thanks to all the panel, but especially to Mr. Detkin who I know took the trip on the same flight I did yesterday from California, to share his company's experiences with class action lawsuits. In reading the testimony I think the experience of Intel with the minor defect on your chip and the class action lawsuit is very instructive for the kinds of problems that really should demand our attention here in the Congress.

Looking at your testimony, you point out that the glitch, which only somebody engaged in higher mathematics would ever even run into and I think there was only one individual that did run into it, resulted in a case where the fees, plaintiffs' lawyers fees were over $4 million, but the remedy was exactly what the company had already done. So I guess in a way I think it would be incorrect for us to ignore the fact that there are problems in some class action lawsuits where you have basically a remedy that is almost nonexistent for plaintiffs and yet fees that are very high, that provide an incentive for frivolous pursuit of companies.

Having said that, the question in my mind is whether the bill before us is the appropriate remedy for those types of abuses. I do have questions, as I mentioned to you on the plane, about some of the reach of this bill. So I guess one of the questions I have for you is whether another remedy that would reduce the incentive might actually provide relief in the case such as you outlined in your testimony?

For example, if we were to examine the function of attorneys fees as a multiplier of the actual award to plaintiffs, whether we might also go after the frivolous pursuits of lawsuits in a way that was less draconian on class action lawsuits altogether. Do you have a comment on that?

Mr. DETKIN. I absolutely agree that those would be two very good objectives to go after. I think that this bill does address those. I believe it does call for heightened scrutiny of attorneys fees, of settlements generally including the popular coupon settlements. I believe also the heightened pleading standards will go a long way toward eliminating the frivolous suits but still maintain the meritorious suits.

So I believe the drafters of the bill really did attempt to address those very concerns that you are raising and tried to address them in the best way possible. I also think it would be important to get them into Federal court where you do not have local elected judges reviewing the work of the local counsel, and you have it guaranteed

to be in the proper jurisdiction. I think those are some of the most important aspects of this bill. I would urge that they be maintained.

Ms. LOFGREN. Could I ask, is it Mr. Beisner? Am I mispronouncing?

Mr. BEISNER. You have it correct.

Ms. LOFGREN. One of the concerns, and I know that the authors are sincere and this would not be an intent on their part, but I do have concerns about the delay in the Federal court system. I just handed a letter to Senator Feinstein that I received yesterday outlining the severe shortage of Federal judges in the Southern District in California which is unlikely to be remedied any time soon. At the same time, California engaged in reform efforts several years ago where you cannot have more than 4 months from issue to trial, so things are really moving through the California court system. We have added lots of lawyers. That is a concern on whether this stuff will get clogged.

But let me ask you, because I have been puzzling over this, on page 16 of the bill, line 15—I hope you have a copy. I am trying to understand the implications of section A where the bill would be extended to named plaintiffs who act for the interest of its members or the interest of the general public.

Now it seems to me that essentially this section of the bill would subject individuals who are acting under California's Unfair Competition Act or antitrust law to the same rules as class action—actually, it basically would eliminate the private right of action for individuals in California under California's antitrust statute. Is that your reading of this?

Mr. BEISNER. As I interpret this, it would not eliminate that at all. This addresses, I think, circumstances in the growth of what's known as non-class action class actions in the trade.

Ms. LOFGREN. If I may interrupt, I think that's what the intent is. But what the language is is much broader than that.

Mr. BEISNER. I think that this would address really the non-class action class action situation. If there is a need for modification of that language then it should be done. But I think that the intent, as I understand it, is to address those sorts of non-class action class actions.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. I would also like to thank the chair, maybe for the benefit of the gentlelady from California, for working so hard and so diligently to help us get those five additional judges in San Diego that have caused the courts to be backed up for lack of them. Although for lack of them because of our tremendous load on immigration it really is why some other litigation was being put behind.

But I would like to turn my attention to the panel. Mr. Friedman, I guess my first question is, do you practice in Federal court?

Mr. FRIEDMAN. I do extensively.

Mr. ISSA. So you are comfortable in Federal court.

Mr. FRIEDMAN. I am.

Mr. ISSA. So if Federal court were more appropriate you would go there?

Mr. FRIEDMAN. When Federal claims are alleged in my cases I bring them in Federal court. We have a series of cases now, for example, involving race discrimination against African-Americans in the sale of life insurance. We have alleged claims under Federal law and brought those claims in Federal court.

Mr. ISSA. So I understand, when it is convenient you go to Federal court. When it is appropriate, you go to Federal court, or when it is just something that you have to do you go to Federal court.

You also made your case very strongly on the Arizona, Arizona, Arizona case. Do you seek business in other States?

Mr. FRIEDMAN. I am not sure I understand what you mean.

Mr. ISSA. Do you advertise for clients in other States?

Mr. FRIEDMAN. Our firm has run advertisements from time to time.

Mr. ISSA. Why would you do this?

Mr. FRIEDMAN. If there is a situation in which we are aware and conduct an investigation, we will run ads in which we ask for people with information to come forward.

Mr. ISSA. So when on January 26th of this year you advertised in the Peoria Star and said, many insurance companies have failed to pay for diminished value of insurance vehicles, and please contact us, would that have been a Federal case?

Mr. FRIEDMAN. Those cases have typically been brought in State court.

Mr. ISSA. So when it is convenient you will go across the country to sue in a State court.

Mr. FRIEDMAN. When it is appropriate we will bring cases in State court, often on a State-only basis, other times on a nationwide basis.

Mr. ISSA. I am not a lawyer. I sort of have the Sonny Bono seat here. I am the non-lawyer—— [Laughter.]

Mr. ISSA. I am proud of that. I have about 34 patents. I have operated—to maintain that intellectual property and my trademarks, so I have a comfort level with the importance of litigation both as a plaintiff and as a defendant. But I also have to go back to the same thing, it says, many insurance companies have failed to pay for diminished value. Now you advertised in Peoria, but I assume that if you are doing a case in Illinois, this is a national problem, is it not?

Mr. FRIEDMAN. Those cases have been brought, many of those cases they have been brought on a State by State basis.

Mr. ISSA. So when it is convenient you will choose your venue, you choose your States, and you will sue in State on something that would benefit the entire Nation if you took it to Federal court, but you have chosen to go to State court even though it is a national problem; is that right?

Mr. FRIEDMAN. I disagree.

Mr. ISSA. I appreciate you disagreeing, but it certainly seems like you picked Peoria on something that is going on all over the Nation. You made a decision to go to State court, not to Federal court because it was, for some reason, perhaps in your best interest as a trial lawyer. Certainly if I were in Peoria and I could be part of

a much larger group and pay a lot lower fees and get a more efficient adjudication on behalf of everyone that may have been so damaged I would want that.

Did you offer the people of Peoria when they responded to your advertising an opportunity to go to Federal court and be part of a larger class action suit?

Mr. FRIEDMAN. I do not believe that those cases could have been brought in Federal court, nor would they be appropriately brought in Federal court.

Mr. ISSA. But if this law were passed it could.

Mr. FRIEDMAN. If this law were passed all cases could be removed, of any kind, to Federal court regardless.

Mr. ISSA. So this law would be good for the people of Peoria if they have been so harmed.

Mr. FRIEDMAN. I very much disagree with that.

Mr. ISSA. I thought you would. In the past, have there been cases in which you have received more in fees than your clients have received in settlement? In other words, more than half of the total dollars that came in went to your firm?

Mr. FRIEDMAN. Not to my knowledge. We almost always apply based upon a percentage of the recovery for the clients.

Mr. ISSA. So what would be your typical part that you would receive on a $10-million case?

Mr. FRIEDMAN. It varies anywhere from 5 percent to as high in some cases as one-third.

Mr. ISSA. But at $10 million one-third would be more common than 5 percent, I trust.

Mr. FRIEDMAN. Not in class action jurisprudence.

Mr. ISSA. That is a good deal if you can do it for 5 percent I guess. I guess the real question I have for the panel is, we are here representing the interest of all the American people and looking for the appropriate time to remove something to Federal court and the appropriate time to respect States' rights. I listened to all of you and I have a hard time understanding why this law would not simply give one more tool, when appropriate, to remove to Federal court. Do any of you have a comment on something I may not be seeing?

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. ISSA. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman, for holding this meeting along with the Ranking Member.

Mr. Friedman, I would like to pose my questions to you. I must acknowledge Ms. Bankston. I am very moved by the testimony. The concern in this Committee room should be to redress the grievances of those who have been harmed, and I certainly would not want any legal actions, laws to unfairly harm small businesses. So I do want that on the record.

Mr. Friedman, first of all, I just want to clarify, as a licensed attorney—you are licensed where?

Mr. FRIEDMAN. Arizona.

Ms. JACKSON LEE. You have the opportunity, of course, to petition courts and to be in Peoria, Illinois, the State of Illinois. There

is no bar to you representing grieved individuals in States throughout the Nation; is that correct?

Mr. FRIEDMAN. That is true, particularly when we have local counsel who are involved in the cases.

Ms. JACKSON LEE. So where there is harm and where there are people who have been injured, if you will, you with your expertise are able to go in and assist them?

Mr. FRIEDMAN. That is absolutely correct.

Ms. JACKSON LEE. Tell me very succinctly why this present legislation is injurious to people who are harmed, and who are harmed without resources to mount the enormous litigating effort against giant corporations.

Mr. FRIEDMAN. This legislation, besides allowing a defendant at its whim to remove cases to Federal court, and then as some palamanders have candidly said, sweep it elsewhere within the Federal system far away from where the victims actually reside, includes provisions including the heightened pleading standard of the PSLRA, including a stay on discovery, which means that we do not get documents, we do not get testimony until that stay is lifted.

It is a prescription for delay because once we are in the Federal system, the discovery stay kicks in until a motion to dismiss is filed. Then class certification rulings are immediately appealable and you are in the appellate system.

Ms. JACKSON LEE. So in essence, if I might stop you because I have a series of questions, more costly and more apt for delay?

Mr. FRIEDMAN. Absolutely.

Ms. JACKSON LEE. It therefore undermines the individual litigant even more because they certainly will not have the resources for that delay. So as a class, the class as collectively representing individuals without means are also diminished.

Mr. FRIEDMAN. That is true. And the delay in cases where you have elderly investors can mean that the case will not go to trial even during their lifetimes.

Ms. JACKSON LEE. Let me cite for you the Private Securities Litigation Reform Act of 1995 which ended the use of the private RICO statute as a means of seeking treble damages and attorneys fees in securities fraud cases unless preceded by a criminal conviction. This was put into place over President Clinton's veto, and certainly what it did is it narrowed the ability of a single litigant to be able to protect themselves when such horrific acts were perpetrated.

We have no findings right now in the Enron case, and I have held myself to the tenets of innocent until proven guilty. It happens to be in my congressional district. I have got 20,000, at best, minimally impacted. Even though this is not a case on the bankruptcy issues, as you may be aware the bankruptcy proceedings were moved to or are in New York, away from the harm, the injured, the victimized, the sick, the sad, and the emotionally distressed.

What does this particular legislation that we have, how can you compare that to the present status of these particular victims? Some of them may be engaged in class actions, by the way, but I do not want to speak to that—the fact that it has moved, it is in a Federal court, it is away from where they have been victimized.

Mr. FRIEDMAN. I would first point out that it was noted I think this Sunday in the New York Times that the PSLRA in the view

of many has led to laxity of standards that led in turn to Enron and situations like the Baptist Foundation. But I would say that the disenfranchising for people to have to watch litigation across the country when it impacts their lives on a local level, I can tell you that we have investors who come to court because their life savings are at risk, to see what is happening and see what is happening in their lawsuit. They cannot do that if the case is hauled into Federal court and transferred across the country. They cannot afford to go to court. They cannot afford to see it. They will not see it, and that is a disenfranchising experience for people who have lost their life savings.

Ms. JACKSON LEE. Thank you very much, Mr. Friedman.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. Good to have you all with us. Most of my probing colleagues have beaten me to the punch. Most of the questions I had have already been resolved, but let me gloss over them quickly again.

Mr. Detkin, Mr. Friedman indicated in his statement that the Federal courts generally were overburdened or overwhelmed or understaffed to handle the jurisdiction that might be imposed upon them as a result of this bill if enacted into law. I believe you said you did not agree with that. This may well be subject to personal interpretation, but you did not agree with that; is that correct?

Mr. DETKIN. That is true, and it is true it is subject to personal interpretation. However, some clear data is that, for example, all Federal courts, all Federal judges have clerks and have staffs; most local judges do not. That is one clear example of the resources that are available to a Federal judge, not available to most State judges.

Mr. COBLE. Thank you, sir. Mr. Beisner, section 3, I think of the bill, the consumer bill of rights, how will that section help protect the rights of members in a class action lawsuit once these cases are resolved?

Mr. BEISNER. I think that the main way in which the consumer protection sections would help is to ensure that when you have settlements, particularly settlements that involve non-cash arrangements where there is a possibility of the class members suffering a net loss, that the courts will specially scrutinize those settlements to make sure that the class members' rights are protected.

I would also note that the notice provisions in the bill that require that notices go out in plain English I think will contribute significantly to the public having a better understanding of what rights are at issue for them in class actions and ensure that they understand what they are signing up for when they agree to the settlement.

Mr. COBLE. Thank you, sir. Ms. Bankston, you and Mr. Bankston were tangled up in the web of class action suits down in Mississippi. If I were to ask you what was the worst experience you had of the many experiences you all encountered what would your answer be? What was the worst feature of that experience that you remember?

Ms. BANKSTON. I would think the first one was the first Fenphen case where I had to testify, because I had never had to be

in court, and it was just 6 months after my husband had died. I think the second worse was whenever we had a Rezulin case and they moved it from Jefferson County to Clayborn County because all the plaintiffs and the jurors had the same last names. Then we went to Jefferson County—we were there and we still had the same judge. So that was really a slap in the fact.

Mr. COBLE. I understand. Mr. Friedman, to show my impartiality I have a little time left. Do you want to be heard on my segment?

Mr. FRIEDMAN. No, Congressman.

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

Chairman SENSENBRENNER. That is appreciated.

The other gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. These hearings are very, very frustrating to me. As somebody who practiced law for 22 years, I feel kind of the same way I did in the hearings regarding bankruptcy. I was the first to acknowledge that there were real problems in the existing bankruptcy system. I am the first to acknowledge after 22 years in the practice of law that there are real problems in the existing class action and tort system. There are plaintiffs' lawyers who press to the edge of the law and will do anything either appropriate or inappropriate to achieve objectives.

I hasten to say that for every one of those plaintiffs' lawyers there are defense lawyers who will do exactly the same. Yet as a whole, lawyers probably are among the highest integrity people in America, both plaintiff and defense lawyers. So it varies.

There are problems in the system, as there were in the bankruptcy system. I did not support the bankruptcy reform bill because I thought that response to the problems created as many or more problems as already exist. I do not support this legislation because I think it will create as many or more problems than already exist, and it is not going to solve many of the problems. I think it is going to exacerbate many of the problems.

Just as Mr.—well, I will not associate myself with any particular witness. Let me just do this independently. We started out in the civil rights era thinking that Federal judges were in fact better than State judges. At a point in time we reached a conclusion that that was not necessarily so. If you have got a claim and it is a good claim, theoretically, that claim ought to get you the same result before a Federal judge as before a State judge, and the same result before a State judge as before a Federal judge.

Now having said that, I know that is not so, in some cases. But a remedy that delivers all of these cases to Federal court would be no more reasonable than what we have now that delivers many of the cases to State court because in some cases the Federal judges are terrible, and in some cases the State judges are terrible. In some cases, the State judges are wonderful; in some cases the Federal judges are wonderful. This legislation is not going to solve that. State interpretation of law, whether it is done by a Federal judge or by a State judge should not be any different.

There is one major concern that nobody has really mentioned here, and that is a concern that I think is maybe illustrated by Mr. Friedman on the one hand and Mr. Beisner on the other hand, and Arthur Andersen on the one hand as opposed to little individual or 2-man or 15-person law firms. I am not sure that—I do not think

this legislation would further escalate a tendency toward all these cases being handled by some mega law firms. That might be beneficial to O'Melveny & Myers and maybe not so beneficial to a smaller practice in Phoenix, Arizona. I am not saying that that is anybody's motivation here. It is just a fact.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WATT. Can I just make one final comment, and that is just to emphasize what my point was. This is extremely complicated, and I think this bill applies kind of a global fix to an extremely complicated issue and it is not going to work.

Chairman SENSENBRENNER. The chair would like to thank all of the witnesses for their good testimony and good answers to the questions. I think this has been a very worthwhile and useful hearing and shed a lot of light on, again, what is a very complicated subject.

I have a number of unanimous consent requests to include items in the record. So without objection, the following will be put in the record: a letter and study by the U.S. Chamber of Commerce, a letter and statement on behalf of the American Trucking Association, and a letter and statement on behalf of the Alliance of American Insurers.

[The information referred to follows in the Appendix]

Chairman SENSENBRENNER.

Does the minority have anything they would want to place in the record?

Mr. CONYERS. No.

Chairman SENSENBRENNER. Okay. Without objection, the Committee stands adjourned.

[Whereupon, at 11:35 a.m., the Committee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

Alliance
of American Insurers

February 4, 2002

Honorable James Sensenbrenner
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

RE: Statement for the Hearing Record on HR 2341

Dear Mr. Chairman:

The 325 members of the Alliance of American Insurers would like to thank you for bringing HR 2341, The Class Action Fairness Act, before the full Judiciary for hearing. Attached is a statement, entitled *Class Action Litigation: Problems and Solutions,* that we ask be included in the committee's hearing record on this legislation.

The Alliance supports your efforts to reform federal class action litigation by making it easier for class actions to be removed from state to federal courts. This legislation accomplishes this by modifying the federal diversity statutes to give federal courts original jurisdiction over class actions in which there is minimal diversity. In addition it modernizes the federal class action process in such ways that abuses would be curbed, restoring class actions to their original purpose.

HR 2341 is a key element of what we believe to be essential reforms to the class action process. Other reforms we support include modification of Rule 23 of the Federal Rules of Civil Procedure governing the certification of class actions and various state legislative initiatives.

Thank you for the opportunity to make our views part of the committee's hearing record. If you or your staff have questions please do not hesitate to contact us. We look forward to working with you and the other sponsors of this legislation as HR2341 moves forward.

Sincerely,

Kenneth D. Schloman
Washington Counsel
Alliance of American Insurers

Enclosure (1)

CLASS ACTION LITIGATION:

PROBLEMS AND SOLUTIONS

EXECUTIVE SUMMARY

Although class actions have been a part of American jurisprudence since its inception, it is the recent explosion in such suits and the abuses that accompany them, which have generated a high level of concern on the part of insurers and the larger business community alike.

While many explanations exist for the dramatic rise in class actions—from changes in procedural rules to the need for an ever-growing population of attorneys to become more entrepreneurial—the result is the same across all segments of the business community. Class actions are forcing corporations to focus on lawsuits rather than manufacturing better products, providing better services, or lowering their prices.

In an effort to curb these abuses and restore class actions to their original purpose, the Alliance has developed a set of reforms that it is proposing at both the federal and state levels. Specifically, the Alliance supports federal efforts to reform class action litigation by making it easier for class actions to be removed from state court to federal court and granting federal district courts original jurisdiction over class actions in which there is minimal diversity. The Alliance also supports reforms to the Federal Rules of Civil Procedure governing the certification of class actions. Additionally, the Alliance supports legislation in the states that would:

- Create a rebuttable presumption of validity in a civil action against a regulated entity for practices and activities engaged in by the regulated entity that have been approved by the regulatory authority charged with overseeing that entity;
- Require a court to dismiss or abate a proceeding where state agency jurisdiction is involved and that provides that relief awarded to a claimant by an administrative agency may be adequate even if the relief does not include exemplary damages, multiple damages, attorneys' fees, or costs of court; and
- Stay discovery in class actions while a motion to dismiss is pending.

Further, the Alliance will seek to facilitate appeal of class action verdicts by supporting legislation or rules of court that:

- Limit the size of appellate bonds required for all civil awards for damages in such actions; or
- Authorize the waiver of such bonds, especially in the appeal of punitive damage awards.

The Alliance believes the time is right to achieve these reforms. Efforts by Congress to enact class action reform legislation and Alabama's recent enactment of a class action reform bill are signs that the public's tolerance of class action abuse is waning. Further, high profile class action settlements where the plaintiffs' attorneys have walked away with millions and the class members received virtually nothing, have also served to heighten the public's overall awareness of the abuses inherent in the current system.

WHAT IS A CLASS ACTION?

A class action is a procedural device that, under certain circumstances, allows a number of individual claims and the rights of a large number of persons to be decided in one lawsuit. The class action involves joining a number of parties and a number of related claims, plus representing the interests of persons not before the court.

The key to the class representative suit is that not all class members must become parties to the lawsuit in order to have their rights adjudicated. Instead, the great majority of the group may participate only as class members while a smaller number represents them in court as parties to the litigation.

A class action is designed to promote efficiency and fairness in handling large numbers of similar claims. A fundamental objective of the class action device is the promotion of uniformity of decision with regard to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. The advantages inherent in a class action are to vindicate the rights of numerous claimants in one action when individual actions might be impracticable.

HOW HAS THE PRESENT RULE DEVELOPED?

The class action evolved over 250 years ago in the English Chancery courts. The Chancery courts were separate tribunals through which the English Crown dis-

pensed justice when the common law courts did not work and the "remedy at law was inadequate." As part of the equity concepts involved in the Chancery courts, the class action appeared to combine common issues in order to resolve them expeditiously. Thus, it was used when many parties were involved to prevent the inconvenience of a multiplicity of lawsuits.

Because both law and equity were retained in U.S. courts, the class action was fully incorporated into American jurisprudence. At the federal level, the class action device was incorporated by virtue of Rule 23 of the Federal Rules of Civil Procedure (FRCP) and many states have statutes or rules that are based on, or are substantially similar to, the federal rules.

Rule 23 was promulgated in 1938 as part of the first FRCP. No changes were made to the rule until 1966 when Congress, among other revisions, expanded the ability of attorneys to prosecute class action lawsuits. Previously, the law had required that all plaintiffs in a class action suit be identified and demonstrate a willingness to participate in the litigation. However, the 1966 amendments gave attorneys, through the use of token plaintiffs, the ability to sue on behalf of limitless numbers of unknown persons. Prior to 1966, individuals had to choose affirmatively to be a party in such a lawsuit, and only parties could share in the recovery. The more permissive procedural changes, however, allowed lawyers to sue whenever they believed that a group of individuals was harmed, merely by suing on one individual's behalf. Some observers believe that the recent explosion in class action litigation can be traced back to this change in the federal rules.

In an attempt to curtail some of the abuses associated with the class action mechanism, efforts were initiated in 1996 to begin the long and arduous task of amending the FRCP. The Judicial Conference of the United States is charged with recommending to the U.S. Supreme Court, improvements in the rules of practice and procedure in the federal courts. There are six Advisory committees that all report to a Standing Committee on Rules of Practice and Procedure in the Judicial Conference. The Advisory Committee on Civil Rules considers changes to the FRCP. Other advisory committees deal with the appellate rules, the bankruptcy code, criminal rules and the rules of evidence.

After considerable debate, the Advisory Committee on Civil Rules submitted several proposed changes to FRCP 23 to the Standing Committee, which approved them, published them in the Federal Register, and allowed six months for comment. The proposed changes are set forth below:

- Permissive Interlocutory Appeals—this provision would provide for a discretionary interlocutory appeal of an order granting or denying class action certification;
- Settlement Classes—this proposal would have essentially permitted claims to be settled on a class action basis even if they would have been denied such status in trial;
- Dismissal or Compromise—this proposal would have made explicit something which is current practice in most courts—the holding of a hearing to determine whether the court should approve a settlement;
- Balancing Individual Recoveries with the Costs and Burdens to the System—this proposal would have required an examination of whether the probable relief to individual class members justifies the costs and burdens of class litigation;
- The Need for Class Certification and Viability of Individual Claims—this proposal would have added additional factors to consider in the court's determination under (b)(3) as to whether the class action is superior to other methods of adjudication;
- Maturity—this proposal would have directed courts to consider the "maturity" of related litigation involving class members;
- Timing of Certification—this proposal would have required a certification decision "when practicable" as opposed to "as soon as practicable" after the action has been brought.

Over 200 interested parties submitted comments on the proposed changes to Rule 23 and the Advisory Committee on Civil Rules compiled nearly four volumes of commentary on the proposals. However, because the proposals were so controversial, the Advisory Committee ultimately recommended only one change to the Standing Committee—an amendment to Rule 23(f) which authorizes an interlocutory appeal from an order granting or denying class action certification. This change addressed a concern that in cases involving large classes, certification as a class gave the prevailing party an almost insurmountable advantage in terms of negotiating a settlement of

the case because class action certification orders were previously not appealable. Once large classes are certified, the defendant will almost always settle rather than litigate.

Pursuant to 28 U.S.C. 2074, the U.S. Supreme Court approved and submitted this change to FRCP 23 to Congress in late April 1998. Congress had until December 1998 to overturn this action by legislation, which, as anticipated, did not occur. Drafters of the 1998 amendment hoped that by streamlining the review process for the certification rulings, a coherent and uniform body of law would emerge, perhaps obviating the need to overhaul the remainder of Rule 23, or at least highlighting those areas of class action law that can be salvaged.

Since that time, the Advisory Committee on Civil Rules has turned its attention to process and procedures to be followed by courts concerning whether to certify classes, when to provide more detailed "opt out" procedures for potential class members who do not wish to be a part of the litigation, and how to address issues posed by settlements and attorney fees in complex class action settings. Proposed amendments have been released by the Standing Committee addressing these items, with comments due in early 2002.

HOW DOES A "CLASS" BECOME CERTIFIED?

Under FRCP 23, the following requirements must be satisfied in order to be certified as a class action:

- Numerosity: the class must be so numerous that joinder of all members is impracticable;
- Commonality: there must be questions of law or fact common to the class;
- Typicality: the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and
- Representation: the representative parties must fairly and adequately protect the interests of the class.

In addition to the above requirements, *one* of the following prerequisites must also be satisfied:

- The prosecution of separate actions would create a risk of 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
- The prosecution of separate actions would create a risk of 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; or
- The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- 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.

IS THERE A PROBLEM?

Today, the class action device is employed in a wide variety of types of litigation, including consumer, securities, antitrust, employment, and civil rights, and increasingly in mass-accident, product-liability, and toxic-tort litigation. Nevertheless, while the class action concept is quite appealing in theory—permitting ordinary citizens, each with relatively minor claims and damages, to invoke the power of the law against wealthy and organized corporations—abuses have developed which are raising product costs and drastically diminishing the litigants recovery, while comparatively increasing their attorneys' recovery.

Class actions can take on a tone of coerciveness when filed as a threat or pressure tactic. Such suits are often frivolous and founded in harassment and intimidation. Nevertheless, defendants can be forced into unwanted settlements when faced with the extraordinary costs of defending a class action.

Further abusing the procedure, plaintiffs will often take a shotgun approach to class actions by including defendants without investigating whether they are proper parties to the lawsuit. The shotgun approach again abuses the class action by permitting discovery and fishing expeditions merely to support filing subsequent class actions after dismissal.

The entrepreneurial character of many such suits and the business decision to settle them has become an unmistakable facet of class actions today. Even when plaintiffs win a class action, high attorneys' fees allow little dollar return for class members. From the perspective of the members of the class, only the attorneys seem to profit from such windfalls. Consider these examples:

Dexter Kamilewicz discovered he was part of a class action suit against his mortgage bank only when he spotted a $91.33 deduction from his escrow account that turned out to be his payment for lawyers he never knew he hired. His winnings—$2.19 in back interest (minus the $91.33 in attorneys' fees). Lawyers received $8.5 million in total fees from Mr. Kamilewicz and 300,000 other unknowing consumers. (Source: *The New York Times*, November 21, 1995)

- In a class action against Allstate and Texas Farmers insurance companies over practices encouraged by state insurance regulators, both companies settled to avoid even larger legal expenses, plus a potential of tens of millions in losses. Insured motorists received $5.50 apiece, while the attorneys were expected to receive $8.5 million, after expenses. (Source: *San Antonio Express-News*, October 14, 1996)
- In a class action suit against Cheerios cereal over a food additive with no evidence of injury to any consumers, lawyers were paid nearly $2 million in fees, or approximately $2,000 per hour. Consumers received coupons for a free box of cereal. (Source: The Metropolitan Corporate Counsel, February 1998)

In a study conducted in 1997, the RAND Institute for Civil Justice noted that the landscape of class action activity has shifted dramatically in the past several years. Litigation is increasing rapidly, especially in the state courts, and most of the growth is taking place in the consumer area, with burgeoning claims alleging fraud, deceptive advertising, and improper calculation of fees and other charges. The study further noted that plaintiffs, claims, remedies, and damages are all becoming more diverse.

In its study, the ICJ notes that there is no national database on class actions. Accordingly, it was not able to observe the changes in class action activity over the last several years. Nevertheless, the ICJ staff conducted interviews with more than 50 people at 34 firms representing different interests. Plaintiff trial lawyers, corporate and outside defense counsel, along with public interest lawyers, and state attorney generals, were all interviewed as part of the study. The study notes that, with a few exceptions, all those interviewed, on both the plaintiff and defense side, stated that class action activity has grown dramatically over the past 2–3 years. Further, all agreed that recent growth has been concentrated in the state courts, as plaintiffs and defendants both see increased unwillingness among federal judges to certify or to sustain certification of class actions.

Additionally, according to the Federal Judicial Conference's Advisory Committee on Civil Rules, corporations are facing a 300 percent to 1,000 percent increase in class action lawsuits. At a hearing before the Advisory Committee on changes to Rule 23, Ford Motor Company's general counsel observed that his company, which in the past might have fought a half-dozen class action suits at a time, as of 1997 faced nearly 70 such actions. Similarly, in an October 1999 newspaper article, Allstate is listed as having at least 50 class action suits pending, up from three in 1988. Such increases are forcing corporations to focus on lawsuits rather than manufacturing better products, providing better services, or lowering their prices.

Statistics compiled by the Administrative Office of the United States Courts further illustrate this rise in class action activity. During the time period 1985–1987, a total of 2,317 class action suits were filed in federal court. Ten years later, 4,171 class action suits were filed in federal court during the same time period—1995–1997—an 80 percent increase!

Further supporting this claim that class action suits are on the rise and impact the majority of U.S. businesses are the results of a survey conducted by the Federalist Society for Law & Public Policy Studies and a member survey conducted by the Alliance.

The survey conducted by the Federalist Society indicates that between 1988 and 1998, the number of pending class actions in state courts increased by 1,315 percent, and the number in all federal courts increased by 340 percent. Further, among respondents, class action litigation rose at a faster rate in state courts than in federal courts, with class action activity more than doubling in federal courts between 1993 and 1998, and more than tripling in state courts for the same years.

In January 1999, the Alliance conducted a survey of its members to learn more about their experiences with class actions and problems faced during the course of such litigation. Of those Alliance members responding to the survey, approximately

63 percent indicated that in the past five years, their company has been named as a defendant in a lawsuit seeking class action certification. Of those involved in such litigation, workers compensation rating issues dominated the list of legal theories forming the basis of the complaints. Further, the majority of those responding indicated that the suits took place in state court only.

The survey asked the members to list specific issues or problems the Alliance should consider with respect to strengthening the defenses available to insurers in class action litigation. Not surprisingly, issues relating to class certification and attorneys fees and sanctions dominated the list.

WHAT CAN BE DONE?

The Alliance supports federal efforts to reform class action litigation by making it easier for class actions to be removed from state court to federal court and granting federal district courts original jurisdiction over class actions in which there is minimal diversity.

Federal courts are better equipped to deal with complex cases such as class actions. Accordingly, the Alliance supports federal efforts to reform class action litigation by making it easier for class actions to be removed from state court to federal court and granting federal district courts original jurisdiction over class actions in which there is minimal diversity. The Alliance recognizes that S. 353 and HR 1875 (legislation pending in the 106th Congress) do not change class action rules, nor do they change anybody's rights to recovery. They merely impact which court should hear the case. The Alliance's own survey results and the study conducted by the RAND Institute for Civil Justice, confirm that class actions filed in state court make up the bulk of all class action litigation. Thus, the Alliance recognizes the need to redirect the bulk of these filings into the federal court system, which has generally been more protective of consumers' and defendants' rights in class actions and which is better equipped to deal with such complex cases. Following are a few of the reasons the Alliance believes the bulk of class actions belong in the federal courts:

Judges:

Resources. Unlike many state court trial judges, federal district judges are well supported by law clerks, research assistants, etc.

Freedom from local political considerations. Federal district judges generally are less subject to local political considerations.

Federal judges "run a tight ship." Federal court hearings are scheduled regularly, requiring counsel to report on the status of the case. Continuances are generally more difficult to obtain and declarations showing good cause are required. Federal judges do not hesitate to impose sanctions against counsel who abuse federal procedures. Although case management standards are now in effect in many state courts, federal judges more often intervene in cases assigned to them to impose scheduling orders, to manage discovery and motion practice, to promote settlement or reference to ADR procedures, and to control the length of trials.

Well-developed body of law: Federal Rule of Civil Procedure 23 governing class actions has been applied in hundreds of cases. In many states, there are few, if any, reported decisions relating to class actions. The body of reported opinions available to the federal judiciary tends to increase the level of predictability in a generally unpredictable area of the law.

Dispositive motions: Federal judges are generally perceived as being more inclined to grant dispositive motions (motions for summary judgment or for dismissal of the action).

Discovery stays: Some federal judges will stay both discovery and class certification motions pending adjudication of a dispositive motion.

Jury considerations: The federal courts generally provide a better jury pool since the geographic area from which federal jurors are chosen is typically larger, resulting in a more diverse jury panel. In addition, unless the parties otherwise agree, a unanimous verdict is required in federal civil trials.

Interlocutory appeals: Under new Rule 23(f) of the Federal Rules of Civil Procedure, parties have conditional access to interlocutory appellate review of orders granting or denying certification.

Costs: In federal court, the expenses of class identification and class notice generally must be borne exclusively by the plaintiff or plaintiff's counsel.

In state courts, the trial judge may be somewhat more likely to order the defendant to advance these costs.

The Alliance supports changes to FRCP 23 that would result in:

- Greater specificity in trial courts orders defining a class and in detailing opt-out procedures;
- More understandable and informative class action notices;
- Stricter judicial scrutiny of class action settlements and requests for attorney fees filed by class counsel; and
- Judicial appointment of class counsel.

Further, the Alliance opposes any changes to the federal rules governing class actions that would result in greater administrative expenses in defending class action litigation or would have the effect of protracting such litigation.

Reforms that produce these results will improve the class action process by enhancing the practical ability to defend them on their merits and improving the ability to control expense of the litigation and its duration.

In addition to the need for federal reforms, the state system also needs change. The Alliance further supports legislation in the states that would:

- Create a rebuttable presumption of validity in a civil action against a regulated entity for practices and activities engaged in by the regulated entity that have been approved by the regulatory authority charged with overseeing that entity;
- Require a court to dismiss or abate a proceeding where state agency jurisdiction is involved and that provides that relief awarded to a claimant by an administrative agency may be adequate even if the relief does not include exemplary damages, multiple damages, attorneys' fees, or costs of court; and
- Stay discovery in class actions while a motion to dismiss is pending.
- Facilitate the appeal of class action verdicts by limiting the size of appellate bonds required for all civil awards for damages in such actions, or authorizing the waiver of such bonds, especially in the appeal of punitive damage awards.

Presumption of Validity

Oftentimes, an insurer will be named as a defendant in a class action suit where the practice or activity giving rise to the complaint was the subject of an earlier approval by the state insurance department, or the insurer was in compliance with all applicable statutory and regulatory requirements relating to the practice or activity at issue at all relevant times. In such cases, insurers experience great frustration and feel they are in a "no-win" situation, in that the company at the time in question had acted in good faith, but could not, at a later date, once the activity or practice was being challenged, use the department's prior approval or the company's compliance, as a defense in the litigation.

To illustrate, Allstate and Texas Farmers Insurance Company were sued in early 1996 in Texas over a practice known as "double-rounding." Pursuant to state insurance regulations, insurers were allowed to round automobile and homeowners' insurance premiums to the nearest dollar to simplify their calculations. However, a class action suit was filed over Farmers' and Allstate's practice of rounding twice—once after calculating premiums and again after dividing premiums into two, six-month payments.

In court proceedings, Allstate produced written documentation from a Texas insurance regulator instructing Allstate to engage in this double-rounding procedure. Nevertheless, this approval did not carry the day in court, and Allstate ultimately settled the case for approximately $35 million with $25 million going to policyholders in the form of refunds and $10 million to the plaintiffs' attorneys. Each policyholder was expected to receive approximately $5.50 a piece.

An interesting postscript to this story is that the regulation at issue was later rewritten to specifically prohibit double rounding of automobile and homeowners' insurance bills. Further, the Insurance Commissioner acknowledged that the prior rule was not clearly written and that former Texas Department of Insurance officials misdirected the companies.

The Texas rounding case is just one of many class actions involving insurers who have, in good faith, followed the law and instructions received from their regulator with respect to a particular practice or activity, only to later find themselves in court being second-guessed by a plaintiffs' attorney engaging in "class action regulation." It is thus in an effort to promote fairness and provide greater certainty and predictability in the business of insurance, that the Alliance supports state legislation that would create a rebuttable presumption of validity in civil actions against

regulated entities for practices and activities engaged in by those entities that have been approved by the applicable regulatory body.

The Alliance believes that such a presumption should exist for all regulated entities, not simply for insurers. The ability to rely on state agency pronouncements and determinations should be a part of the public policy adopted by each state.

Model legislation developed by the Alliance on this issue is attached as Appendix 1.

Exhaustion of Administrative Remedies

The Alliance also supports legislation in the states that would require a court to dismiss or abate a proceeding where state agency jurisdiction is involved and that further provides that relief awarded to a claimant may be adequate even if the relief does not include exemplary damages, multiple damages, attorneys' fees, or costs of court.

Had such a procedure been in place in Texas at the time Allstate and Texas Farmers were sued in the premium rounding case discussed above, the matter would have been transferred from state court to the Texas Department of Insurance for resolution. As such, consumers who were unhappy with their bills could have filed complaints with the Department. The Department, in turn, could have ordered appropriate relief, saving all parties both time and money.

Consumers will undoubtedly be better served under this approach since state insurance regulators are experts in the field and will not be motivated, as are class action plaintiffs' attorneys, by their own financial gain. Additionally, judicial resources would be conserved under such an approach and referral to an administrative agency would likely discourage the filing of frivolous class action suits and give companies more time to take corrective action.

Model legislation developed by the Alliance on this issue is attached as Appendix 2.

Staying Discovery

The Alliance also studied recent federal legislation intended to curb abuses associated with class action securities litigation. Although many of the reforms were specific to the securities industry, the Alliance believes that the provision staying discovery while a motion to dismiss is pending could be easily extended to all class actions and that doing so would help solve several of the abuses associated with class action litigation. For instance, attorneys' fees would be greatly reduced by staying discovery while a motion to dismiss is pending and insurers who never should have been named as defendants in the first place could be dismissed from the litigation with minimal time and money expended.

Model legislation developed by the Alliance on this issue is attached as Appendix 3.

Appellate Bonds

Class action verdicts have become increasingly large and often lack a rational basis in law to justify their size. Many state appellate courts have discretion to require that a bond be posted in the amount, or in an amount in excess of, an award before an appeal can proceed. As a result, many corporate defendants find that the bond requirement is an obstacle to appealing large jury verdicts, such as from class action suits and those involving punitive damages or other large jury awards. They contend that the discretion currently given to state courts is being used to inhibit corporate defendants from appealing runaway awards at the trial court level. Posting a bond can be particularly onerous for small businesses that are defendants in litigation.

Accordingly, the Alliance will seek to facilitate appeal of class action verdicts by supporting legislation or rules of court that limit the size of appellate bonds required for all civil awards for damages in such actions, or that authorize the waiver of such bonds, especially in the appeal of punitive damage awards.

Several states, including Georgia, Kentucky, Virginia, North Carolina, and Florida enacted legislation on this issue during their 2000 legislative sessions. Legislation was also introduced in Missouri during the 2000 session, but failed to pass.

Model legislation developed by the Alliance on this issue is attached as Appendix 4.

RECENT STATE REFORMS

Perhaps signaling a shift in the states' seeming tolerance of class action abuse, Alabama, a state notorious for large jury verdicts and a haven for class actions, passed a significant piece of class action reform legislation in May 1999. Senate Bill 72 establishes certain procedures concerning the certification of class actions in the Alabama courts. The bill purports to cover all civil class actions brought in Alabama

courts and states that, if there is any inconsistency between SB 72 and the Alabama Rules of Civil Procedure, SB 72 is controlling.

Senate Bill 72 requires a court considering a class action to hold an early conference to establish a schedule for any discovery the parties may wish to engage in that is allowed by the rules of civil procedure and germane to the issue of whether the class action should be certified. At the conference, the court may set a date for hearing on the issue of class certification, but the hearing cannot be set sooner than 90-days after the date on which the court issues its schedule order, unless a shorter time is agreed to by the parties.

On the motion of any party, the court is required to stay all discovery directed solely at the merits of the claims or defenses in the action until the court has made a decision regarding certification of the class. However, the court may decline to issue the stay for good cause shown if the interests of justice require that the court not issue the stay.

The court is required to hold a full evidentiary hearing on class certification on the motion of any party. At the hearing, parties are allowed to present, in the same manner as at trial, any admissible evidence in support of or in opposition to the certification of the class.

The court is required to use a "rigorous analysis" in deciding whether to certify the class. The burden is on the class proponent to show that certification is proper. The court is prohibited from certifying the class unless all of the factors required by Ala. R. Civ. P. 23 for certification of a class action have been met. The court is required to place in the record a written order addressing all the factors and specifying the evidence, or lack of evidence, on which the court based its decision as to whether each factor has been established.

The court's order certifying or refusing to certify a class action is appealable in the same manner as a final order to the appellate court that would otherwise have jurisdiction over an appeal from a final order in the action. The appeal may only be filed within 42 days of the order certifying or refusing to certify the class. The filing or failure to file this type of appeal does not affect the right of any party, after the entry of final judgment, to appeal the earlier certification of or refusal to certify the class. During the pendency of an appeal as to the certification of the class, the action in the trial court is stayed.

CONCLUSION

The Alliance believes that the time is right to achieve the reforms discussed above. Recent high profile settlements, such as that between Big Tobacco and the State Attorneys General, have created a backlash against attorneys and heightened the public's overall awareness of the abuses inherent in the civil justice system.

In the tobacco litigation, private lawyers who helped eight states sue the tobacco industry were paid $221 million in legal fees under a settlement with the industry. In addition, an arbitration panel in December 1998 awarded $8 billion to lawyers who negotiated separate multi-billion dollar settlements for Texas, Florida, and Mississippi.

Additionally, efforts by Congress to enact class action reform legislation and Alabama's recent enactment of a class action reform bill are expected to generate momentum within the states to curb such abuses.

Appendix 1

PRESUMPTION OF VALIDITY

MODEL LEGISLATION

In a civil action brought against a regulated entity doing business in this state for harm allegedly caused by an activity or practice engaged in by that entity, there is a rebuttable presumption that the entity and/or its agent(s) is not liable if, at the time the act giving rise to the complaint took place, the entity had received the explicit or implicit approval of the regulatory authority charged with overseeing that entity to engage in the activity or practice at issue, or the entity has complied with all applicable statutory and regulatory requirements relating to the practice or activity at issue, including but not limited to, rules, regulations and bulletins.

Appendix 2

EXHAUSTION OF ADMINISTRATIVE REMEDIES

MODEL LEGISLATION

I. DISMISSAL OR ABATEMENT IF STATE AGENCY JURISDICTION INVOLVED:

(a) A court shall abate or dismiss an action unless the court determines that:

(1) the interpretation, application, or violation of an agency statute or rule involves only questions of law; and

(2) the state agency may not make any findings of fact or conclusions of law or issue any orders that would aid the court in resolving the action.

(b) A court may abate or dismiss an action if the court determines that a state agency may order in a contested case all or part of the relief the claimant seeks. The court shall specify in its order of abatement or dismissal the state agency and the portion of the agency statute on which the court bases its order.

(c) A court that abates an action under this section:

(1) shall refer specific issues or claims within the state agency's jurisdiction to the agency for action; and

(2) may direct the state agency to report to the court periodically concerning the disposition of the matters referred to the agency.

(d) The statute of limitations for an action dismissed or abated under this section is tolled for the period during which the claimant seeks an administrative remedy.

II. PERIOD OF ABATEMENT: The court shall provide that the period of abatement is at least six months from the date the court enters the order of abatement, or such other reasonable time as the court may determine.

III. ADEQUATE RELIEF: Relief awarded to a claimant may be adequate even if the relief does not include exemplary damages, multiple damages, attorneys' fees, or costs of court.

IV. APPLICABILITY: This section applies only to a civil action in which:

(1) a claimant seeks recovery of damages on behalf of a class of claimants and

(2) the interpretation, application, or violation of an agency statute or rule is involved for at least one defendant.

Appendix 3

STAYING DISCOVERY

MODEL LEGISLATION

In any civil action in which class certification is being sought, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

Appendix 4

APPELLATE BONDS

MODEL LEGISLATION

(NOTE: Dollar amounts will need to be determined based upon state economic and political considerations.)

Section 1. Waiver of Appeal Bond

(A) The state supersedeas bond requirements shall be waived as to that portion of any civil award for damages that exceeds $————————————if the party or parties found liable seek a stay of enforcement of the judgment during the appeal.

(B) If the party seeking the appeal is a small business organized and doing business under the laws of this state, the state supersedeas bond requirements shall be waived as to that portion of any civil award for damages that exceeds $————————————while any

appeals are pending. A small business is a business that has 50 or fewer employees and annual revenues of $5,000,000 or less.

(C) If plaintiff proves by a preponderance of the evidence that a party bringing an appeal, for whom the supersedeas bond requirement has been waived, is purposefully dissipating its assets or diverting assets outside the jurisdiction of the United States courts, waiver shall be rescinded and the bond requirement shall be reinstated for the full amount of the judgment.

(D) A court may otherwise waive the filing of a supersedeas bond in a civil action for good cause shown.

Section 2. Effective Date

This Act shall take effect on its date of enactment and shall apply to any action which has not yet begun or which is pending on the date of enactment of this Act.

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Legislative Affairs

February 4, 2002

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn Building
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for holding this hearing on H.R. 2341, a bill to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members.

This is an important bill for the thousands of businesses, both large and small, that make up the American Trucking Associations (ATA), and I respectfully ask that you make the attached written statement by Mr. Fred Burns a part of the official hearing record. Mr. Burns is the President of Burns Motor Freight in Marlinton, West Virginia, and is also a Vice Chairman of the ATA.

Again, thank you Mr. Chairman for holding the important hearing, and know that the ATA stands ready to assist as you move forward on tort reforms and insurance reforms that recognize the role of both small and large businesses.

Sincerely,

James R. Whittinghill
Senior Vice President for
Legislative Affairs

STATEMENT OF FRED C. BURNS, JR.

PRESIDENT AND CHIEF EXECUTIVE OFFICER OF BURNS MOTOR FREIGHT, INC.
BEFORE THE HOUSE JUDICIARY COMMITTEE
ON BEHALF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.

H. R. 2341: THE CLASS ACTION FAIRNESS ACT OF 2001
February 6, 2002

Good afternoon, Mr. Chairman, and thank you for the opportunity to present my views to you today about the ways in which H.R. 2341, the Class Action Fairness Act of 2001, will benefit this country's legal system and in turn, the trucking industry. I strongly urge you to support this legislation. To put my remarks in perspective, let me tell you that I am the President and Chief Executive Officer of Burns Motor Freight, Inc., headquartered in Marlinton, West Virginia. I also am a member of the American Trucking Associations, Inc. ("ATA"), and serve as a Vice Chairman of ATA and formerly chaired the ATA Small Carriers Committee. I presently chair a special ATA task force formed to study and address the current crisis in the trucking industry's insurance costs. ATA is the national trade association for the trucking industry and represents more than 2000 motor carrier companies of every type and class in the country. Speaking on behalf of ATA and myself, I want you to understand the relationship between the harmful impact the tremendous growth in frivolous and costly lawsuits has had on my company's insurance costs, and therefore, on the economics of running my family's business.

To understand that relationship, this Committee needs to know that the trucking industry is a vital part of the United States' economy, representing about five percent of the nation's gross domestic product and providing employment for almost 10 million

people in jobs that directly relate to trucking. Trucking represents over 87 percent of the freight transportation market in the United States, and transports practically every type of product and raw material used in the economy.[1] As the predominant mode by which U.S. consumers receive virtually all of their goods, the trucking industry also has significant influence on the cost of finished goods and raw materials in the economy. Over 75 percent of all communities in the United States rely exclusively on trucks to deliver all of their food, clothing, medicine, and other consumer goods.

The nation's trucking industry provides the essential transportation resources, infrastructure and services that are necessary to sustain the growing economy that benefits all Americans, but does so in a very precarious business environment. Most of the trucking industry is comprised of small businesses, like mine. According to the Department of Transportation, almost 50% of motor carriers have only one truck, and fully 95% of motor carriers, almost 395,000 of them, have 20 or fewer trucks.[2] The profit margins in the trucking industry are extremely tight. Our industry's net profit margin in 2000 was less than 3.0 %.

This tight profit margin means that our livelihood is dramatically impacted by increased insurance costs. Insurance generally comprises a significant portion of a motor carrier's expenses. For example, U.S. Department of Transportation data compiled in ATA's Motor Carrier Financial & Operating Statistics 2000 Annual Report shows all insurance premiums were nearly 2.5% of total trucking company expenses in 2000. Liability insurance was almost 1.5% of all carrier expenses. Insurance is not optional for

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1 DRI-WEPA, Inc., 2002 *U.S. Freight Transportation Forecast ...to 2013.*

2 Federal Motor Carrier Safety Administration, Docket Item FMCSA 1997-2350-954, Preliminary Regulatory Evaluation (Truck Driver Hours of Service), page 60, paragraph 3.

the trucking industry. We are required to have liability insurance policies in place with Congressionally-mandated minimum levels of coverage. Depending on the type of carrier, those expenses can increase substantially. An increase in insurance premiums can make the difference between profitability and bankruptcy. According to A.G. Edwards, there were 3,670 trucking bankruptcies in 2000 and another 3,250 in the first three quarters of 2001. These figures include only fleets with at least five trucks and do not count the potentially thousands of motor carriers with fewer than five trucks who went out of business in 2000 and 2001. In sum, our ability to provide vital transportation services is being severely hampered by the tremendous increase in insurance premiums.

This problem is why ATA formed an Insurance Task Force. We examined the insurance crisis that confronts our industry by surveying the scope of the problem. After analyzing our options, we concluded that meaningful civil justice reform was the primary answer to escalating insurance premiums.

An insured's claims history and the history of jury awards in the insured's locality have a substantial impact on insurance premiums. Insurance is generally regulated at the state level and is responsive to the claims history in that state. While there are some unifying principles of tort law, each state has its own laws, jurisprudence, and verdict history that directly impact insurance premiums and the coverage available in that state. Even when I am not a party to such cases, the outcome of them affects the insurance premiums I am offered by my insurance company. For example, my home state of West Virginia is rapidly gaining a reputation as the most difficult state in which to successfully defend a product liability case. In particular, successful class action certification and medical monitoring claims have put a severe strain on the insurance industry in West

Virginia. In fact, it is very difficult to obtain liability insurance coverage for all manner of professions and activities in West Virginia because of its claims history. My own company's experience is the impetus for my involvement in civil justice reform and for the conviction with which ATA and I tell you that there must be reform and it should start with this bill.

The Class Action Fairness Act partially addresses this problem by easing the diversity requirement for removal of class action lawsuits from state to federal court. A number of states have a relatively lax attitude toward class action lawsuits; some local courts will certify cases for class action treatment that do not meet the generally accepted requirements for class certification. This leads to forum shopping by some members of the plaintiffs' bar who file their cases in jurisdictions that are less likely to manage the cases rigorously. Ineffective case management means that the due process rights of all litigants are at jeopardy of being compromised.

The proliferation of non-meritorious class action lawsuits forces companies to expend substantial resources defending large cases. Cases which do not satisfy the class action requirements unnecessarily bog down already overburdened state court dockets, create enormous financial exposure for defendants, and often result in settlements of cases that otherwise would not be taken seriously. Since class actions rarely are settled for nuisance value, they create a track record that exaggerates the liability regardless of whether causation has been established. That track record is used by insurance underwriters to help determine insurance costs and has a negative impact on the jurisdiction's claims history.

My father started Burns Motor Freight in 1949 with one truck. I began working at our company in 1958 and became its President and CEO in 1964. We have grown from one truck to 100 power units. I am extremely proud of the company my father started, and I am continuing his legacy. I firmly believe that my company, like the thousands of other trucking companies large and small that move America's freight, is at jeopardy because of the flood of class action lawsuits and other abuses of our legal system. I ask this Committee to seize this opportunity and pass this legislation. We need its simple corrective action of providing access to federal courts, which typically are better equipped to manage big lawsuits, for cases raising interstate issues. Better management of cases means better and more just verdicts and settlements for all of the litigants and for the insurance companies whose liability policies ultimately will be impacted by the resolution. Trucks move America's freight, but we must have affordable insurance in order to operate. Please enable us to continue fulfilling our role in our nation's economy by supporting this and similar civil justice reform measures. Thank you again for the opportunity to express my views.

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

February 1, 2002

Hon. James Sensenbrenner
Hon. John Conyers, Jr.
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 2341, "Class Action Fairness Act"

Dear Chairman Sensenbrenner and Ranking Member Conyers:

We are writing to comment on H.R. 2341 relating to class actions. This bill would give the federal courts jurisdiction over most class action lawsuits, and add a "Consumer Bill of Rights" for members of a class.

Public Citizen has a long history of working to make class actions fairer and more beneficial to plaintiffs. We have participated in nearly forty cases to advocate for more equitable settlement terms for consumers, oppose excessive attorneys fees, and ensure that the class action vehicle is not weakened. For the reasons stated in our testimony on an earlier version of this bill, which is attached, we strongly oppose this bill. We ask that you include these comments and our earlier testimony in the hearing record.

The Importance of Class Actions

Proponents of this bill have expressed concerns that businesses are being unfairly targeted by class action litigation. We recognize that most businesses are working hard to provide good products to American consumers. But the fact is that many of the business enterprises that are being sued are really no different from the old-fashioned flim-flam men, taking the corporate guise for the legitimacy it bestows, and also for its insulation from liability.

This is illustrated best by the tremendous problem of predatory lending. There are lenders who pay bribes and kickbacks to mortgage brokers, to induce them to sell out their clients and sign them up for higher rather than lower interest rate loans. There are mortgage companies accepting kickbacks from overpriced title insurance companies. There is also nickel-and-dime chiseling, turning $85 recording fees into $100 recording fees, $325 appraisal fees into $500 appraisal fees, and the like. There are $10,000 credit life insurance policies being packed on to loans, which

have little if any value to the consumer. The defendants in most class actions are not acting like legitimate businesses, but are simply fast-buck artists and con men.

In other cases, the businesses are legitimate and are trying to provide valuable services, but corner-cutting or overreaching has prevailed. These problems may be caused by ambitious individual managers, a bean-counter mentality, a chainsaw-CEO, groupthink, or just plain greed. As the Enron scandal has demonstrated, in some cases you find that the moral compass has failed.

In many of these cases, it is only the class action lawsuit that can protect the victim. In some instances, the amount of money stolen is too small on a per-person basis to support an individual lawsuit; in others, there are vulnerable, unsophisticated consumers, who are unable to recognize that they have been fleeced. The class action device permits aggregation of cases and a more efficient disposition of claims.

Federalism and Class Actions

When Congress perceives a problem in an area that is traditionally handled by state and local government, it has five legislative options. You can provide (1) grants or (2) technical assistance to state and local governments to help them solve the problem; (3) you can exercise concurrent jurisdiction; (4) you can mandate state and local compliance with your standards; or (5) you can pre-empt state law with federal law.

Obviously, as you move down this list, you are usurping local control to increasingly greater degrees. So it seems odd that here, broad federal preemption has been the first impulse, rather than the last resort, of those who suggest that class action changes are needed.

We believe that this issue calls for the least onerous federal intervention, for a number of reasons.

First, proponents of the legislation have argued that some rural counties in a few states have become magnets for class actions and invite abuse. If that is the case, the appropriate response is at the state level, not in Washington. Responding to due process and forum shopping concerns expressed by corporate defendants, the Alabama Supreme Court acted to abolish the practice of *ex parte* certifications of class actions. We are confident that any local problems will be resolved by state governments.

Second, the basic premise behind the bill, that federal judges are "better equipped" to monitor cases (to quote Senator Grassley) and "likely to give closer scrutiny" to settlements (in the words of Senator Kohl) is untrue.

With regard to the "better equipped" proposition, it is argued that federal judges have more "complex litigation experience" than state judges. In fact, less than 1 percent of the federal courts' caseload is class actions. Moreover, of the 2,393 class actions filed in the entire federal system in 2000, only 321 involved state law claims. The vast majority of the cases involved uniquely federal law questions, such as securities, civil rights, or antitrust. Only 105 of the cases

involved consumer fraud-type claims, which are the mainstay of state court class actions. That's about one consumer fraud claim per *federal district*, not per judge. If a federal judge has experience with this sort of class action, it is probably because he or she was a state court judge before elevation to the federal bench.

The authors of this bill acknowledge that certain state court judges have expertise in particular areas—the bill makes an exception for corporate governance cases to be heard in Delaware. We believe that expertise among state judges is not limited to Delaware chancery judges. The state court bench in Arizona is perhaps the most innovative in the nation, and has been at the forefront of reforms that have spread to other states and to the federal system. In responding to horror stories from a few rural counties, this bill could take cases away from well-qualified state judges in places like Phoenix or Chicago.

As to the claim that federal judges would do a better job scrutinizing class action settlements, we believe that is, unfortunately, not true. A number of attorneys have alleged that a federal judge in Chicago recently approved an unfair "reverse auction" settlement, whereby defendants settled with the plaintiffs' firm that accepted the least benefits for the class members.[1] This case involved competing state and federal class actions over "refund anticipation loans." The attorneys intervening to stop the settlement allege that the plaintiff's attorneys accepted a mere $25 million in return for releasing a nationwide class' claims worth a billion dollars. We have no way of knowing the actual value of the claims, but the incident leaves one important question unanswered: If it is true that federal judges are more likely to give close scrutiny to settlements, why did the defendants choose to settle a federal court case rather than one of six identical state court cases? If the premises underlying this bill are correct, shouldn't they have settled one of the state court cases instead? The fact that the federal judge here had law clerks did not deter this settlement.

Moreover, we note also that the RAND Institute's report[2] was very clear in finding no empirical evidence to support the argument that federal judges are better able to manage class actions than state judges. Public Citizen's own experience shows that federal judges can err just as often in approving abusive settlements.

Procedural Changes

H.R. 2341 also contains several "Consumer Bill of Rights" provisions. Some of these ideas have merit and some plainly do not. However, we believe Congress should refrain from making adjustments to Rule 23 and leave such changes to the federal judiciary's Advisory Committee on Civil Rules. The Rules Advisory Committee consists of judges, academics, and practicing lawyers who are among the nation's top experts on civil procedure. Pursuant to the Rules Enabling Act, the Advisory Committee is empowered to review the current rules, study problems, and propose amendments. The Advisory Committee solicits and carefully considers input from the bar and from interest groups in formulating changes.

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[1] See *National Law Journal,* April 2, 2001, "Class action 'collusion' claimed in appeal."
[2] Class Action Dilemmas: Pursuing Public Goals for Private Gain (2000)

Class actions have been the subject of their attention in recent months, and they are currently considering extensive changes to Rule 23. We respect the expertise that the Congress and its Judiciary Committees have on civil procedure matters. Nonetheless, we feel that these contentious issues are best resolved outside the heated political process.

Finding a Solution

Sound congressional policymaking must take account of the advantages and disadvantages of our federal system. Achieving good federalism means understanding the competing values of local control and national uniformity, and striking the appropriate balance between these values in individual policy areas.

Unfortunately, the dispersion of authority among 50 states can sometimes create perverse incentives. The reverse-auction phenomenon in overlapping class actions is an example of this. Narrowly tailored federal legislation could fix this problem without upsetting the delicate state/national balance by bringing most state class actions into federal court. But that in no way resembles the legislation that the sponsors of H.R. 2341 have proposed.

Another avenue to explore is RAND's suggestion that one way to improve judicial scrutiny would be to allow judges to seek assistance from neutral experts and auditors to assess the value of settlements. Congress could use its spending power to assist judges, both state and federal, by increasing the resources available to them to manage class actions. A grant program through which individual courts could secure funding for neutral experts and special masters would exemplify cooperative, rather than coercive federalism. Such a program could be administered by the Justice Department, the National Center for State Courts, or the Administrative Office of the U.S. Courts.

As an organization that vigorously opposes abusive class action settlements, we can only conclude from H.R. 2341 that the business community wants this legislation not to end such practices, but because they perceive an advantage to defending class actions in federal court. We urge you not to move forward with this bill.

Sincerely,

Joan Claybrook
President, Public Citizen

Frank Clemente
Director, Public Citizen's Congress Watch

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TESTIMONY OF BRIAN WOLFMAN
STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP
BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
REGARDING H.R. 1875, THE INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999

July 21, 1999

Chairman Hyde and members of the Committee: Thank you for the opportunity to appear today in opposition to H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999. Although Public Citizen supports the use of class actions and actively works to improve the class action process, this bill would do nothing to further that goal. To the contrary, H.R. 1875 is an unwise and ill-considered incursion by the federal government on the jurisdiction of the state courts. It works a radical transformation of judicial authority between the state and federal judiciaries that is not justified by any alleged "crisis" in state-court class action litigation.

Before explaining the basis for my conclusion that H.R. 1875 should not be enacted, I want to describe my experience in class action litigation. I am a staff attorney with Public Citizen Litigation Group, a non-profit, national public interest law firm founded in 1972, as the litigating arm of Public Citizen, a consumer advocacy organization with approximately 150,000 members. Like other lawyers who represent consumers, we use class actions in situations where litigation of individual claims would be economically impossible.

Because we value class actions as an important tool for justice, we have, for a number

of years, combatted abuses in the class action system. We have increasingly devoted resources to opposing what we believe are inappropriate or collusive class action settlements, and have become the nationwide leader in fighting class action abuse. Among the more than 30 nationwide class actions settlements on which we have worked, we have served as lead or co-counsel for objectors in many of the most important cases, including *Bowling v. Pfizer* (Bjork-Shiley heart valve); *Amchem v. Windsor* (settlement of future asbestos personal-injury cases, also known as *Georgine*); *Wish v. Interneuron Pharmaceutical* (Redux diet drug); *Hanlon v. Chrysler Corp.* (Chrysler mini-vans); *In re Telectronics Pacing Systems, Inc.* (pacemaker leads); *Duhaime v. John Hancock Mut. Life Ins. Co.* (life insurance sales practices); *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.* (GM C/K Pickup Trucks); and *In re Ford Motor Co. Bronco II Prod. Liab. Litig.* (Ford Broncos). In these cases, we have objected to settlements that we thought grossly undervalued the plaintiffs' claims and/or we have opposed what we believed were the inflated fees of the plaintiffs' attorneys.

In addition, we have written articles on the problems we have encountered in class action settlements for law reviews and the popular press. *See* Brian Wolfman & Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439 (1996); Brian Wolfman, *Forward: The National Association of Consumer Advocates' Standards and Guidelines for Litigating and Settling Class Actions*, 176 F.R.D. 370 (1998); David C. Vladeck, *Trust the Judicial System to Do Its Job*, The Los

Angeles Times, p. M5 (Apr. 30, 1995); Brian Wolfman, *Class actions for the injured classes*, The San Diego Union Leader, p. B-11 (Nov. 14, 1997).

The point of these introductory comments is that Public Citizen takes a back seat to no one in fighting improper class actions, to assure that injured consumers will be justly compensated, that class action attorneys' fees are sufficient (but not excessive), and the class action tool is not weakened. In our judgment, H.R. 1875 will not aid injured consumers or combat collusion, but it will work a massive shift of power and cases to our overburdened federal courts at the expense of the state courts, the traditional forum for hearing disputes involving state law.

I. The Enormous Expansion of Federal Jurisdiction.

Section 3 of H.R. 1875 allows proposed class actions to be filed in federal court if "any member of a proposed plaintiff class is a citizen of a State different from any defendant...." Building on the language in section 3, section 4 of the bill permits removal from state court to federal court of any class action meeting these expanded criteria for filing class actions in federal court. Thus, as a practical matter, section 3, when combined with section 4's removal provision, would end most state-court involvement in consumer class actions. Although the bill provides that the federal court may not entertain class actions denominated as "intrastate," this exception applies only where a "substantial majority" of the proposed class **and** all of the primary defendants are citizens of a single state, **and** the claims

asserted will be governed primarily by the laws of that state.[1]

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

Two hypothetical cases illustrate our point. Assume that over the past two years a regional life insurance company, with headquarters in Georgia and incorporated in Delaware, and with a sales force of agents employed by the company's Florida affiliate, fleeced 100,000 of its Florida customers, by charging premiums higher than those promised and not paying certain benefits. On average, each customer lost about $1,000. The company, the Florida affiliate, and the sales agents particularly targeted senior citizens. The customers file a class action against the company, the Florida affiliate, and the key agents who helped perpetrate the scheme in Florida state court alleging solely violations of Florida law. Under H.R. 1875, any of the defendants would have the option of removing this class action to federal court. There is no federal interest in resolving such a dispute because it does not involve federal

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[1] The bill would also bar federal jurisdiction over so-called "limited scope" class actions, where the **aggregate** damages asserted by **all** class members do not exceed $1 million or in which there are less than 100 class members. This provision would have little or (more likely) no practical effect. We are not aware of any significant consumer class actions that are "limited scope" class actions.

law; more important, the Florida courts have a strong interest in resolving the case, to assure that Florida law is properly enforced. That interest is usurped by H.R. 1875. Indeed, this example makes clear that H.R. 1875 is little more than a "Corporate Defendant Choice of Forum Act," since it allows the corporate defendants -- not the plaintiffs -- to select the court system it prefers.[2]

Similarly, a class of Oklahoma landowners allege that they have been unlawfully deprived of oil and gas royalties by an Oklahoma-based utility company (through its Oklahoma-based sales force), and by the Oklahoma firm's parent company, a Texas-based energy conglomerate, incorporated in Delaware. The landowners file suit in state court under a Oklahoma consumer protection statute and Oklahoma common-law. There is no reason why a state court should not handle this class action. Surely, most Oklahoma trial courts, and the Oklahoma appellate courts on review, will be more familiar with the state-law issues than a federal court sitting in Kansas or the relevant federal appeals court headquartered in Denver. And yet H.R. 1875 virtually assures that, regardless of the plaintiffs' wishes, this one-state controversy, involving only state law, will end up in federal court.

But the cases need not be hypothetical. In *Hidi v. State and County Mutual Fire Ins. Co.*, a class of insureds alleged that they were improperly charged a deductible. The class

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

maintained that third parties -- people who caused accidents involving their cars -- were responsible for the deductibles and that Texas law required the insurance companies to sue those third parties to recover the class members' deductibles. Although most if not all of the class members are Texans, because two of the defendants are out-of-state corporations, under H.R. 1875, the defendants would have the right to force this intra-state controversy into federal court.

In *Morgan, Sword v. Bell Atlantic*, the class is composed of West Virginians who paid for inside wire maintenance sold by Bell Atlantic-West Virginia, Inc, a West Virginia corporation, and its parent, Bell Atlantic. The class alleges that the defendants illegally "bundled" inside wiring maintenance service with their regular phone service and charged their customers a monthly service charge. Although all (or virtually all) of the class members are West Virginians, and the defendants have an established presence in West Virginia, under H.R. 1875, any defendant could remove the case to federal court, because Bell Atlantic is headquartered and incorporated out of state. There is simply no reason why the state court should be divested of its traditional role of hearing this kind of purely intra-state dispute involving only state law.[3]

As these examples show, H.R. 1875 dishonors the proper spheres of the states and the federal government in our federal system. The bill is a resounding vote of "no confidence" in our state courts. It is premised on a deep -- and misplaced -- distrust in state courts' ability

[3] Attached to this testimony as Exhibit 1 is a list of similar intra-state class actions in which plaintiffs would be deprived of their choice of forum under H.R. 1875.

to uphold the law. Our Constitution properly assumes that the states are fully capable of interpreting their own laws and handing out justice impartially.

Although this radical revision of the allocation of authority between the state and federal courts is enough in itself to warrant the defeat of H.R. 1875, it is the inefficiencies created by the bill that will pose the largest roadblock to justice for ordinary citizens. By channeling most state-law based class actions to the federal courts, H.R. 1875 will further weaken the ability of litigants to obtain justice in our federal courts. As Chief Justice William H. Rehnquist has repeatedly explained in his annual report on the judiciary, the federal courts are already overburdened with cases that traditionally are dealt with in state courts, and the federal courts cannot bear any additional burden. *See, e.g.,* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 5-7 (Jan. 1, 1999). And the Chief Justice has particularly asked Congress to consider reducing, not expanding, federal diversity jurisdiction. *Id.* at 7.

Moreover, not only would H.R. 1875 increase the caseload of the federal courts, but it would do so with cases that are extremely complex and time consuming. Making matters even worse, these new federal cases involve solely issues of state law, with which state-court judges are intimately familiar, but federal judges generally are not.

The caseload burden imposed by H.R. 1875 would be reason enough to reject this legislation at any time, but the problem is particularly acute now, because there are a large number of federal judicial vacancies and the civil docket in some districts is severely

backlogged. In short, H.R. 1875 promises that injured consumers will be put on "hold" in the overburdened federal courts, without any opportunity to litigate their cases in state courts where they properly belong.

The proponents of H.R. 1875 try to justify the bill on the ground that there is a class action "crisis" peculiar to the state courts. In general, the class action tool is a tremendous benefit to Americans. It is an important and powerful component of our civil justice system that can compensate ordinary citizens who, acting individually, would not have the means to challenge corporate and governmental wrongdoers. As noted at the outset of this testimony, Public Citizen recognizes that class action abuse threatens to sour the public and harm the very people that the class action tool is supposed to help. But it is wrong to think that abuse is limited to state courts. Last year, a federal appeals court approved the Chrysler minivan settlement -- where the settlement provided little more than Chrysler's prior promise to a federal regulator to fix the class members' defective door latches, with Chrysler agreeing to pay the lawyers five million dollars in fees! Both the federal **and** state courts must be vigilant and prevent such abuses and progress is being made in that regard.

The state courts can play a role in preventing abuse. For example, many of the anecdotes used by the proponents of H.R. 1875 are based on class actions in Alabama where, the argument goes, the state courts there have been certifying cases without following the proper procedures. Responding to due process and forum-shopping concerns from corporate defendants, however, the Alabama Supreme Court has abolished the practice of certifying

class actions before the defendant has an opportunity to answer the suit. *See, e.g., Ex Parte State Mutual Ins. Co.*, 715 So.2d 207 (Ala. 1997); *Ex Parte American Bankers Life Assur. Co. of Fla.*, 715 So.2d 186 (Ala. 1997). The Alabama court made clear that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied.

Meanwhile, state-court class actions continue to provide significant relief to consumers who would otherwise have gone without compensation. For instance, state-court class actions involving polybutylene pipe illustrate the importance of consumers banding together to fight corporate irresponsibility. Shell, Dupont, and other corporate giants sold leaky plastic pipes, which caused severe damage to the homes of tens of thousands of unsuspecting consumers. This state-court litigation resulted in hundreds of millions of dollars in recoveries and replacement of the faulty piping, which would never have occurred if the homeowners were required to face off against the companies on their own.

Another example is *Naef v. Masonite* -- concerning claims of defects in hardwood siding on homes and commercial property -- commenced in 1994 in Mobile County, Alabama. The defendant removed the case to federal court, but the case was later remanded because of a lack of federal jurisdiction. A state-court jury found for the plaintiffs on the question of whether the product was defective, and the matter then settled for hundreds of millions of dollars shortly before trial on liability and damages. Under H.R. 1875, this case could have been removed to federal court, although it appears that the matter was pursued

vigorously in the state court and brought very considerable benefit to injured class members.

In another Alabama case -- *Coleman v. GAF Building Materials Corporation* -- a settlement was stuck that would provide thousands of injured plaintiffs with a replacement or repair of their allegedly defective roof shingles. As originally proposed, the settlement contained serious problems, including inadequate notice of the remedy. But objectors appeared, and the court allowed them to intervene to present their objections. The settlement was modified to remedy the settlement's serious flaws. The case was based on state law, and there is nothing to suggest that a federal, rather than state, forum was essential.[4]

As evidence of the state-court class action "crisis," the supporters of H.R. 1875 rely on a few anecdotes of settlements in which the class members were cheated at the expense of their lawyers. As noted, abuses do occur in state **and** federal court, and that abuse must be fought in the courts. But the anecdotes are just that -- anecdotes -- and much more evidence showing a systematic pattern of abuse in the state (as opposed to federal) courts must be required before Congress should consider enacting anything approaching the radical transformation in our state-federal balance contemplated by H.R. 1875.

In sum, H.R. 1875 should be rejected as unwise and unnecessary. It is an unwarranted attack on the integrity of the state courts and their ability to provide justice to its citizens, and it comes at a time when the federal courts are unable to handle the enormous increase in caseload that H.R. 1875 would entail.

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[4] Further examples of successful state-court class actions are contained in Exhibit 1 to this testimony.

II. Constitutional Concerns.

H.R. 1875 should not be enacted for the policy considerations given above. The Committee should be aware, as well, that H.R. 1875 may also be constitutionally flawed. As this Committee is aware, our federal courts are courts of limited jurisdiction. Section 3 of the bill would stretch the limits, perhaps beyond the breaking point. The bill would overrule *Strawbridge v. Curtiss*, 3 Cranch 267 (1806), where the Supreme Court interpreted the diversity statute to require "complete diversity" between all named plaintiffs and defendants. *Strawbridge* is not a constitutional case and the Supreme Court has held that only "minimal" diversity (*i.e.*, diversity between one plaintiff and one defendant) is required by the constitution. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). However, in our judgment, the Supreme Court's endorsement of minimal diversity does not ensure the constitutionality of sections 3 and 4 of H.R. 1875, at least not in all of their applications.

The relevant constitutional provision, Article III, section 2, provides that "[t]he judicial Power shall extend to ... Controversies...between citizens of different States[.]" Assume a situation in which the named plaintiff and all the named defendants are citizens of state "X." 50% of the proposed class members are also citizens of state "X," but 50% of the proposed class members are citizens of states "Y" or "Z." When a proposed class action is filed, the class does not yet exist and a constitutional "controversy" exists only between the named plaintiffs and the defendant. Thus, in the hypothetical, prior to class certification,

all of the parties are from the same state -- X. Put another way, there is no controversy between the absent class members -- on whom jurisdiction under H.R. 1875 hinges -- and the defendant, and thus it is difficult to imagine how diversity jurisdiction can be constitutionally maintained in this circumstance prior to certification of the class and some reasonable assurance that there is, in fact, diversity. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975).

III. Other Problems With Sections 3 and 4 of H.R. 1875.

Although we believe that H.R. 1875 should be defeated, it should surely not be enacted in its current form. The following amendments would improve the bill.

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

Under H.R. 1875, an in-state class of plaintiffs suing under their own state law can keep a state-law class action in state court **only** if the primary defendants are citizens of that state. (A corporation's citizenship is generally defined to include both the state in which it has its principal place of business and its state of incorporation). To be blunt, that makes

little sense in a society in which large corporations have a significant business presence in many states. Surely, Disney should be suable in state court in Florida, as well as in California, where it has its headquarters. Ford Motor Company should be suable in state court in Kentucky, where it has a substantial manufacturing plant, as well as in Michigan (where it has its headquarters). Proctor & Gamble should be suable in state court in Georgia and Missouri, where it has substantial business operations, not just in Ohio (where it has its headquarters and is incorporated). Thus, at the very least, the portion of proposed 28 U.S.C. 1332(b)(2)(A) -- defining the kinds of "intrastate" class actions over which a federal court may not exercise jurisdiction -- should be amended. Under the amendment, the federal court would not have jurisdiction in class actions in which a substantial majority of the class members are citizens of a single state of which the primary defendants are also citizens "or in which the primary defendants have a substantial business presence," and the claims asserted will be governed primarily by the laws of that state.

♦ Section 4(e) of H.R. 1875 (proposed 28 U.S.C. 1447(f)) provides that the statute of limitations for any claim that was asserted on behalf of a class member in an action dismissed or remanded to state court for failure to meet Rule 23's class certification criteria "shall be deemed tolled to the full extent provided under Federal law." This provision is unfair for two reasons.

First, under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), tolling would apply in any future individual action in federal court. As a practical matter, this means that

the statute of limitations for the claims of individual class members is tolled between the filing of the federal class action and the denial of class certification. However, it is not certain that all the state courts -- where many subsequent individual actions would have to be filed -- will adopt the *American Pipe* rule. Second, *American Pipe* arguably does not apply to the issue of whether the limitations period for a subsequent **class** action (as opposed to an individual action) would be tolled during the pendency of the original federal class action. Some federal circuit courts have held that *American Pipe* does not apply in that circumstance. *See, e.g., Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987).

The solution to both problems is the same. Rather than referring to "Federal law," the bill should simply provide that the claims of the class members are tolled during the pendency of any action in which jurisdiction is based on proposed section 1332(b).

* * *

In closing, I want to reiterate our opposition to this legislation. Since the founding of the Republic and the first Judiciary Act, it has been our shared national understanding that, generally speaking, litigation of state law questions would be the province of state courts. The enormous aggregation of power in federal court proposed by this legislation is unwise because it tears a large hole in the fabric of federal-state relations and because it adds a considerable burden on our already overworked federal court system. If there are genuine problems with state-court class actions, Congress should work hand-in-hand with state courts and legislatures to resolve them, mindful of the vital state interests that are implicated when

Congress proposes curtailing state-court jurisdiction. But under no circumstances should Congress adopt the heavy-handed approach embodied in H.R. 1875.

Material Submitted for the Hearing Record

Civil Justice Report No. 3 September 2001

They're Making a Federal Case Out of It . . . In State Court

John H. Beisner and Jessica Davidson Miller

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John Beisner, head of O'Melveny & Myers LLP's 120-attorney Class Action Practice Group, specializes in the defense of purported class actions, mass tort matters, and other complex litigation in both federal and state courts. Over the past twenty years, he has been involved in defending numerous major U.S. and foreign corporations in upwards of 400 purported class actions filed in the federal and state courts of 33 states at both the trial court and appellate level. Those class actions have concerned a wide variety of subjects, including antitrust/unfair competition, consumer fraud, RICO, ERISA, employment/discrimination, environmental, product-related, and securities class actions. He has also handled numerous matters before the Judicial Panel on Multidistrict Litigation, and has also been responsible for proceedings before various federal and state administrative agencies, particularly the National Highway Traffic Administration and the Consumer Product Safety Commission.

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THEY'RE MAKING A FEDERAL CASE OUT OF IT . . . IN STATE COURT

Increasingly, academics and policy makers are concerned that a handful of state courts, through their certification and settlement of interstate class action lawsuits, are effectively making law for 49 other states in addition to their own, or applying their own state law to citizens of other states. Interstate class actions, often brought by a relatively small number of very skilled plaintiff's firms, can dictate regulatory policy for national industries and affect the rights of millions of consumers. This study examined class actions from 1998-2000 in 3 counties (Palm Beach County, Fl; Jefferson County, Tx; Madison County, Il) to discern whether the problems being discussed are an anomaly or a genuine threat that warrants congressional action.

In the last Congress, both houses carefully examined a key judicial policy question—should interstate class actions (that is, large-scale lawsuits with significant interstate commerce implications involving the residents and laws of multiple states) normally be heard by local county courts (that is, by judges typically elected by the residents of the court's locality) or by federal courts (that is, by judges nominated by the President of the United States and confirmed by the duly elected Senators of all 50 states)? These discussions were prompted by introduction of legislation intended to widen the scope of federal diversity jurisdiction over interstate class actions.[2] After several detailed hearings,[3] that legislation passed the House.[4] Senate hearings were also held on the subject,[5] and the Senate Judiciary Committee ultimately endorsed enactment of a bill parallel to that passed by the House.[6] However, the full Senate never considered the measure, and the jurisdiction expansion proposals did not become law. The legislation has been reintroduced in the current session of Congress.[7]

I. THE IMPETUS FOR EXPANDING FEDERAL JURISDICTION OVER INTERSTATE CLASS ACTIONS.

The prospect of expanding federal jurisdiction over class actions has taken center stage because of an anomaly in current law that normally causes interstate class actions filed in state courts to remain there, notwithstanding their inherently federal character. In structuring our judicial system, the Framers established that federal courts would hear cases presenting federal law issues (that is, lawsuits asserting constitutional or federal statutory claims, or involving the federal government as a party), while leaving to state courts the task of adjudicating local questions arising under state laws. However, the Framers did not stop their line drawing there. In Article III of the U.S. Constitution, they authorized the extension of federal jurisdiction to one category of cases arising under state law: so-called "diversity" cases, defined as suits "between Citizens of different States." In enacting the Judiciary Act of 1789,[8] Congress exercised that authority, specifically empowering federal courts to hear diversity cases that met certain criteria. Such cases are thus firmly entrenched in the federal jurisdictional landscape.

The Framers established the concept of federal diversity jurisdiction out of concern that local biases would render state courts ineffective in adjudicating disputes between in-state plaintiffs and out-of-state defendants.[9] In short, they feared that non-local defendants might be "hometowned." Diversity jurisdiction was designed not only to diminish this risk, but also "to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents."[10] The Framers reasoned that some state courts might discriminate against interstate commerce activity and out-of-state businesses engaged in such activity and that federal courts therefore should be allowed to hear diver-

sity cases so as to ensure the availability of a fair, uniform and efficient forum for adjudicating interstate commercial disputes.[11] Thus, since the nation's inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. Constitutional scholars have argued that "[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts."[12]

...since the nation's inception, diversity jurisdiction has served to guarantee that parties that do not share common state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce.

In enacting the diversity jurisdiction statute, Congress did not exercise the full authority granted under Article III for diversity jurisdiction. Under 28 U.S.C. § 1332, an action is subject to federal diversity jurisdiction only where the parties are "completely" diverse (that is, where no plaintiff is a citizen of the same state where any defendant is deemed to be a citizen) and where each plaintiff asserts claims that put in controversy an amount in excess of a specified threshold—currently set at $75,000. In short, section 1332 essentially allows federal courts to hear cases that are large (that is, cases with large "amounts in controversy") and that have interstate implications (that is, cases involving citizens from multiple jurisdictions).

Class actions would usually be expected to meet these criteria because they (a) place substantial amounts into controversy (insofar as they encompass many people with many claims) and (b) involve parties from multiple jurisdictions. Yet, because section 1332 was originally enacted before modern day class actions existed and therefore does not take account of the unique circumstances that such cases present, section 1332 tends to *exclude* class actions from federal courts, while welcoming much smaller single-plaintiff cases having few (if any) interstate ramifications.

Section 1332 has two exclusionary dimensions. *First*, as noted above, it has been interpreted to require "complete" diversity, so that diversity jurisdiction is lacking whenever any single plaintiff is a citizen of the same state as any single defendant.[13] Wisely, the federal courts have determined that in class actions, this complete diversity inquiry should be made only regarding the parties actually named in the actions; the citizenship of unnamed class members is disregarded.[14] If not interpreted in this manner, section 1332 would effectively bar all non-federal question class actions from federal court. This is because it is normally impossible to prove the citizenship of all unnamed class members at the outset of a case, given that their identities are generally unknown at that juncture. Still, this commonsense interpretation of section 1332 poses a problem, since a plaintiff can readily avoid federal jurisdiction by simply including a non-diverse named plaintiff or defendant in his or her complaint.

Second, an even greater impediment is posed by the manner in which the jurisdictional amount requirement is applied in class actions. While for complete diversity purposes, a court looks only at the named parties, the jurisdictional amount requirement has been interpreted as applying to both the named plaintiffs and all unnamed class members. Thus, courts have held that a class action satisfies the jurisdictional amount requirement only if it can be shown that *each and every* member of the proposed class has separate and distinct claims exceeding $75,000.[15] Although some federal courts have questioned the breadth and current vitality of this rule,[16] this difficult-to-satisfy prerequisite still bars most interstate class

actions from federal court. Indeed, in many class actions, plaintiffs seek to avoid federal court by making affirmative allegations that their proposed class action does not satisfy the diversity jurisdictional amount prerequisite.

As the Senate Judiciary Committee concluded last year, the combination of these factors leads to the nonsensical result under which a citizen can bring a "federal case" by claiming $75,001 in damages for a simply slip-and-fall case against a party from another State, while a class of 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 run-of-the-mill State law-based tort 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 [claimants] from multiple States, and hundreds of millions of dollars—cases that have significant implications for the national economy.[17]

Emerging from the discussion of this subject is a growing recognition that this jurisdictional anomaly should be corrected:

- The leading treatise on federal civil procedure has declared that current principles governing federal diversity jurisdiction over class actions make no sense: "*The traditional principles in this area have evolved haphazardly and with little reasoning. They serve no apparent policy . . . .*"[18]
- In a 1999 decision, the U.S. Court of Appeals for the Eleventh Circuit "*apologi[zed]*" for its "seemingly arbitrary" and "anomal[ous]" ruling sending a large 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."[19] 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 section 1332 would have had in mind."[20]
- In that same case, Judge John Nangle, for many years the chair of the federal Judicial Panel on 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]he present [jurisdictional] case law does not . . . accommodate the reality of modern class action litigation and settlements.*"[21]
- Similarly, in an opinion by Judge Anthony Scirica (chairman of the federal Judicial Conference's Standing Committee on Rules and Procedure), the U.S. Court of Appeals for the Third Circuit observed that "*national (interstate) class actions are the paradigm for federal diversity jurisdiction* because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises," but that "at least under the current jurisdictional statutes, such class actions may be beyond the reach of the federal courts."[22]

The solution proposed by some legislators is a simple one: to amend the diversity jurisdiction statute to allow more interstate class actions to be heard in federal court. As former Solicitor General Walter Dellinger testified before the House Judiciary Committee, if Congress were to start over and write a new federal diversity jurisdiction statute, interstate class actions would be the first category of cases to be included within the scope of the statute.[23]

The reasons are obvious. In the *first* place, because these cases clearly have significant interstate commerce ramifications, federal supervision and management of such cases is desirable. As Chief Justice Marshall recognized, the Commerce Clause reflects the substantial federal interest in regulating "that commerce which concerns more States than one" (as opposed to "the exclusively internal commerce of a State").[24] Clearly, that federal interest is implicated by interstate class actions, which typically involve more money, more people in more states, and more interstate commerce ramifications than any other type of lawsuit.

Second, the rationales underlying the constitutionally established concept of diversity jurisdiction apply fully to interstate class actions. Such cases typically involve in-state plaintiffs suing out-of-state defendants, thereby raising the specter of local court biases against the out-of-state defendant.

Third, federal courts are better equipped to deal with the substantial burdens of presiding over the sprawling, complex proceedings that are often triggered by the filing of an interstate class action. While our federal courts are facing substantial burdens, state courts are as well. The civil caseload in state courts has grown much more rapidly than the federal court civil caseload.[25] Federal courts have more resources to meet this challenge.[26] Virtually all federal court judges have two or three law clerks on staff; state court judges typically have none.[27] Federal court judges are usually able to delegate some aspects of their class action cases (*e.g.*, discovery issues) to magistrate judges or special masters; such personnel are usually not available to state court judges. And federal courts are authorized to transfer and consolidate similar class actions from various states before a single judge in the interest of efficiency;[28] state courts lack such consolidation authority and therefore must engage in the wasteful exercise of separately handling such overlapping cases.

Fourth, federal courts have significant institutional advantages over state courts in adjudicating interstate class actions. For example, in recent months, the federal judiciary has been examining the problem of "copy cat" class actions—the strategy under which plaintiffs' counsel file the same class action before multiple state courts, attempting to convince each state court to certify the matter for class treatment until one finally agrees.[29] As was noted in recent discussions before the federal Judicial Conference's Advisory Committee on Civil Rules, strategic maneuvering by plaintiffs' attorneys often results in a proliferation of duplicative class action litigation in different jurisdictions. "As a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward." [In addition,] . . . "[t]he availability of multiple fora dilutes judicial control over class action certification and settlement, as attorneys and parties who are unhappy with the outcome in one jurisdiction move on to seek more favorable outcomes in another."[30]

Indeed, the congressional record reflects cases in which counsel have effectively asked state courts to overrule the denial of class certification by federal courts.[31] This strategy, which takes forum shopping to the extreme, is generally unavailable to the extent that class actions are pending in the federal courts because, as noted previously, "competing federal court class actions can be consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation."[32]

Fifth, federalism principles dictate that interstate class actions be heard by federal courts. The classes in such cases normally encompass residents of many states, often all 50 (plus the District of Columbia). Thus, the trial court—regardless of whether it is a state or federal court—must interpret and apply the laws of multiple jurisdictions. During 1998 hearings on this subject, the House Judiciary Committee heard multiple instances in which state courts handling class actions have ridden roughshod over the laws of other jurisdictions—where one state court has told other state judiciaries what their laws are.[33] There is little those other jurisdictions can do to prevent such behavior, since the judgment of a court in one state is generally not reviewable by other states' courts.[34] It is far more appropriate for a federal court to interpret the laws of various states (a task inherent in the constitutional concept of di-

versity jurisdiction). What business does a state court judge elected by the several thousand residents of a small county in Alabama have in telling the state of Massachusetts what its laws mean? Why should an Alabama state court judge be rendering interpretations of Massachusetts law that are binding on Massachusetts residents and that cannot be appealed to or reviewed by Massachusetts courts? Such matters of interstate comity are more appropriately handled by federal judges appointed by the President and confirmed by the Senate. Further, federal courts have the authority (which they frequently exercise[35]) to use "certified questions" to ask state courts to advise how their laws should be applied in uncharted situations.

Finally, some state courts have been less than proficient in handling interstate class actions. In particular, some have shown a tendency to approve settlements that generously compensate the class counsel while giving little or nothing to the people on whose behalf the action supposedly was brought—the unnamed class members.[36] A recent Institute for Civil Justice/RAND study indicates that in state court consumer class action settlements (*i.e.*, non-personal injury monetary relief cases), class counsel sometimes walk off with more money than all of the class members combined.[37] In contrast, a contemporaneous Federal Judicial Center study found that "[i]n most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys' fees by substantial margins."[38] In this same vein, the Senate Judiciary Committee last year issued a report documenting numerous problems that it identified with the adjudication of interstate class actions in state courts—including the failure to carefully apply class certification requirements (some of which have due process underpinnings), the use of the class device as "judicial blackmail" (giving class counsel leverage to obtain unwarranted settlements), and denials of defendants' due process rights (denying the opportunity to contest plaintiffs' claims).[39]

Based on all of these concerns, the ICJ/RAND study ultimately articulates three reasons why federal courts arguably are the preferred tribunals for handling interstate class actions:

- "[F]ederal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly."
- "[S]tate judges may not have adequate resources to oversee and manage class actions with a national scope."
- "[I]f a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in federal court than in a state court."[40]

Over the past three years, both the House and the Senate have debated whether to amend the federal diversity jurisdictional statute to fix the anomaly outlined above—to allow more interstate class actions to be heard in federal court. The proponents for change have urged that every day, state judges elected by (and therefore accountable only to) the relatively small number of voters in their own county or judicial district are regularly hearing interstate class actions—cases involving thousands (and sometimes millions) of persons from many states presenting issues involving the laws of many jurisdictions and presenting widespread interstate commerce implications. Further, they have argued that since interstate class actions uniquely qualify as "universal venue" cases, they often can be filed in virtually any federal or state court in the country, creating maximum forum shopping opportunities.[41] As a result, class action lawyers are bringing a large number of cases in a small number of state courts that have become "magnets" for interstate class actions, and are thus exercising a wildly disproportionate role in adjudicating national disputes. The proponents have argued that state courts should not be playing this role—that such matters should be entrusted to federal judges, who are nominated by the President of the United States and confirmed by U.S. Senators representing all 50 states.[42]

Opposing voices have not contended that Congress lacks authority to modify the complete diversity or jurisdictional amount prerequisites for diversity jurisdiction, as applied to interstate class actions.[43] And relatively few have urged that expanding federal jurisdiction over interstate class

actions would be bad policy. Instead, the primary argument offered against modifying the diversity jurisdiction rules for interstate class actions has been that the empirical case for taking such action has not been made—that there is insufficient evidence that state courts are playing an inappropriate, disproportionate role in the adjudication of interstate class actions.[44] Some opponents urge that before the federal diversity jurisdiction statute can be amended, it must be demonstrated that the current jurisdictional divides are producing more than just anecdotes—there must be proof that there exists a systemic problem.

II. THE EMPIRICAL CASE FOR EXPANDING FEDERAL JURISDICTION OVER INTERSTATE CLASS ACTIONS.

A. The Current Congressional Record.

The congressional record on this subject already spotlights a systemic problem. In particular, it contains substantial evidence that the frequency with which state courts are being called upon to hear interstate class actions has grown exponentially in recent years. In 1999, the House Judiciary Committee noted that there had been "dramatic increases in the number of purported class actions being filed in State courts, according to data supplied to the Committee."[45] In that same time frame, a preliminary report on a major empirical research project by RAND's Institute for Civil Justice ("ICJ") observed that over a several year period, there had been a "doubling or tripling of the number of putative class actions" that was "concentrated in the state courts."[46] Yet another survey indicated that while federal court class actions had increased by 340 percent over the past decade, state court class action filings had increased 1,315 percent.[47] Typically, the new state court filings were on behalf of proposed nationwide or multi-state classes.[48]

The congressional record further indicates that this new wave of class actions was not evenly distributed among state courts nationwide. For example, one study submitted to the House Judiciary Committee in 1999 indicated that in the courts of six small, rural Alabama counties, at least 91 class actions were filed over a two-year period, often seeking relief on behalf of purported nationwide classes concerning matters of national significance.[49] And based on a review of various case filings data, 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."[50]

B. The 2001 County Court Data Collection Effort.

Even though the congressional record already reflects considerable empirical evidence of the disproportionate involvement of state courts in interstate class action litigation, the Manhattan Institute commenced further research on this subject earlier this year, producing a substantial quantum of fresh data about state court class actions.

That research was prompted by the fact that although the Administrative Office of the U.S. Courts tracks the numbers and subject matters of purported class actions that are filed in federal courts and annually publishes statistical analysis regarding such cases,[51] no institution systematically gathers comparable comprehensive data regarding purported class actions filed in state courts. Obtaining data on state court class actions is made exceedingly difficult by the failure of many state courts to have any sort of computerized tracking system that distinguishes class actions from other sorts of cases. In short, in many state courts, there is no database that can be searched to isolate those cases on the docket that are purported class actions. As a result, there is no means of assembling data on the numbers and subject matters of class actions filed in state courts without physically going to those courts individually and reviewing dockets and other records to derive relevant data.

The Manhattan Institute study sought to identify trends in nationwide class action activity by examining the civil dockets of three county courts and using those courts as a window on what was happening with state court class actions nationwide. In order to assist with the research, the Manhattan Institute enlisted Stateside Asso-

ciates, a Virginia-based research organization, which previously conducted research on class actions in Alabama.[52] As the first step, the researchers conducted an exhaustive literature search, focusing on published decisions, litigation publications and general media reports, to obtain some indication of which counties appeared to have had the most new class actions filed between 1998 and 2000.[53] Then, the researchers sought to identify which of those counties had systems, rules, computers and data-keeping practices that might facilitate data collection.

The researchers ultimately elected not to conduct their reviews in the more populous counties identified in the class action literature search—*i.e.*, Los Angeles County, California; Cook County, Illinois; and Dade County, Florida—for several reasons. First, these counties (by virtue of their size) had massive volumes of case filings (more than 45,000 per year in Dade County) and outdated filing systems that would have made it difficult to identify and retrieve class action dockets. Second, the larger metropolitan centers tend to experience higher volumes of more complex litigation of all sorts, limiting the ability to assess the specific impact of class actions in those judicial districts.

In the end, the researchers focused on three county courts—Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida—that had (a) relatively high volumes of class action filings and (b) computer systems that were more likely to enable swift and accurate research and retrieval of class action dockets. The courts of each of these counties (most notably, Madison County, Illinois) have seen a steep rise in class action filings over the last several years that seems disproportional to their populations. Based on the aforementioned literature search, Madison County ranked third nationwide (after Los Angeles County, California and Cook County, Illinois) in the estimated number of class actions filed each year, whereas Jefferson County and Palm Beach County ranked eighth and ninth, respectively.

Once the counties were selected, a group of attorneys and law students went to the clerks' offices of the selected courts and used available research tools to assemble data. The researchers' primary objectives were (a) to identify all purported class actions that were filed in each county during the 1998-2000 timeframe,[54] (b) to locate and review the dockets of each of those identified class actions, and (c) to harvest from those dockets certain information about each case, particularly the complaint(s), class certification briefing, and status information. The researchers soon found that the computer systems in these county courts were deficient in some respects, and as a result, they ultimately relied on a combination of computer research and manual docket searches to ensure accurate results.

The Manhattan Institute research confirmed what the anecdotal analysis had suggested—that the three county courts surveyed have experienced a disproportionally high volume of class action filings, given their respective population and general case docket size.

III. THE COUNTY COURT RESEARCH PROJECT: PRIMARY FINDINGS.

The Manhattan Institute research confirmed what the anecdotal analysis had suggested—that the three county courts surveyed have experienced a disproportionately high volume of class action filings, given their respective population and general case docket size. The study also found that the number of class actions—and most particularly, nationwide class actions—filed annually in each county increased substantially between 1998 and 2000. In Madison County, for example, there were only two class actions filed in 1998; last year, 39 class actions were filed there—*an increase of 1850 percent.* In the first two months of calendar year 2001 alone, 13 new class actions were filed in the Madison County courthouse. At that pace, class action filings will grow by another 92 percent this year.

The table below provides a year-by-year breakdown of the total number of class actions filed in each county:[55]

A. The County Courts Experienced Class Action Filing Rates That Were Disproportionate To Their Populations.

In order to understand the significance of the research about the frequency of class action filings (e.g., 91 class actions being filed in Palm Beach County over three years), one must consider these numbers in light of the counties' demographics and the class action filing patterns in other counties. Because there are no comprehensive published data on the number of class actions filed each year in state courts, this exercise necessarily involves several steps.

First, it is important to note that the three counties surveyed account for only a very small portion of our nation's population and economic activity. For example, Jefferson and Madison counties—each with a population of about 250,000 (based on 2000 census data)—represent less than one-tenth of one percent of the U.S. population. Even Palm Beach County, which is substantially more populous (with about 1.1 million people), represents less than one-half of one percent of the nation's population. Economic data for these counties similarly reveals that they are not commercial hubs in which one might expect to find large number of lawsuits filed against locally headquartered enterprises. To the contrary, these counties account for only a miniscule percentage of the gross national product. Jefferson County, which has the largest manufacturing component of any of the counties surveyed, accounts for less than one-half of one percent of manufacturers' shipments in the United States.[56] Nor are these counties major retail centers. Palm Beach, Florida, the most populous of the three counties, accounts for only about one-half of a percent of total U.S. retail sales,[57] and Madison County accounts for less than one-tenth of one percent.[58]

Nevertheless, based on the aforementioned literature research, the local Madison County court has been the situs of more class actions in the last few years than any other county court in the United States (except Los Angeles and Cook counties, which have populations larger than Madison County by a factor of 38 and 21 respectively). And the Manhattan Institute research

Overview Of Research Results

County:	Palm Beach County	Jefferson County	Madison County
Civil Cases Filed (1998-2000)	36,000	10,500	10,368
Class Actions Filed (1998)	29	11	2
Class Actions Filed(1999)	23	15	16
Class Actions Filed (2000)	39	20	39
Class Actions Filed (Early Months 2001)	*	1	13
Total Class Actions Filed (1998-2000)	91	49	70
Class Actions as Percentage of Total Civil Actions Docket (1998-2000)	0.25%	0.47%	0.68%
Percentage Increase in Class Actions (1998 vs. 2000)	34%	82%	1850%

confirms that the number of filings in these counties is anomalous, though the path to that conclusion is somewhat indirect because of the lack of state court class action filings data.

Perhaps the best way to assess the Manhattan Institute research is to consider the *per capita* class action filing rates in the three counties surveyed. As set forth in the table below, these rates confirm that the three counties have highly disproportionate numbers of class actions. For example, if class actions were filed throughout the country at the same *per capita* rates as Jefferson County, there would have been 22,331 class actions filed in state courts in 2000. At the Madison County rate, the total number of class actions would have been 42,386. Despite the lack of published data on the total number of class actions brought each year in state courts, the number probably does not approach 20,000.

A comparison with the federal court system is instructive. Only about 2,000 class actions are filed in the entire federal court system each year.[59] That amounts to a *per capita* rate of about 7.6 class actions for every million residents. In Madison County in 1999, the rate of *per capita* state court class actions was nearly *nine* times higher—with about 61 class actions filed per million people. Even the most populous county surveyed (Palm Beach) has a *per capita* class action filing rate that is three times the rate in federal court. If class actions were being filed in federal court at the same rate as in Madison County, there would be a total of 17,344 class action filings in federal courts each year. If they were filed at the Palm Beach County rate, there would be 5,790 instead of 2,000.

B. Surprisingly Numerous Cases Involved Named Parties Who Reside Outside The County Court's Vicinity.

A second key finding of the Manhattan Institute research, which is consistent with the discussion above regarding the economic demographics of the counties surveyed, is that a large percentage of the cases involved plaintiffs and/or defendants that were not residents of the counties where the class actions were filed. For example, in Madison County, *none* of the companies listed as defendants was based inside Madison County, and only 63 percent of the named plaintiffs were county residents. Similarly, in Jefferson County, just 13 of the 173 defendants named in class actions between 1998 and early 2001 were based inside the county, and about 64 percent of the plaintiffs were Jefferson County residents. Even in Palm Beach County, which had the largest number of suits against local companies, about half of the defendants sued were based outside the county. This lack of any real nexus between most of these lawsuits and the forums in which they were brought is one of the most important findings of the Manhattan Institute research and is discussed in more detail in Section IV, below.

Per Capita Class Action Filings In Counties Surveyed/Federal Courts

Court:	Madison County	Jefferson County	Palm Beach County	Entire Federal Court System
Number of Class Actions Filed In 1999	16	15	23	2,133
Per Capita Class Action Filings In 1999 (per million)	61.8	59.5	20.3	7.6

C. The County Courts' Class Action Dockets Are Monopolized By A Small Cadre Of Out-Of-County Plaintiffs' Counsel.

In addition to finding an inexplicably large number of class actions in the three surveyed state courts, the research also found that a large number of these cases were brought by small groups of plaintiffs' counsel who have developed expertise in bringing massive actions against large corporations in a select number of state courts. In Madison County, the same five firms appeared as counsel in approximately 45 percent of the cases on the class action docket. Similarly, in Jefferson County, five firms seem to be driving a large percentage of the local class action industry, cumulatively appearing in 32 percent of the class action lawsuits included in the survey.

Moreover, most of these firms are not located in the counties where they are choosing to sue. In Madison County, the law firms that filed the purported class actions generally were not based in that locale. Of the 66 plaintiffs' firms that were listed on the Madison County case files, 56 (or 85 percent) listed office addresses *outside* Madison County. These attorneys reside and practice in far-flung locations, such as New Orleans, Louisiana; Lexington, Mississippi; Washington, D.C.; Houston, Texas; San Francisco, California; and Mobile, Alabama.

Of the 66 plaintiffs' firms that were listed on the Madison County case files, 56 (or 85 percent) listed office addresses outside *Madison County. These attorneys reside and practice in far-flung locations, such as New Orleans, Louisiana; Lexington, Mississippi; Washington, D.C.; Houston, Texas; San Francisco, California; and Mobile, Alabama.*

The same trends were evident in the actions filed in the courts of the other two counties. In Jefferson County, Texas, 58 percent of the law firms appearing on complaints listed addresses *outside* the county. Jefferson County was the venue of choice for attorneys from Houston, Dallas, Washington, D.C., San Antonio and Baton Rouge, who made the trek to Jefferson County (about 75 miles east of Houston) to file their actions. In Palm Beach County, 60 percent of the law firms appearing on class action complaints listed office addresses outside the county.

Another trend that was evident in the research was the use of "cut-and-paste" complaints in which plaintiffs' attorneys file a number of suits against different defendants in the same industry challenging standard industry practices. For example, within a one-week period early this year, six law firms filed nine nearly identical class actions in Madison County alleging that the automobile insurance industry is defrauding Americans in the way that they calculate claims rates for totaled vehicles.[60] Another group of law firms filed two class actions against automobile insurers (one of which lists 20-plus defendants) involving reimbursement for replacement parts.[61] A third group of lawyers filed five class actions in Palm Beach County challenging companies that sell interests in the life insurance policies of critically ill patients.[62]

Needless to say, when large numbers of very similar lawsuits attacking many players in the same industry coalesce before the same court and involve the same counsel, the situation does not appear to be mere happenstance. These facts tend to confirm what has long been suspected—that the impetus for filing class actions generally comes from lawyers eager for substantial attorneys' fees, not individual consumers seeking redress for their grievances.

In this regard, a glance at the websites of some of the class action law firms active in Madison County is informative. For example, the website of one of the law firms involved in the automobile insurance class actions boasts that the firm has brought 24 nationwide class actions in Madison County, challenging a broad array of practices in a number of industries. The firm's website advertises that it specializes in class actions that seek less than $500 in damages on be-

half of consumers and that it is currently involved in a number of class actions, including: (1) lawsuits against ten automobile insurance companies over the standard "medical payment" provisions in automobile insurance policies; (2) lawsuits against three automobile manufacturers over allegedly defective paint processes; (3) a lawsuit against UPS for its policies for excess value insurance; (4) a suit against the manufacturers of air purifiers; and (5) a suit against Sprint on behalf of everyone who ever got disconnected on a cell phone call.[63] Another firm that is involved in ten of the class actions identified by the research in Palm Beach County advertises on its website that "more claimants mean greater potential liability for defendants. Because there is greater potential liability, these lawsuits become worthwhile for lawyers to prosecute on a contingent-fee basis."[64]

D. Many Of The County Court Cases Were "Copy Cat" Class Actions, Duplicative Of Other Pending Litigation.

As both the Senate and House Judiciary Committees have noted in recent reports, the jump in the numbers of state court class actions has resulted in part from the increasingly common practice of filing "copy cat" class actions—duplicative class actions that assert the same claims on behalf of essentially the same people in a number of different courts.[65] Sometimes these class actions are brought by attorneys vying to take the lead role in any potential lucrative settlement with the defendant. In other cases, the strategy is to go fishing in a number of ponds—to file many identical lawsuits before many different court, hoping to land the big one with a favorable judge somewhere. When such copy-cat class actions are filed in federal courts, the federal judiciary can address this problem by establishing a multi-district litigation ("MDL") proceeding; however, there is no analogous multi-state procedure to address the duplication and waste caused by multiple class action filings in different states.

Not surprisingly, all of the counties surveyed in the study were sites for "copy cat" class actions. For example, *Flanagan v. Bridgestone/Firestone Inc.*,[66] a Palm Beach County suit, was one of nearly 100 identical class action lawsuits that have been filed against Bridgestone/Firestone, Inc., and Ford Motor Company since the Firestone tire recall was announced in August 2001. Similarly, the *Kaiser v. Cigna Corp.* case in Madison County, Illinois[67] is duplicative of several class actions that have been filed against Cigna on behalf of the same or similarly defined nationwide classes. Other "copy cat" cases discussed below include a suit against Smith Barney involving its employee investment plan that was substantially the same as a case pending in federal court. There were even "copy cat" cases within the survey itself. As discussed in Sections IV.A and IV.B below, a number of automobile insurance cases filed in Jefferson County sought to certify the same nationwide classes as cases filed in Madison County.

In both the Firestone tire litigation and the HMO litigation, the federal court cases have been consolidated in MDL proceedings (in fact, the *Flanagan* case was removed to federal court and consolidated in an MDL proceeding before plaintiffs sought to dismiss it voluntarily).[68] But plaintiffs' counsel often go to great lengths to avoid such MDL proceedings by making their cases "removal-proof" in the hopes that they can establish an alternative litigation (ideally in a friendly venue) to the federal court proceeding. This strategizing not only results in judicial waste, but also pits federal judges and state court judges against each other on issues like the appropriateness of class certification or proposed settlements, compromising judicial comity. As Chief Justice William Rehnquist has noted: "[W]e can no longer afford the luxury of state and federal courts that work at cross-purposes or irrationally duplicate one another."[69]

IV. THE COUNTY COURT SURVEY: THE INDIVIDUAL COURTS AND THEIR CLASS ACTION DOCKETS.

As noted above, the two key findings of the survey were that class actions increased in all three counties during the period surveyed and that many—if not most—of these cases had little relationship to the counties in which they were brought. There were, however, some variations among the county courts' class action experiences.

Most notably, Madison County appears to be an outlier among outliers, with an even more disproportionate number of class actions and an even greater percentage of nationwide class actions than the other counties surveyed. In contrast, Palm Beach County had a significant number of class actions with some local orientation (*i.e.*, Florida-specific claims) and fewer class actions *per capita*. Below, we analyze the survey results on a county-by-county basis and discuss several of the nationwide class actions that were filed in each of the counties during the period surveyed.

A. Madison County, Illinois: A Projected 3650% Increase In Class Action Filings Over Four Years.

Madison County covers 725 square miles in southwest Illinois and borders the Mississippi River.[70] The two largest towns are Granite City and Alton, with populations of 31,301 and 30,496, respectively.[71] The largest private employer is the Olin Corporation, an ammunitions manufacturer, with 4,000 employees.[72] Judges in Madison County are elected by popular vote and serve six-year terms.[73]

In the Third Judicial District of Madison County, Illinois, 70 purported class actions were filed between February 1998 and March 2001, of which 81 percent (57 cases) were brought on behalf of putative nationwide classes. The breakdown for each year is on the table below.

In analyzing the Manhattan Institute research, Madison County stands out even among other counties with disproportional class action dockets for two distinct reasons—(1) the recent exponential increase in class action filings and (2) the relative dearth of cases involving local defendants. This comports with anecdotal evidence suggesting that Madison County is a very favorable venue sought out by plaintiffs' attorneys seeking to bring nationwide class actions. The popularity of this venue is evident from the statistics on class action filings over the last several years, which show a steep increase in filings among the class action plaintiffs' bar.

During calendar year 1998, the Madison County court handled two nationwide class actions filed that year. The first, *Rice v. National Steel Corp.*,[74] was certified as a nationwide class alleging underpayment on a profit sharing plan. The second, *Morrow v. J & B Importers, Inc.*[75] was certified for settlement as a national class alleging overcharges on shipping. Those results seem to have started the ball rolling in Madison County. Within two years, the number of class actions filed in that jurisdiction had increased by a factor of 20, with 39 purported class actions filed in 2000. If the balance of calendar year 2001 keeps pace with the first three months, 75 class actions will be filed in the Madison County judiciary this year, *an increase of 3650 percent over calendar year 1998*. Moreover, the vast majority of these cases will be nationwide class actions. Clearly, something is drawing plaintiffs' counsel to this court.

A brief summary of some of the nationwide class actions currently pending in Madison County provides a window on the breadth of these lawsuits and reflects the concerns discussed above about the propriety of a locally elected judge re-

Year	Number of Class Actions Filed	Number Brought on Behalf of Proposed Nationwide Classes	Percentage Increase In Total Class Actions From Prior Year
1998	2	2 (100%)	*
1999	16	15 (94%)	700%
2000	39	29 (74%)	144%
2001 (Through March 7)	13	11 (85%)	92% (projected)

solving all of these disputes—many of which have no real local nexus—on a nationwide basis from a county courthouse in Madison County:

Automobile Repair—*Wheeler v. Sears, Roebuck & Co.*,[76] is a purported class action on behalf of 30 million consumers, alleging that Sears' tire balancing service was deceptive and seeking to recover between $12.50 and $50 for each purported class member. As the Complaint readily admits, the allegedly offensive conduct took place at "more than 800 Tire and Auto Centers throughout the United States."[77] Of course, the obvious question is: Why is this suit being brought in Madison County? The Complaint contends that Madison County is the proper venue for this nationwide class action, because the single named plaintiff resides there and Sears is authorized to conduct business within Illinois.[78] That is the sum total of the connection plaintiff's counsel attempts to establish. What the complaint fails to mention is that there are only nine Sears Automotive Repair shops in the entire state of Illinois—and only one in Madison County.[79] Thus, despite the fact that the vast majority of Sears tire centers have no nexus whatsoever to Madison County, plaintiff's counsel would have a locally elected county judge resolve this dispute on behalf of a broad class of individuals from all 50 states. Moreover, in seeking to allege claims for violation of consumer fraud law, the Complaint glosses over the substantial differences in various states' laws and policies and simply asserts that the Illinois Consumer Fraud Act applies to the claims of all putative class members nationwide.[80]

Telephone Bills—*Ott v. MCI Worldcom Communications, Inc.*[81] is a case brought by a Maryland resident (who used to live in St. Clair County, Illinois) against a Delaware corporation that is headquartered in Mississippi on behalf of a nationwide class of MCI customers. The Complaint seeks class action status for a nationwide class of "thousands" of phone customers who the named plaintiff contends were "bait and switch" victims, because they were charged more than the advertised rate for long-distance telephone service. Plaintiff's counsel baldly alleges that his choice of venue is appropriate under Illinois law, but not surprisingly, fails to explain exactly why the Madison County courts are the right forum in which to adjudicate his claim. After all, none of the parties is located in Madison County, and obviously only a very small percentage of MCI's 20 million long-distance customers[82] live or work there.

Despite the lack of any apparent nexus between the dispute and the courthouse selected for the suit, the Complaint asks the Madison County court to issue an injunction preventing "the defendant from continuing the policies and practices [regarding billing]" if the court finds that MCI WorldCom violated, among other home-grown laws and statutes, Illinois' Deceptive Business Practices Act.[83] Here too, plaintiff's counsel has selected Madison County for a reason that is not immediately apparent from the Complaint, raising the question of whether it is appropriate for a Madison County judge to dictate new national billing policies to a major long-distance company when there is no real local interest in the case.

Cell Phone Connections—*Snyder v. Sprint Spectrum L.P.*[84] seeks to certify a class of all Sprint PCS customers who have experienced a "dropped call." According to the Complaint, which is brought by two named plaintiffs (only one of whom is a Madison County resident), Sprint misrepresented the clarity of its cellular phone service by advertising that it would provide "remarkably clear" and "consistent nationwide service."[85] The Complaint contends that the Madison County venue is proper because "Sprint conducts substantial business in Madison County" and "the transaction or some part thereof . . . occurred in Madison County."[86] Of course, Sprint also conducts the vast majority of its business *outside* of Madison County, Illinois. As plaintiffs' counsel attest, "Sprint is one of the largest cellular telephone service companies in Illinois and throughout the United States."[87] More specifically, Sprint, which is headquartered in Kansas City, is the fourth largest cellular telephone provider in terms of customers with more than 10.8 million direct and resale subscribers and more than 1 million affiliate subscribers, providing service in more than 4,000 cities and communities across the country.[88] Even if every member of every household in Madison County (including infants, children and the elderly) subscribed separately to Sprint's cellular ser-

vice, they would still only account for 2.2 percent of Sprint's business. Nonetheless, this class action places before a locally elected Madison County judge an effort to seek redress for supposedly countless disconnected phone calls that affected "thousands of persons" throughout the United States,[89] that occurred for a number of disparate reasons, and that potentially implicate the laws of 50 different states.

Clogged Drains—In *Garvey v. Roto-Rooter Services Co.*,[90] a lone Madison County resident is suing on behalf of customers residing in 31 states[91] and the District of Columbia, alleging that their drains were repaired by unlicensed plumbers under the defendant's auspices. The Complaint does not allege that the service was performed poorly. Instead, the grievance is that the plaintiff and putative class members allegedly were deceived because the individuals who performed their services were not licensed plumbers. According to the Complaint, "there are thousands of members of the class whose identities can be easily ascertained by the records and files of ROTO-ROOTER."[92] Obviously, at best, only a small number of these putative class members hail from Madison County. There is no Roto-Rooter operation in Madison County; to the extent (if any) that the defendant provides service to Madison County, it is provided by a franchisee based in St. Louis, Missouri.[93] Thus, in this case, the named plaintiff seeks to put a non-Illinois company that does only a minuscule amount of local business (at most) on trial in Madison County for practices that affect citizens in a multitude of states. Moreover, the policies implicated in this case are particularly inappropriate for multi-state resolution because plumbing licenses are obviously a local concern, with each state setting its own standards and regulations on such licenses. Perhaps it is appropriate for a Madison County court to issue a ruling that interprets Illinois' laws regarding plumbing licenses; but how can one county judge possibly adjudicate a matter that involves the disparate plumbing laws and regulations of 32 jurisdictions?

Automobile Insurance—Replacement Parts—*Hobbs v. State Farm Mutual Automobile Insurance Co.*[94] and *Paul v. Country Mutual Insurance Co.*,[95] allege that car insurance companies have violated their contracts and acted deceptively by refusing to provide original equipment manufacturer ("OEM") parts to policyholders involved in car accidents. These two cut-and-paste complaints seek to capitalize on the plaintiffs' victory in a nearly identical case, *Avery v. State Farm Mut. Auto Ins. Cos.*[96] In *Avery*, another Illinois county court certified a nationwide class on these issues, 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, which 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.

> As The New York Times *reported at the time, 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."*

In upholding the *Avery* jury's award earlier this year, an Illinois court of appeals found that "the question of whether laws of different states apply to specific transactions alleged in a class action does not ordinarily prevent certification of the class."[97] According to the court, "there were no true conflicts between the substantive laws of Illinois and those of the other states whose residents were part of the class."[98] Moreover, the court 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."[99] According to the appellate court, this testimony was irrelevant because of the trial court's finding that the parts were inferior.[100] As *The New York Times* reported at the time, 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."[101]

Perhaps not coincidentally, the number of insurance cases in Madison County has grown significantly in the period since the *Avery* verdict. The willingness of certain Illinois state courts to serve as free-roving insurance commissioners and issue edicts that affect the way insurance companies can do business in 49 other states may explain why 26 class action law suits have been filed in Madison County against insurance companies in the last few years.

The *Paul* Complaint was filed by a geographically dispersed coalition of 10 plaintiffs' counsel located throughout the country—and one named plaintiff who resides in Granite City, Illinois—against Country Mutual, an insurance company that is based in Bloomington, Illinois (150 miles from Madison County) and that offers insurance policies in nine states.[102] The *Hobbs* case was brought by a number of class action law firms spread across the country[103] *against more than 20 insurance companies*. In *Hobbs*, plaintiffs' counsel are suing on behalf of any State Farm customers who made claims for vehicle repairs after the *Avery* case was decided and on behalf of policyholders from more than 20 other large automobile insurance companies that were not included in the *Avery* case.[104] Of course, the named plaintiff (since there is only one) is only insured by one of these insurance companies (State Farm). There are no named plaintiffs who claim to have bought policies from any of the other 20-plus insurance companies targeted by this class action.

In seeking to justify the selection of the Madison County judiciary as the nationwide[105] arbiter of these car insurance disputes, the *Hobbs* Complaint alleges simply that "plaintiff Shannon Hobbs, and one or more class members, are residents of this County, each of the defendants conducts substantial business in this State, and the actions at issue in this case took place in significant part in this State."[106] In fact, a "significant part"—or more accurately, the overwhelming part—of the allegations took place outside of Madison County and outside Illinois. The 20-plus insurance companies against which this case is brought (none of which is headquartered in Madison County and only eight of which are headquartered in Illinois), account for nearly 40 percent of the automobile insurance premiums paid annually throughout the United States.[107] More than 99 percent of these policies are sold outside Madison County, and 97 percent are sold outside Illinois.[108] Indeed, plaintiffs' counsel readily admit that the proposed class "includes millions of geographically dispersed insureds" (whereas Madison County only has 250,000 residents).[109] Plaintiffs are thus asking a judge to issue an edict affecting the way major automobile manufacturers must handle millions of insurance claims that were issued outside the county—and indeed, outside the state of Illinois.

In short, plaintiffs' counsel in *Hobbs* seek to put the entire automobile insurance industry on trial in Madison County based on one Madison County resident's experience with one insurance company. If this case is certified and tried, its ramifications would reach far beyond Madison County. One Madison County judge could be single-handedly responsible for dramatically increasing the price of automobile insurance for all Americans and adversely affecting the non-original manufacturer automobile parts industry. The ability of one locally elected judge to exercise that much power raises serious federalism questions.

Automobile Insurance—Value Of Wrecked Vehicles—As noted above, a group of six plaintiffs' counsel (only one of whom is actually resident in Madison County) filed nine separate insurance class actions in Madison County over a three-week period in early 2001, alleging that nine major insurance companies have engaged in fraud by miscalculating the value of wrecked vehicles. These cases—also presumably spawned by the *Avery* verdict—were brought against nine major insurance companies, alleging that all the defendants contracted with a company (based in Illinois) to provide "biased, below-market estimates of ve-

hicle values."[110] Among the violations claimed by plaintiffs are violations of the Illinois Consumer Fraud Act and "similar state consumer protection statutes" in the other states where the defendant insurance companies do business.[111]

All nine of the cases seek to certify nationwide classes that allegedly have thousands of members. For example, in the *Schoenleber* case, which was brought against Prudential, the Complaint alleges that "[t]he plaintiff class includes thousands of policyholders whose vehicles have been declared a total loss."[112] (The *Schoenleber* complaint also seeks to certify a defendant class that consists of at least "25 Prudential entities" that use the challenged claims adjustment program.)[113] Similarly, in the nearly verbatim motions for class certification filed in all nine cases, plaintiffs' counsel allege that the proposed plaintiff classes "consist of thousands of persons who reside throughout Illinois and the United States."[114] This is no exaggeration. Prudential, the defendant in *Schoenleber*, is a New Jersey company headquartered in Newark with approximately two million outstanding automobile policies in forty-eight states.[115] Geico, the insurance company targeted in the *Billups* case, is a Maryland corporation licensed to provide automobile insurance to consumers in 48 states and the District of Columbia, with "over 4.7 million policyholders and 7.3 million automobiles insured as of [December 2000]."[116]

Once again, other than alleging that the defendants have "transacted substantial business in Madison County, Illinois,"[117] the complaints in these cases offer no compelling nexus between the plaintiffs' broad nationwide claims against nonresident corporations and the small county in which they have sued. Moreover, by alleging that the Illinois-based provider of the valuation software engaged in conspiracy with the insurance companies,[118] plaintiffs in the nine cases have effectively shielded all of the cases from removal to federal court—since all have at least one in-state defendant—clearing the way for a Madison County judge to set nationwide policy on yet another facet of the automobile insurance industry.

Automobile Insurance—Medical Treatment—Another cluster of lawsuits filed in Madison County during the time period researched involved 10 virtually identical suits against a number of automobile insurance companies alleging that these companies engaged in statutory fraud under the Illinois Consumer Fraud Act "and the substantially similar consumer fraud statutes of sister states"[119] with regard to medical claims resulting from car accidents. According to the complaints in these cases, the defendant insurance companies engaged in fraud because they adjusted accident victims' medical claims by using biased utilization review organizations, medical exams and computer-generated reports.[120] Plaintiffs' counsel readily admit that most of these putative class members have no relationship to Madison County. For example, in *Hernandez v. American Family Mutual Ins. Co.*,[121] the Complaint alleges that "AFI is one of the largest automobile insurers in the United States. The classes include tens of thousands of policyholders geographically dispersed throughout the United States, thousands of whom reside in Illinois."[122] Plaintiffs' counsel do not provide any support for their belief that "thousands" of class members reside in Illinois and offer just one example of a potential class members who lives in Madison County—the single named plaintiff. Given that AFI, a Wisconsin company, has issued more than 7 million policies in more than 15 states, Madison County likely accounts for only a *very* small portion of its business, and the company's insurance policies are governed by the laws of 14 other states in addition to Illinois.

Certainly, it is appropriate for the named plaintiff, who was allegedly involved in an automobile accident, to sue his insurance company in Madison County if he believes that he was not properly reimbursed for his medical expenses. But the more important question is why his lawyers have chosen to sue AFI and a number of other insurance companies in Madison County on behalf of every American with an automobile policy outside of Madison County and thereby seek to turn the Madison County courthouse into a nationwide insurance czar. Notably, despite these policy concerns and the substantial difficulties of applying numerous state laws in one judicial proceeding, at least one of the so-called "medpay" class actions has already been certified for nationwide

treatment, giving plaintiffs' counsel an incentive to bring even more of these lawsuits.[123]

Barbie Dolls—*Cunningham v. Mattel, Inc.*[124] is a nationwide class action claiming that consumers paid too much for "limited edition" Barbie dolls that were later sold by Mattel at a lower price through other vendors. Plaintiff, a Madison County resident and purported Barbie doll collector, seeks to represent a class of "thousands" of people throughout the country who have purchased such "limited edition" Barbie dolls. The only explanation plaintiff's counsel provides for bringing this nationwide suit in Madison County is the statement that Mattel, a California corporation, is "engaged in the manufacture, sale and distribution of toys, including Barbie dolls, throughout the United States, including Madison County, Illinois."[125] Plaintiff does not allege—and there is no reason to believe—that Madison County is a Mecca of Barbie collectors or otherwise has a particularly strong interest in resolution of this suit. And while on the surface, a suit about Barbie dolls may not seem to raise important civil justice policy issues, the case does present broader-ranging issues about the responsibility of a manufacturer to maintain the retail value of a product. Thus, once again, a locally elected county judge is being asked to set a policy for 50 states on an issue with potentially wide ramifications for consumers and businesses.

Environmental—*England v. Atlantic Richfield Co.*[126] and *Mizukonis v. Atlantic Richfield Co.*[127] are two nearly identical lawsuits filed by the same law firm that seek to hold all of the major gasoline manufacturers in the United States (including ARCO, Exxon Mobil and Chevron to name a few) liable for allegedly contaminating the nation's groundwater with methyl tertiary butyl ether ("MTBE"), a fuel additive that was approved by the Environmental Protection Agency ("EPA") to help reduce carbon dioxide emissions. The two suits are brought on behalf of individuals who own non-commercial property in 16 states and rely on private wells for their drinking water. Plaintiffs' counsel claim that there are "hundreds of thousands of members" in their putative class,[128] but that venue is nonetheless appropriate in Madison County "because at least one of the Plaintiffs resides and owns real property wherein a private well is located in Madison County."[129]

These two cases highlight the inefficiency that results from dueling class actions. The *England* case has been removed to federal court and transferred to an MDL proceeding.[130] The *Mizukonis* case, however, which plaintiffs sought to make removal-proof by alleging that any damages are "less than Seventy-Five Thousand Dollars" per plaintiff,[131] is still pending in state court in Madison County and is thus being litigated separately from the ongoing, consolidated federal court litigation.

According to the Mizukonis Complaint, defendants engaged in negligent and conspiratorial behavior by allegedly failing to perform standard toxicological tests on the effects of MTBE and thus "expos[ing] millions of Americans, including Plaintiffs, to potential harm without warning of the potential health risks associated with MTBE."[132] Based on these allegations, plaintiffs' counsel are seeking compensation for two subclasses—a testing subclass and an alternative drinking supply subclass. As the Complaint itself attests, MTBE is an issue that has received national—and federal—attention. In fact, the EPA is currently engaged in a rulemaking proceeding that seeks to address any contamination issues addressed by the gasoline industry's use of MTBE and whether the additive should be removed from gasoline.[133] Despite the federal role in this broad ranging environmental policy, plaintiffs' counsel would have a locally elected Madison County judge issue a broad ruling that addresses: (1) whether MTBE "adversely impacts groundwater"; (2) whether the gasoline industry failed to adequately test MTBE; and (3) whether the gasoline industry conspired to conceal and/or misrepresent the risks of MTBE for government, agencies, regulators and the public at large.[134] Whatever the court decides, the ruling could have a profound impact on the practices of the entire gasoline industry and/or the drinking water of millions of Americans who have no connection to Madison County. At the same time, the ruling could undermine the federal government's statutory role in regulating the gasoline industry and protecting the air and water supply of millions of Americans and contradict any ruling by the fed-

eral court in New York that is presiding over the MDL proceeding.

Cable Late Fees—In *Unfried v. Charter Communications, Inc.*,[135] a Madison County judge approved a settlement for a nationwide class composed of "[a]ll [Charter] residential cable subscribers located in the continental United States"[136] (with the exception of six states) who were allegedly charged improper cable late fees. Charter Communications is among the nation's largest cable companies and currently serves approximately 7 million customers in 40 states.[137] Obviously, only a very small percentage of those customers reside in Madison County. Indeed, even if every household in the entire county subscribed to Charter, Madison County would still account for just 1.5 percent of the cable company's customers. In seeking to explain why this suit was filed in Madison County, the Complaint merely states that "Charter received substantial compensation and profits from sales of cable television in Madison County."[138] This attenuated relationship did not stop a locally elected Madison County judge from entering a settlement order that (a) required Charter to change its late fee billing policies throughout the country, (b) provided *no* compensation to the putative class for any past late fee billing problems, and (c) provided plaintiffs' counsel with $5.6 million for their efforts (which spanned only 23 months).[139]

Shipping Fees—In *Smith, Allen, Mendenhall, Emons & Selby v. The Thomson Corp.*,[140] a Madison County judge certified a nationwide class of law firms and other businesses that were allegedly charged extra shipping fees when they purchased certain reference books. The case was brought by three law firms located in Madison County.[141] According to the Complaint, the class, which includes "[a]ll persons who are subscribers to the defendants' CD-Rom libraries, or who purchased or leased CD-Roms from defendants, and who have been charged transportation and handling costs . . . above the actual cost of transportation and handling. . . ,"[142] purportedly consists of "thousands of subscribers throughout the United States."[143] Although this class potentially includes thousands of law firms and law libraries across the United States, Madison County is home to just 89 law offices[144] and no law schools (and plaintiffs only list the names of three law firms in the county that actually subscribed to the service). Moreover, Thomson is a Canadian company with no business operations in Illinois. Nevertheless, the court certified the widely dispersed class for trial under Illinois and Minnesota law for purchases that were made throughout the United States.[145]

Fiber Optic Cable Trespass Claims—*Poor v. Sprint Corp.*,[146] which lists three named plaintiffs (only one of whom owns land in Madison County, Illinois), alleges that Sprint Corp. trespassed on the land of millions of property holders nationwide while installing fiber optic cable. In this case, plaintiff's counsel sought to certify a nationwide class that included "all current and former owners of land in the United States that is or was subject to an easement for a limited purpose held by a railroad, pipeline, energy or other utility company on which SPRINT has entered to install or maintain fiber optic cable without obtaining the consent of the owner of the land."[147] According to the Complaint, Sprint "agreed to pay tens of millions of dollars to the railroads, pipeline, energy, or other utility companies" that had easements to individuals' property when it should have entered into individual agreements with each of the property owners.[148] Given that Sprint has installed more than 23,500 route miles of fiber optic cable throughout the United States[149]—and that Madison County covers just 900 square miles—the vast majority of the individuals involved clearly live outside of Madison County (and outside of Illinois, for that matter). Indeed, as noted above, two of the three named plaintiffs in this action live elsewhere—one in Tennessee and one in Texas.

The history of this case provides a lens into some of the potential benefits of federal court class action practice over state court practice. The first time Sprint sought to remove the case to federal court it was remanded because one of the named plaintiffs was from Kansas, where Sprint has its principal place of business.[150] After the Kansas plaintiff was dropped from the case (the defendants decided to acquiesce in its removal for reasons not apparent from the docket), it was re-

moved again, and a federal judge certified a class.[151] The defendants appealed the class certification order under a recently enacted federal rule that allows for immediate appeal of class certification orders, and the U.S. Court of Appeals for the Seventh Circuit recently reversed the certification.[152] (In contrast to this federal provision (Fed. R. Civ. . 23(f)), the vast majority of states allow appellate review of class certification orders only in very rare circumstances, or deny it altogether.)

In its decision, the Seventh Circuit held that that class certification was "decidedly inappropriate" in a case that "involves different conveyances by and to different parties made at different times over a period of more than a century . . . in 48 different states . . . which have different laws regarding the scope of easements."[153] The Seventh Circuit's strongly worded decision only highlights the inappropriateness of the forum in which the case was originally brought. Had plaintiffs not agreed to drop the Kansas plaintiff (which was an almost-unheard of step in class action practice), this case would still be proceeding in Madison County and one local court would have been called upon to issue a broad ruling that affected the property rights of thousands of Americans even though the claims that plaintiffs allege—trespass, unjust enrichment and slander of title and property—implicate highly localized laws and policies that vary from state to state and are (as the Seventh Circuit found) highly unsuitable for class certification.

* * *

In sum, Madison County judges have been asked over the last two years to set national policy on issues that could affect the daily lives of millions of Americans throughout the country—from what water they drink to how much they pay for their next insurance policy or telephone bill—all from a small courthouse in southwest Illinois.

B. Jefferson County, Texas: Class Action Filings Double Over 1998-2000 Period.

Jefferson County, with a population of 252,051 in the 2000 Census, covers approximately 900 square miles and is located 75 miles east of Houston.[154] The two largest cities are Beaumont and Port Arthur, with populations of 113,866 and 57,755, respectively.[155] Judges in Jefferson County are elected by popular vote for four-year terms.[156] The county's largest private employer is the Huntsman Corporation, a chemical company, with 1300 employees.[157] Certainly, it is not the type of place where most people would expect to find complex, civil litigation with a national scope.

While the Manhattan Institute research revealed a smaller number of class actions in Jefferson County (versus Madison County), the trends are similarly disproportional. Between April 1998 and January 2001, 49 class actions were filed in the 60th Judicial District of Jefferson County, Texas, of which 27 were brought on behalf of putative nationwide classes.[158] Moreover, as with the other locales included in the research effort, the number of class actions grew steadily over the period surveyed. Between 1998 and 2000, the number of class actions filed in Jefferson County nearly doubled, and most of the additional cases involved requests for nationwide classes. The breakdown for each year is:

Year	Number of Class Actions Filed	Number Brought on Behalf of Purported Nationwide Classes (Percentage of Total)	Percentage Increase In Class Action Filings From Prior Year
1998	11	4 (36%)	*
1999	15	9 (60%)	36%
2000	20	14 (70%)	33%
2001(Jan. only)	1	0 (0%)	*

The business sectors under attack in the nationwide class actions pending in Jefferson County courts include technology, automobile insurance, retail practices and medical equipment. In most of the cases, there is no obvious nexus between the alleged dispute and the choice of Jefferson County to adjudicate the plaintiffs' claims. The following sample of the class actions that the Manhattan Institute study found pending in Jefferson County provides a sense of the breadth and potential nationwide ramifications of these cases:

Computers—*Lapray v. Compaq Computer Corp.*,[159] brought by three named plaintiffs in Jefferson County, alleges that Compaq sold certain computers with defective floppy diskette controllers, resulting in the "storage of corrupt data or the destruction of data without the user's knowledge."[160] The Complaint seeks to certify two classes: a nationwide equitable relief class and a nationwide damages class.[161] According to plaintiffs' counsel, "the classes consist of thousands of persons making the members so numerous that joinder of all members of any classes would be impracticable."[162]

In seeking to explain why plaintiffs' counsel have sued Compaq in Jefferson County, the Complaint simply states that two of the named plaintiffs purchased their Compaq computers in Jefferson County and all three use their computers in Jefferson County.[163] Jefferson County, as noted above, is a very small county, with just 92,880 households. In contrast, Compaq, a very large company, sold 1.78 million computers in the third quarter of 1999 alone.[164] Obviously, most of its business is going elsewhere. Thus, once again, two questions arise: Why do plaintiffs' counsel seek out Jefferson County when they wish to file class actions? And should a Jefferson County judge be responsible for effectively issuing standards that govern how personal computer manufacturers throughout the country configure and market their computers?

Retailing/Rental Issues—In *Scott v. Blockbuster, Inc.*,[165] plaintiffs' counsel have sued on behalf of a putative nationwide class of individuals who paid late fees for home video rentals. Blockbuster operates 4,800 domestic stores—one "within a ten-minute drive of virtually every major U.S. neighborhood," collectively serving 42 million American households.[166] Jefferson County, on the other hand, has a total of six Blockbuster stores[167] that serve (at most) 92,880 households.[168] Despite the 41.9 million households who rent videos elsewhere, the plaintiffs claim that Jefferson County is the proper venue because "all or a substantial part of the events or omissions giving rise to the claims occurred in this county."[169] Notably, although Blockbuster has its principal place of business in Dallas, Texas, plaintiffs have chosen to file their action in Jefferson County (330 miles away), presumably because they consider it to be a more favorable venue. While many would consider video late fees a mere annoyance (not an earth-shaking commercial issue), this lawsuit could have profound impacts on the way companies do business throughout the country and what types of fees they are (or are not) allowed to charge. Once again, the obvious question raised by these suits is whether a locally elected judge in Jefferson County should be making decisions that have broad ramifications for the conduct of commerce and the 99.9 percent of retail business in the country that occurs *outside* of Jefferson County.

This question has taken on new significance in light of Blockbuster's reported agreement to settle this case on a nationwide class basis. Under the proposed settlement (which has reportedly received preliminary approval from the Jefferson County court), customers would get varying amounts of benefits.[170] For example, a customer who claimed payment of $30 in late fees would get two free movie rentals and five $1 coupons good toward the purchase of non-food items.[171] Initially, Blockbuster announced that the various coupons to be issued would have a face value of $460 million, but the company has now acknowledged that fewer than 10 percent of the coupons will be used and that it will not be changing its late fee policy.[172] If the settlement is approved, plaintiffs' class counsel will be paid $9.25 million in fees and expenses. One commentator has observed that "the real winners in the settlement are the lawyers who sued the company," who will be paid "in cash, not coupons."[173]

Medicine—In *Rawls v. Mentor Corp.*,[174] the plaintiff allegedly sustained injuries after undergoing a breast augmentation procedure performed in Beaumont (a town in Jefferson County). Plaintiff alleges that the saline breast implants she received, one of which later deflated, were defective and caused her pain, mental anguish and disfigurement.[175] She is therefore suing Mentor on behalf of all persons who have been injured by the company's saline breast implants.

Mentor Corporation is a medical products company headquartered in California with a manufacturing facility in Irving, Texas (which is near Dallas and not near Jefferson County). Last year, the company sold its products in more than 60 countries.[176] Jefferson County has only a handful of plastic surgeons, and Mentor has no corporate presence there. Thus, there is no obvious nexus between the class action allegations and the venue selected by plaintiffs' attorney.

Extended Warranties—Best Buy is a discount electronics retail chain with 400 stores in 41 states, only one of which is located in Jefferson County.[177] In *Brew v. Best Buy Co., Inc.*,[178] two Jefferson County residents who purchased a computer from Best Buy along with an extended warranty allege that Best Buy violated consumer fraud laws, breached its contracts and engaged in negligence and common law fraud because the extended warranty turned out to be much narrower than they understood it to be at the time of purchase. According to the Complaint, Best Buy "entered into a corporate wide scheme to institute high pressure sales techniques involving the extended warranties to reap substantial ill-gotten gains" and "erect artificial barriers to discourage consumers who purchased the 'complete extended warranties' from making legitimate claims."[179]

Based on these allegations, plaintiffs' counsel have asked a Jefferson County court to certify a class composed of "[a]ll persons and entities throughout the United States that purchased an extended warranty for merchandise from Best Buy or any of its retail store locations."[180] That class, according to plaintiffs, consists of "multiple thousands of members" throughout the United States.[181] In seeking to litigate these nationwide claims in Jefferson County, plaintiffs do not attempt to provide any connection between their allegations and Jefferson County (other than their residence there). Indeed, they do not even allege that they purchased their computer at the sole Best Buy store that is located in Jefferson County. Nonetheless, they are asking a local court to issue a ruling that would affect Best Buy's business practices throughout the country and could have ripple effects on numerous other companies that offer consumers extended service warranties.

Automobile Insurance—Medical Payment—*Pego v. Allstate County Mutual Insurance Com.*,[182] seeks to certify virtually the same nationwide class of claimants as two other cases pending in Madison County and discussed above.[183] The case involves allegations that Allstate breached its contracts and defrauded its automobile policy-holders by failing to pay reasonable and necessary medical expenses resulting from car accidents. Although the named plaintiffs live in Jefferson County, plaintiffs' counsel do not otherwise tie the dispute to the forum in which the suit was brought. To the contrary, the Complaint emphasizes the nationwide implications of the case they have brought and seeks to certify a class of all Allstate policy-holders nationwide who have been denied coverage—in whole or in part—for injuries sustained in car accidents, or whose reimbursements were delayed.[184] Allstate, which is headquartered in Illinois, provides automobile insurance to more than 12 percent of insured motorists throughout the country, only a small portion of whom live in Texas (let along Jefferson County).[185] As discussed above, resolution of these allegations on a nationwide basis in a county court would have broad implications for the insurance industry that would extend far beyond Jefferson County.

Automobile Insurance—Value Of Wrecked Vehicles—*Shields v. Allstate County Mutual Insurance Co.*,[186] brought by three named plaintiffs whose vehicles were totaled in car accidents, seeks certification of a nationwide class of persons who were insured by Allstate, Farmers and Progressive and received an offer for the value of their vehicle based on a valuation report prepared by CCC Information Services, Inc. The Complaint alleges that CCC prepares "unreliable, inaccurate and

biased vehicle valuation reports . . . with the intent of generating vehicle valuations well below the actual cash value or replacement cost of vehicles owned by an insured."[187] As discussed above, a group of plaintiffs' counsel have brought nine law suits suing nine insurance companies (including Allstate, Farmers and Progressive) in Madison County and making the same claims; thus, all three of the insurance companies being sued in this case are also targets of nearly identical class actions that are pending in Madison County and involve prospective class members.[188] (The key difference between the Madison County and Jefferson County cases is the inclusion of CCC as a defendant in the Illinois cases. Presumably, plaintiffs in the Madison Counties included CCC as a defendant because it is an Illinois company and its presence in those cases would therefore prevent defendants from removing the case to federal court; in this case, which is brought in Texas, CCC's involvement would have no such effect and it is not included as a defendant.)

According to the Complaint, venue is appropriate in Jefferson County because the three named plaintiffs live there and "the actions at issue in this case took place in this State and in Jefferson County."[189] Among the pleadings that the researchers found in the case file was a motion by the defendants to transfer venue to Dallas, where Allstate has its principal Texas office.[190]

Mobile Home Siding—In *Dunn v. Boise Cascade Corp.*,[191] the named plaintiff, a mobile home owner in Jefferson County, Texas, is suing Boise Cascade for allegedly defective siding and seeks to certify a class composed of all persons in the United States who own mobile homes with exterior hardboard siding manufactured by Boise.[192]

Although the Complaint alleges that "all or part of the cause of action arose in Jefferson County, Texas,"[193] the defendant in the suit is a company incorporated under the laws of Delaware and headquartered in Boise, Idaho. Moreover, only three of the twenty-eight wholesale building materials distribution facilities and ten wood products manufacturing facilities that Boise operates across the United States are in Texas—and none of these are in Jefferson County.[194] Before Boise discontinued manufacturing the challenged hardboard siding product in 1984,[195] the company was one of just fifteen manufacturers of hardboard siding in the country.

* * *

In the most recent judicial election in Jefferson County, approximately 55,000 people voted for the judge who was elected to the 60th Judicial District.[196] That amounts to just one-tenth of one percent of the 50.4 million people who voted for the President who was elected in the same election[197] and who is responsible—under the U.S. Constitution—for nominating judges to the federal bench. While the Jefferson County judge will face re-election in just four years, federal judges are protected from political pressure because they are granted tenure and salary protection under the U.S. Constitution. The question remains: Which of these judiciaries should be charged with responsibility for handling large-scale, interstate class actions involving issues with significant national commercial implications?

C. Palm Beach County, Florida: Class Action Filings Up By 34%.

Palm Beach County, the most populous of those included in the Manhattan Institute research, with 1.1 million people, is located in southern Florida and includes well-known resort towns such as West Palm Beach and Boca Raton, with populations of 82,103 and 74,764, respectively.[198] The largest private employer is Pratt & Whitney, a jet engine manufacturer, with 4,700 employees.[199] Like their counterparts in the other counties surveyed, Palm Beach County judges are elected by popular vote; their term is six years.[200]

Ironically, Palm Beach County, with a population that is nearly four times that of Madison County, was the site of the same number of class action overall (and eleven fewer nationwide class actions) as Madison County during calendar year 2000. Still, even while Palm Beach County may seem relatively dormant, it has also experienced a substantial increase in class action filings (up 34 percent between 1998 and 2000). And as noted above, the *per capita* rate of state court class actions was triple the rate of federal filings in 1999.

The Manhattan Institute research indicates that 91 purported class actions were filed in the 15th Judicial Circuit for Palm Beach County between May 1998 and December 2000, of which 46 (51 percent) were brought on behalf of putative nationwide classes. The annual breakdown is illustrated in the table below.

The two key differences between the Palm Beach County suits and the suits from the other three counties included in the study were that many of the Palm Beach law suits involved defendants located in Palm Beach (or at least Florida) and a smaller percentage of the cases sought nationwide classes. Nonetheless, approximately half of the Florida cases sought to hold defendants liable in a Palm Beach County court for practices that allegedly injured consumers not just in Florida, but throughout the country. Some examples of the nationwide class actions brought in Palm Beach County since 1998 are:

Investment Services—The plaintiff in *Foster v. Cabot Money Management, Inc.*,[201] is a Florida resident (albeit *not* a resident of Palm Beach County), who alleges that his investment adviser, Cabot Money Management, Inc. (a Massachusetts corporation), breached its contract with him by failing to adhere to its 20 percent stop-loss policy, under which the advisor agreed to sell any stock if its value fell more than 20 percent below the purchase price.[202] Based on this one plaintiff's alleged experience, the Complaint seeks to represent a nationwide class consisting of all persons with Cabot stock accounts who "were not sold out of any stock when the market value of any one stock fell 20% below the person's average purchase price."[203] According to plaintiff's counsel, Cabot has "more than 1200 clients" and "actively solicits accounts in Florida and throughout the United States."[204] The Complaint does not explain why plaintiff sued Cabot in Palm Beach County rather than his own unnamed county in Florida or in Massachusetts where the company is based.

Dietary Supplements—*Greenfield v. Rexall Sundown, Inc.*,[205] involves allegations that the defendant, a health products company located in Palm Beach County, engaged in deceptive trade practices in connection with the marketing of a "dietary supplement" called Cellasene that the company allegedly claimed would eliminate cellulite.[206] According to the Amended Complaint, "Rexall has generated over $60 million in Cellasene sales with an annual projection of $300 million in sales."[207] Rexall's own advertisements purport that "hundreds of thousands of women across the country are now enjoying the benefits of Cellasene...."[208] The case was originally brought by one Palm Beach County resident on behalf of all consumers throughout the United States who have purchased the product. It was later expanded twice, and in March 2001, plaintiffs filed a "Consolidated Complaint," signed by ten law firms (none of which lists a Palm Beach County address and only one of which is located in Florida).[209] The Consolidated Complaint drops the sole Palm Beach County resident and lists several new plaintiffs. All told, there are now six named plaintiffs in the case, *none* of whom is a resident of Palm Beach County and four of whom live *outside* Florida.[210]

Although the named plaintiffs hail from South Carolina, New Jersey, and Pennsylvania, and the Complaint alleges that Rexall has sold this product all over the country, plaintiffs' counsel are bringing this nationwide class action exclu-

Year	Number of Class Actions Filed	Number of Nationwide Purported Class Actions (Percentage of Total)	Percentage Increase In Class Action Filings From Prior Year
1998	29	20 (69%)	*
1999	23	8 (35%)	*
2000	39	18 (46%)	70%

sively under Florida's deceptive trade practices law. "Since all of Rexall's sales of Cellasene as well as the Company's marketing of it have their origin in Florida, where Rexall is domiciled," the Complaint posits, "the [Florida Deceptive and Unfair Trade Practices Act] is applicable to all members of the Class including those residing outside Florida."[211]

Once again in this case, a locally elected court is being asked to issue a ruling under one state's laws on a serious issue—appropriate marketing of health supplements—that could affect millions of consumers throughout out the country—and could effectively impose new standards on health products companies that offer dietary supplements. Moreover, plaintiffs' counsel seek to certify this case even though they themselves allege that the practices they are challenging are under investigation both by the Federal Trade Commission and the Florida state attorney general's office.[212] The FTC filed a lawsuit in U.S. District Court in Florida alleging that the company made false and unsubstantiated claims regarding the effectiveness of Cellasene in cellulite reduction.[213] That case is currently pending in the U.S. District Court for the Southern District of Florida.

Health Insurance—*Beer v. United HealthCare, Inc.*[214] is one of several lawsuits that have been brought in recent years against health insurers on behalf of patients and doctors, alleging that these companies engage in numerous cost-cutting practices that amount to breach of contract, including denying claims on the ground that various procedures prescribed by doctors are not "medical[ly] necess[ary]."[215] The Complaint seeks to certify two classes—one on behalf of healthcare providers who have contracts with United ("Provider Class") and another on behalf of consumers who are insured by United ("Subscriber Class"). According to plaintiffs' counsel, there are more than "320,000 physicians and 3,500 hospitals" that qualify for membership in the proposed Provider Class, and "millions" of members in the proposed Subscriber Class.[216] Clearly, the overwhelming majority of these millions of proposed class members have virtually no relationship with Palm Beach County.

United is a Delaware corporation with its principal place of business in Minnesota,[217] that "operates in all 50 states, the District of Columbia, Puerto Rico and internationally."[218] The Complaint alleges that "United's products and services. . . are provided to more than 9 million persons."[219] Plaintiffs' counsel further allege that United holds "a majority ownership interest in health plans operating in approximately 40 markets nationwide and in Puerto Rico" and quote United's CEO, stating that the company serves "9 million individuals."[220] Independent research confirms that United has approximately 8.6 million members in the United States,[221] including 107,000 (1.2 percent) in Palm Beach County.[222]

While United does have a wholly owned subsidiary in Florida, which is also named as a defendant (almost certainly in order to ensure that the case cannot be removed to federal court), that company operates out of Orlando, Florida—and not Palm Beach County.[223] Moreover, that in-state defendant apparently had no contract or contractual relationship with the millions of consumers *outside* Florida who subscribe to United's health plans, and while plaintiffs define their class to include all providers and subscribers who have entered into contracts "with a subsidiary of United to provide health coverage,"[224] the only subsidiary they sue is the one whose citizenship aids their efforts to remain in state court.

Despite the fact that plaintiffs' counsel seek to represent subscribers and providers all over the country, they give short shift to any discussion of how various states laws would apply to their claims or prohibit the alleged conduct. For example, the Complaint simply alleges that "defendants have uniformly breached or caused the breach of the Florida Administrative Code, Chapter 627 and other similar statutes enacted by other states" and that plaintiffs have "a claim sounding in common law for money had and received, now recognized by Florida case law as an action for restitution to prevent unjust enrichment, as well as in other states wherein United and/or its subsidiaries do business."[225]

Claims Processing—In *Kantor v. Vivra Specialty Partners, Inc.*,[226] three medical professionals (two of whom are residents of Palm Beach

County) are suing Vivra Specialty Partners ("VSP"), a claims processor incorporated in Nevada and based in California for breach of contract. The Complaint seeks to certify a nationwide class consisting of all medical professionals who are parties to health insurance contracts under which VSP is responsible for payment of fees, and who submitted claims that were either paid late or not paid at all.[227] According to the Complaint, VSP is under contract to provide claims processing to "a substantial number of the country's largest HMOs and other insurers . . . including without limitation Health Options, MetraHealth, United Health Care, Blue Cross/Blue Shield, PCA Health Plans, and others."[228] Other than alleging that "VSP does substantial business within the state of Florida and particularly within Palm Beach County,"[229] plaintiffs do not explain why they have chosen a Palm Beach County court as a venue for their nationwide claims.

In class actions, attorneys often file cases listing themselves as the plaintiffs until they can find "real" plaintiffs to substitute.

Viatical Settlements—Five of the Palm Beach County class actions involve allegations of deception with regard to the marketing of "viatical settlements," investment contracts in which the investor buys an interest in the life insurance policy of a terminally ill person, typically an AIDS patient.[230] Plaintiffs in the five nearly identical lawsuits, all brought by the same group of lawyers, allege that the defendants (only one of which is headquartered in Palm Beach County) brokered or sold viatical settlements, and that the companies misled them by concealing the fact that new AIDS treatment are substantially extending the life expectancies of AIDS patients. The complaints thus seek damages or rescission of the contracts "on behalf of all persons and entities who purchased viatical settlements from Defendants between July 1995 through the date of certification of the class."[231]

One of the law firms listed as counsel for plaintiffs in the *Thum, Schwartz,* and *Chancellor* cases, Investors' Law Center in Palm Beach, Florida, is also listed as a named plaintiff in the *Schachter* case, because it allegedly invested in viatical settlements itself in 1996.[232] According to the firm's website, Investors' Law Center is a class action plaintiffs' firm that specializes in bringing class action law suits on behalf of investors. It is unclear whether the firm purchased a viatical settlement as a financial investment—or as a litigation investment.

While the *Chancellor* complaint does not provide an estimate for the size of the proposed class,[233] the nearly identical *Schachter* complaint alleges that there are more than 1,000 putative class members who purchased viatical settlements through the named defendant in that case—Mutual Benefits Corporation—and that these individuals reside throughout the United States.[234] Similarly, Mutual Benefits' website states that the company has "worked closely with more than 18,500 satisfied purchasers of policies and more than 11,000 viators throughout the Unites States.[235] Notably, although plaintiffs' counsel in these cases are suing nationwide businesses "on behalf of all persons and entities" who purchased the investments at issue, they seek to resolve all the claims of this proposed nationwide class under two Florida-specific statutes which prohibit: (1) untrue statements and omissions in connection with offer or sale of investment; and (2) misleading advertisements.[236]

Bad Trades—*Handler v. Florida Marlins Baseball, Ltd.*,[237] seeks reimbursement on behalf of all Florida Marlins' seasons ticket-holders on the ground that the team owner reneged on his promise that he would field a "World Class baseball team." This case was brought by a Palm Beach County attorney who purchased seasons tickets to the Florida Marlins and was apparently disgusted by the team's performance and by certain management decisions to trade key players and reduce the team's players. In class actions, attorneys often file cases listing themselves as the plaintiffs until they can find "real" plaintiffs to substitute. That is apparently what happened in this

matter. Less than a month after filing the original complaint, the plaintiff/lawyer found two other plaintiffs, who were also Marlins season ticketholders, and substituted them for himself.[238]

According to the Amended Complaint, the proposed class consists of "all persons who purchased" season tickets to see the Marlins play at home in 1998.[239] The Complaint alleges that there are approximately "ten thousand (10,000) members" in the proposed class "who live throughout South Florida and . . . elsewhere."[240] While this case clearly has a Florida connection, the relation to Palm Beach County is attenuated since the team is headquartered in Dade County and plays its games in Miami. Once again, the question remains: why would a lawyer choose Palm Beach County as the venue to sue a defendant located elsewhere—especially in this case, when the defendant resides in a county that is just a few miles down the road?

Check Cashing Policies—*Elliott v. First Union National Bank*[241] challenges certain procedures instituted by First Union—the nation's sixth largest bank—for processing checks when a customer's account contains insufficient funds. Plaintiff alleges that First Union acted improperly under both Florida law and federal law[242] by paying checks when plaintiff's account was overdrawn and then assessing substantial overdraft fees when her account was replenished. Based on these allegations, the Complaint seeks to certify a class consisting of "all persons. . . who presently maintain or have maintained in the past a First Union checking account and who have been improperly assessed overdraft . . . charges or similar fees" because First Union allegedly did not follow its published check posting procedures.[243]

Plaintiff's counsel in this matter seek to certify both a multi-state class and a Florida subclass.[244] According to the Complaint, the proposed multi-state class members "are geographically dispersed throughout the United States and within the State of Florida."[245] Indeed, as the Complaint readily admits, First Union operates in "12 states and Washington, DC" and "serves a customer base of more than 12 million."[246] While the Complaint attempts to draw some connection between the controversy and the State of Florida by alleging that First Union has more than "500 banking branches" in the State of Florida and controls more than "17 percent of the retail banking market in Florida,"[247] the Complaint offers no real explanation as to why this case was brought in Palm Beach County. The one named plaintiff does *not* reside there; nor does the complaint allege that she banked at a Palm Beach branch. Rather in seeking to explain why venue is proper, the Complaint simply alleges that "plaintiff resides in Florida, and First Union transacts business in Palm Beach County and maintains numerous places of business in Palm Beach County."[248] In fact, while First Union has 51 branches in Palm Beach County, the vast majority of its branches (97.6 percent) are located in other states or other Florida counties. Nonetheless, plaintiff's counsel seeks not only to bring this multi-state matter in Florida but also to recover on behalf of all putative class members—including those who live outside Florida—under *Florida's* banking statute.[249] According to the Complaint, First Union has "been unjustly enriched" by virtue of its violation of the Florida law and should compensate *all* proposed class members for that violation.[250]

Despite the lack of any obvious connection between the overdraft dispute and Palm Beach County, plaintiff is asking a Palm Beach County court to issue a ruling under Florida law that would condemn First Union's practices not just in Florida, but in all of the states in which the bank conducts business. Moreover, a ruling by a Palm Beach County court regarding the legality of overdraft fees would inevitably lead to a host of copy-cat class actions against other banks with similar policies—much like the OEM parts cases in Illinois. Thus, plaintiff is essentially asking a local judge in Palm Beach County to set national policy regarding when banks can and cannot process checks and charge overdraft fees.

Employee Investment Plan—Two of the class actions filed in Palm Beach County involved challenges to employee investment plans run by Travelers Group, Inc., and Smith Barney, Inc., both of which are now subsidiaries of Citigroup. The first, *Josephs v. Smith Barney, Inc.*,[251] was brought by two former employees of Smith Barney, Inc., who worked in the investment company's

Broward County, Florida office and allegedly were forced to forfeit their earnings in the company's Capital Accumulation Plan ("CAP"), described by plaintiffs as a mandatory investment program.[252] The two named plaintiffs, who do not allege any connection to Palm Beach County, seek to certify a nationwide class of all current or former employees of Smith Barney and Salomon Bros. (now Salomon Smith Barney) whose income was partially withheld under the CAP program.[253] This case is another example of the "copy cat" phenomenon; at the time the case was brought, a virtually identical class action was already pending in the United States District Court for the Middle District of Florida.[254]

In seeking to justify their odd choice of a forum, plaintiffs' counsel allege that SSB has 40 Florida branches, three of which are located in Palm Beach County.[255] On that basis alone, the Complaint alleges that "Palm Beach County is the most appropriate forum for this action."[256] This conclusion is not supported by other allegations in the Complaint, indicating that the challenged practice has occurred throughout the United States and has no particular relationship to Florida or Palm Beach County. For example, the Complaint alleges that Smith Barney "has done business through approximately 450 offices in the United States and . . . has employed approximately 28,000 individuals."[257] The Complaint also alleges that Salomon Smith Barney has 35,000 employees,[258] and that there are currently "37 to 40 million shares of the Company stock owned by employees [that] are subject to forfeiture under CAP."[259]

* * *

Virtually every sector of the United States economy is on trial in Madison County, Palm Beach County, and Jefferson County—long-distance carriers, gasoline producers, insurance companies, computer manufacturers and pharmaceutical developers. The locally elected judges in these county courts are being asked to set national polices in areas as diverse as the scope of warranties, land use rights and environmental protection, the propriety of advertising campaigns, bank billing practices, the legality of employee investment plans, automobile insurance practices, viatical settlements, and numerous other broad-ranging issues for 49 other states—and 3,065 counties—in addition to their own. While some of the class actions pending in these jurisdictions may seem trivial (*e.g.*, Blockbuster late fees, the price of Barbie dolls), these cases (particularly if they are decided incorrectly) can have a dramatic impact on commerce by limiting how companies can market and charge for their products. Other class actions turned up in the research could have broad ramifications in a host of industries including cosmetic surgery, automobile insurance, and computers. If a judge in Madison County orders automobile insurance companies to provide only manufacturer parts, to provide broader coverage on all medical claims, and to pay consumers more when their cars are totaled (three issues that are the subject of multiple class actions included in the survey), the price of car insurance could skyrocket and result in more Americans taking the risks of driving uninsured. The resulting question is a simple one: Who should be charged with responsibility for handling such types of large-scale, interstate class actions involving issues with significant national commerce implications—federal judges who are selected by the President and confirmed by the U.S. Senate or state court judges who are elected by a few thousand votes in a rural county election? As the Senate Judiciary Committee has noted, "[c]learly, a system that allows State court judges to dictate national policy from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism."[260]

V. CONCLUSION

By assembling another substantial body of data confirming that certain state courts have become "magnets" for multi-state and nationwide class actions, the Manhattan Institute research further demonstrates the need for federal legislation to address current anomalies in the federal diversity jurisdiction statute. As discussed above, these anomalies have resulted in a system under which federal courts have jurisdiction over "slip-and-fall" cases in which a plaintiff steps over state lines, injures his back and seeks $75,000 in lost wages and chiropractic fees; at the same time, however,

federal courts are barred from adjudicating most of the multi-state class actions identified in the Manhattan Institute research—controversies that involve widespread commercial practices in insurance, banking, computing and other industries that affect millions of Americans and could have substantial reverberations on the nation's economy. Instead of being adjudicated in federal courts, many of these interstate class actions are being heard by locally elected county judges, who typically have only scant resources to devote to such complex cases, are often viewed by plaintiffs' lawyers as willing to "rubber stamp" class certification orders and "coupon" settlements, and are periodically forced to turn to the local bar to fund their efforts at re-election.

Congress is currently considering legislation that would rectify these unintended consequences of federal jurisdictional law by expanding diversity jurisdiction to include more interstate class actions. Such legislation would meet several important objectives. First, it would fulfill the intention of the Framers in establishing diversity jurisdiction—by ensuring that large cases that directly touch large numbers of citizens in all states and that have broad ramifications for interstate commerce can be adjudicated in federal courts. Second, it would eliminate concerns that local prejudices are stacking the deck against out-of-state defendants in many local courts that have become class action "magnets." Third, it would increase judicial efficiency by enabling federal courts to coordinate a greater percentage of duplicative class actions through multidistrict litigation procedures. Fourth, it would help ensure that one state court cannot trample federalism principles by dictating other states' policies on issues as varied as insurance, property rights, or even plumbing licenses. And finally, it would provide access to a forum that by its very design has more resources and is less susceptible to political pressures than local county courts. Such a law would ensure that when attorneys seek to make a "federal" case out of a client's personal disputes with a defendant by bringing a class action on behalf of millions of people living in all 50 states, the parties will have access to a federal court that can provide the constitutional safeguards that the Framers considered necessary for the fair and efficient adjudication of such interstate commercial disputes.

APPENDIX OF STATISTICAL TABLES

Table 1: Populations Of Counties Surveyed, With Comparisons To Other Counties With Large Class Action Dockets

County	Population of County	Percent Population of the United States
Palm Beach, FL	1,131,184	0.40%
Madison, IL	258,941	0.09%
Jefferson, TX	252,051	0.09%
Los Angeles, CA	9,519,338	3.4%
Cook County, CA	5,376,741	1.9%

Table 2: Retail Sales and Manufacturers Shipments by County, with Comparisons to State and National Values

County	Palm Beach, FL	Madison, IL	Jefferson, TX
Retail Sales by County, 1997(in $1000)	11,731,186	2,057,045	2,570,929
Percent Retail Sales of State	7.8%	1.9%	1.4%
Percent Retail Sales of the United States	0.48%	0.08%	0.10%
County Manufacturers Shipments, 1997 (in $1000)	6,344,506	7,676,517	15,920,187
Percent Manufacturers Shipments of State	8.2%	3.8%	5.3%
Percent Manufacturers Shipments of the United States	0.17%	0.20%	0.41%

Table 3: Per Capita Class Action Rate Of Counties Surveyed

County	Palm Beach, FL	Madison, IL	Jefferson, TX
Population of County	1,131,184	258,941	252,051
Percent Population of the United States	0.4%	0.09%	0.09%
Per Capita Class Action Rate For 2000 (Per Million)	35.4	150.6	78.4
Projected Number Of Total US Class Actions At Per Capita Rate	9,951	42,386	22,331

Table 4: Repeat Appearances By Plaintiffs' Counsel

County	Palm Beach, FL	Madison, IL	Jefferson, TX
Distinct Law Firms Appearing on Complaints	115	67	45
Cumulative Number of Appearances by All Law Firms on All Complaints	181	222	75
Percentage of Cumulative Appearances Attributable to Top Five Most Frequently Appearing Firms	26.5%	45.5%	32%
Number of Firms Appearing Only Once	96	40	30

NOTES

1. The authors wish to thank Theodore Lis, Georgetown University Law Center '02, for his invaluable research assistance.

2. In the 106th Congress, 2d Session, the House class action jurisdiction bill was denominated H.R. 1875; the House bill in the previous session was labeled H.R. 3789. The former bill passed the House on September 23, 1999. *See* 145 CONG. REC. H8595 (1999). In the 106th Congress, 2d Session, the Senate bill was S. 353.

3. *See Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998) ("1998 General House Hearing"); *Class Action Jurisdiction Act of 1998: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998) ("1998 House Bill Hearing"); *The Interstate Class Action Jurisdiction Act of 1999: Hearing on H.R. 1875 and H.R. 2005 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (unpublished) (transcripts and prepared testimony *available* at www.house.gov/judiciary/full0721.htm.

4. *See* 145 CONG. REC. H8568-8595 (Sept. 23, 1999) (debates on H.R. 1875); 145 CONG. REC. H8595 (1999) (House passage of H.R. 1875); *Interstate Class Action Jurisdiction Act of 1999*, H.R. REP. NO. 106-320 (1999) ("House Report").

5. *See The Class Action Fairness Act of 1999: Hearing before the Subcomm. On Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, S. HRG. NO. 106-465, 106th Cong. (1999) ("1999 Senate Hearing"); *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees*, S. HRG. NO. 105-504, 105th Cong., 2d Sess. (1997).

6. *The Class Action Fairness Act of 2000*, S. REP. NO. 106-420, 106th Cong. (2000) ("Senate Report").

7. The new House bill is H.R. 2341.

8. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92 (1789).

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

10. 1999 Senate Hearing at 100 (prepared statement of Prof. E. Donald Elliott, Yale Law School). *See also* James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEX L. REV. 1, 16 (1964). *See also Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) ("[Even if] tribunals of states will administer justice as impartially as those of the nation, to the parties of every description, . . . the Constitution itself . . . entertains apprehensions of the subject . . . , [such] that it has established national tribunals for the decision of controversies between . . . citizens of different states.").

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

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

13. *See, e.g., Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

14. *See, e.g., Snyder v. Harris*, 394 U.S. 332 (1969).

15. *See, e.g., Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

16. *See* n._ *infra.*

17. Senate Report at 14.

18. 14B Charles A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE, § 3704, at 127 (3d ed. 1998) (emphasis added).

19. *See Davis v. Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999) (emphasis added).

20. *Id.*

21. *Id.* at 798-99 (emphasis added).

22. *In re Prudential Ins. Co. America Sales Practice Litig.*, 148 F.3d 283, 305 (3d Cir. 1998) (emphasis added). Agreement with this view can also be found in *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1079 (11th Cir. 2000) (noting that there are "persuasive reasons" for viewing the class action in its totality for purposes of determining the existence of federal jurisdiction).

23. *The Interstate Class Action Jurisdiction Act of 1999: Hearing on H.R. 1875 and H.R. 2005 Before the House Comm. on the* Judiciary, 106th Cong. (1999) (statement of Hon. Walter E. Dellinger), *available at* http://www.house.gov/judiciary/dell0721.htm.

24. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194-195 (1824).

25. Civil filings in state trial courts of general jurisdiction have increased 28 percent since 1984 (versus an increase of only 4 percent in the federal courts). *See* B. Ostrom & N. Kauder, *Examining the Work of State Courts*, STATE JUSTICE INSTITUTE, 1997, at 15 (Court Statistics Project 1998). Most tellingly, in most jurisdictions, each state court judge is assigned an average of 1,000 to 2,000 new cases each year. *Id.* In contrast, each federal court judge was assigned an average of 500 cases last year. *See* L.H. Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 REPORT OF THE DIRECTOR 20, 22 (2001) (Administrative Office of the U.S. Courts) ("JUDICIAL BUSINESS"). The federal court trend is downward. Since 1997, there has been an eight percent decrease in the number of pending civil cases in our federal courts nationwide. *Id.* at 22.

26. Senate Report at 16.

27. *Id.*

28. *See* 28 U.S.C. § 1407.

29. *See* Memorandum to Advisory Comm. on Civil Rules from Judge Lee Rosenthal, Prof. Edward H. Cooper, Prof. Richard Marcus (dated Apr. 10, 2001) ("Advisory Comm. Memo").

30. *Id.* at 13 (citing Deborah R. Hensler, *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS (Executive Summary 1999) ("ICJ/RAND Study") at 15)).

31. Senate Report at 21.

32. Advisory Comm. Memo at 14.

33. See Statement of Hon. Walter E. Dellinger before the House Judiciary Committee, Hearing on H.R. 1875, the Class Action Jurisdiction Act of 1999 (July 21, 1999), *available at* http://www.house.gov/judiciary/dell0721.htm.

34. *See* U.S. Const. art. IV, § 1; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (absent class members from other states are generally bound by a state court's decision in a class action).

35. *See* American Judicature Society (State Justice Institute), CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 28, 34-35 (1995) (noting that over a several year period, federal appeals and trial courts had certified hundreds of state law questions to state appellate courts for resolution).

36. *See* Senate Report at 16-17 (citing numerous examples).

37. ICJ/RAND Study at 21-22.

38. Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 68-69 (1996).

39. Senate Report at 15-22.

40. ICJ/RAND Study, Executive Summary, at 28.

41. In individual lawsuits, venue laws limit the forums in which a plaintiff may sue a defendant. For example, under the federal venue statute, a plaintiff may bring a lawsuit that is based on federal diversity jurisdiction only in (a) "a judicial district where any defendant resides, if all defendants reside in the same State," or (b) "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred" (unless there is no such venue, at which point the action may be filed in any "judicial dis-

trict in which any defendant is subject to personal jurisdiction"). 28 U.S.C. § 1391(a). In contrast, a nationwide class action often can be filed in almost any federal or state court nationwide. For example, plaintiffs' attorneys who seek to bring a class action in a certain county challenging a nationally distributed product, typically select a named plaintiff who purchased the product in that county and then argue that "a substantial part of the events or omissions occurred" there. Or, plaintiffs who sue multiple defendants from different states often argue that there is no one place where "a substantial part of the events" occurred and that they are therefore free to sue in any judicial district where the defendants are subject to personal jurisdiction (which, in the case of a company that sells its products throughout the country, is usually anywhere).

42. Another impetus for change is the current division among federal courts about the breadth and current vitality of the *Zahn* view that the amount in controversy can only be established in a class action if each unnamed class member seeks damages in excess of the statutory minimum. Two federal appeals courts have held that in enacting 28 U.S.C. § 1367, Congress has overridden *Zahn* and that federal courts can preside over a class action as long as one plaintiff meets the amount-in-controversy minimum. *See In re Abbott Labs.*, 51 F.3d 524, 526-27 (5th Cir. 1995), *aff'd sub nom., Free v. Abbott Labs.*, 120 S. Ct. 1578 (2000) (per curiam; affirmance on tied vote); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-34 (7th Cir. 1996). Other courts have found that section 1367 did not abrogate the holding in *Zahn* and continue to require that each potential class member independently meet the amount-in-controversy minimum. *See, e.g., Trimble v. Asarco, Inc.*, 232 F.3d 946, 959-62 (8th Cir. 2000). Because the *Abbott* decision was affirmed by an equally divided Supreme Court, *Abbott* controls only in the Fifth Circuit, and the conflict among the Circuits on this point remains.

43. For example, in confirming the "complete diversity" prerequisite for diversity jurisdiction in *Strawbridge*, the Supreme Court was construing the language of the 1789 Judiciary Act, not the limits of Article III diversity jurisdiction. The Supreme Court has regularly recognized that the decision to require complete diversity and to establish a minimum amount in controversy are political decision not mandated by the Constitution. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrian*, 490 U.S. 826, 829 (1989). Congress therefore has the prerogative to broaden the scope of diversity jurisdiction as it chooses, so long as any two adverse parties to a lawsuit are entities of different states. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). In short, "minimal diversity" is the only prerequisite for federal diversity jurisdiction required by the Constitution.

44. *See, e.g.*, Statement of Rep. Lloyd Doggett (D-Tex.), 145 Cong. Rec. H8565 (daily ed. Sept. 23, 1999).

45. 1999 House Report at 9 (citing Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1, at ix-x (May 1, 1997) ("Advisory Committee Working Papers") (memorandum of Judge Paul V. Niemeyer to members of the Advisory Committee on Civil Rules).

46. Deborah Hensler, *et al.*, Preliminary Results of Rand Study Of Class Action Litigation (1997).

47. *Analysis: Class Action Litigation*, Class Action Watch, Spring 1999, at 3 (Figure 2).

48. *Id.* at 2 (Figure 1).

49. March 1998 House Hearing at 140-53.

50. ICJ/RAND Study at 7.

51. *See, e.g.*, L.H. Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 REPORT OF THE DIRECTOR 402-08 (2001) (Administrative Office of the U.S. Courts) ("JUDICIAL BUSINESS").

52. March 1998 House Hearing at 140-53.

53. Obviously, the literature search was not a scientific indicator of where state court class actions are being filed. For whatever reason, commentators and journalists may be focusing on certain locations and ignoring others, skewing the media record toward certain jurisdictions. Nevertheless, the literature review suggests that the local courts of the following counties appear to have had the most class action filings in the 1998-2000 timeframe (listed in descending order of apparent number of class action filings):

1. Los Angeles County, California
2. Cook County, Illinois
3. Madison County, Illinois
4. Dade County, Florida
5. Santa Clara County, California
6. San Diego County, California; Orange County, California
7. San Francisco County, California
8. Travis County, Texas; Broward County, Florida; Camden County, New Jersey; Jefferson County, Texas
9. Palm Beach County, Florida

54. As detailed below, the researchers also looked at cases filed during the early months of calendar year 2001, to the extent possible.

55. Researchers in Palm Beach County did not collect cases for 2001. Madison County cases were collected through March 7, 2001. Jefferson County cases were collected through January 2001.

56. U.S. Census Bureau, Jefferson County, Texas QuickFacts, *at* http://www.fedstats.gov/qf/states/48/48245.html.

57. U.S. Census Bureau, Palm Beach County, Florida QuickFacts, *at* http://www.fedstats.gov/qf/states/12/12099.html.

58. U.S. Census Bureau, Madison County, Texas QuickFacts, *at* http://www.fedstats.gov/qf/states/17/17119.html.

59. *See* JUDICIAL BUSINESS at 405.

60. *Schoenleber v. Prudential Prop. & Cas. Ins. Company*, No. 01-L-99 (filed Jan. 18, 2001); *Lancey v. Country Mut. Ins. Co.*, No. 01-L-113 (filed Jan. 29, 2001); *Richardson v. Progressive Premier Ins. Co. of Illinois*, No. 01-L-149 (filed Feb. 6, 2001); *Edwards v. Mid-Century Ins. Co.*, No. 01-L-151 (filed Feb. 6, 2001); *Knackstedt v. St. Paul Fire and Marine Ins. Co.*, No. 01-L-153 (filed Feb. 6, 2001); *Bordoni v. CGU Ins. Group*, No. 01-L-157 (filed Feb. 6, 2001); *Huff v. Hartford Ins. Co. of Illinois*, No. 01-L-158 (filed Feb. 6, 2001); *Billups v. GEICO Gen. Ins. Co.*, No. 01-L-159 (filed Feb. 6, 2001); *Moore v. Shelter Ins. Co.*, No. 01-L-160 (filed Feb. 6, 2001).

61. *Hobbs v. State Farm Mut. Ins. Co.*, No. 99-L-1068 (filed Nov. 2, 1999); *Kelly v. Progressive Premier Ins. Co.*, No. 00-L-277 (filed Apr. 3, 2000).

62. *Schachter v. Mut. Benefits Corp.*, No. 98-4490 AI (filed July 28, 1998); *Thum v. Accelerated Benefits Corp.*, No. 98-9389 AN (filed Oct. 21, 1998); *Schwartz v. Dedicated Res., Inc.*, No. 98-9393 AD (filed Oct. 21, 1998); *Chancellor v. Future First Fin'l Group, Inc.*, No. 99-4429 AE (filed May 6, 1999); *Brackman v. Dedicated Res., Inc.*, No. 99-9361 (filed Sept. 30, 1999).

63. See The Lakin Law Firm, Class Actions, *at* http://www.weblinecommunications.com/practice/class-action/index.htm.

64. Berman DeValerio Pease Tabacco Burt & Pucillo: About Class Action Lawsuits: FAQ, *at* http://www.bermanesq.com/content/classaction-faq.asp (cases filed by Burt & Pucillo prior to merger).

65. Senate Report at 19 ("Yet another common abuse [of the class action device in state courts] is the filing of 'copy cat' class actions (*i.e.*, duplicative class actions asserting similar claims on behalf of essentially the same people)."). As noted in the Senate Report, "sometimes these duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers, [and] in other instances, the 'copy cat' class actions are blatant forum shopping—the original class lawyers file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class." *Id.* When these cases are filed in state courts, there is no way to coordinate or consolidate the cases; the cases must be litigated in an "uncoordinated, redundant fashion." *Id.* "The result is enormous waste—multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people." *Id.* at 19-20. "As a result, State courts and class counsel may 'compete' to control the cases, often harming all the parties involved." *Id. See also* House Report at 9.

66. No. 00-7879 AE (filed Aug. 15, 2000).

67. No. 00-L-480 (filed May 26, 2000). The defendants sought to remove this case on the basis that the plaintiffs' claims are preempted by ERISA. The court remanded, finding that the complete preemption doctrine does not apply to this case.

68. *See Flanagan v. Bridgestone/Firestone, Inc.*, No. IP00-C-5106-B/S (S.D. Ind.).

69. William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 AM. J. TRIAL ADVOC. 571, 572 (1994).

70. *See* State and County Quick Facts, *at* http://quickfacts.census.gov/qfd/states/17/17119.html.

71. *See* Profiles of General Demographic Characteristics 2000, *at* http://factfinder.census.gov.

72. Telephone Call With Ed Taft, First Stop Business Information Center, August 14, 2001.

73. ILL. CONST., Art. 6, § 10 (2001).

74. No. 98-L-98 (filed Feb. 4, 1998). Although the defendants attempted to remove this case, the case was remanded.

75. No. 98-L-828 (filed Nov. 6, 1998).

76. No. 99-L-529 (filed June 15, 1999).

77. Plaintiff's Complaint, ¶ 4, *Wheeler v. Sears, Roebuck & Co.*, No. 99-L-529 (filed June 15, 1999) ("Wheeler Compl.").

78. *Id.* ¶ 6.

79. Yellow Pages search using www.infospace.com.

80. Wheeler Compl. ¶ 89.

81. No. 00-L-830 (filed Aug. 28, 2000).

82. About MCI WorldCom, *at* http://www.worldcom.com.

83. Compl. ¶¶ 36, 46, *Ott v. MCI Worldcom Communications, Inc.*, No. 00-L-830 (filed Aug. 28, 2000).

84. No. 00-L-1112 (filed Nov. 6, 2000). The defendants sought to remove this case to federal court on the ground that the plaintiff's claims were preempted by federal telecommunications laws and regulations. The court disagreed with the defendants, finding that the claims asserted in the case were not preempted by the Communications Act and that it therefore did not have jurisdiction over the state law claims asserted in the Complaint. *See* Order, *Snyder v. Sprint Spectrum*, No. 3:00cv971 (Feb. 6, 2001).

85. Compl. ¶ 13. *Snyder v. Sprint Spectrum L.P.*

86. Class Action Complaint, ¶ 8, *Snyder v. Sprint Spectrum* L.P. (filed November 6, 2000).

87. *Id.* ¶ 18.

88. Sprint Facts-at-a-glance, *at* http://www.sprintpcs.com/aboutsprintpcs/mediacenter/facts.html.

89. *Id.*¶ 18.

90. No. 00-L-525 (filed June 13, 2000).

91. Besides Illinois and the District of Columbia, the states are: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, and Wisconsin. Plaintiff's Compl. ¶ 4, *Garvey v. Roto-Rooter Services Co.*, No. 00-L-525 (filed June 13, 2000).

92. *Id.* ¶ 15.

93. Telephone Interview with Roto-Rooter operator based in Addison, Illinois (Aug. 1, 2001).

94. No. 99-L-1068 (filed Nov. 2, 1999).

95. No. 99-L-995 (filed Oct. 13, 1999).

96. 746 N.E.2d 1242 (Ill. Ct. App. 2001).

97. *Id.* at 1242.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, THE NEW YORK TIMES, Sept. 27, 1998, § 1, at 29.

102. Complaint, ¶¶ 6-7, *Paul v. Country Mut. Ins. Co.*, No. 99-L-995 (filed Oct. 12, 1999).

103. The plaintiffs' law firms on the complaint list addresses in a number of cities, including Little Rock, Arkansas; Lexington, Mississippi; San Francisco, California; Chicago, Illinois; Mobile, Alabama; and Knoxville, Tennessee.

104. Complaint, ¶ 42, *Hobbs v. State Farm Mut. Auto. Ins.*, No. 99-L-1068 (filed Nov. 2, 1999).

105. In a slight gesture that only addresses one of the problems with the Complaint, plaintiffs' counsel seek to exclude from the class residents of Massachusetts and Hawaii, where state law *mandates* the use of non-OEM parts.

106. *Id.* ¶ 27.

107. Based on a comparison of the total direct premiums for twenty automobile insurance companies against those for all U.S. insurance companies in 1999. Lynna Goch, *Car Wars*, BEST'S REVIEW MAGAZINE, Oct. 2000, *available at* http://www.bestreview.com/2000-10/cover_carwars.html.

108. Estimated percentages are based on total automobile premiums across the nation. *See* BEST'S INSURANCE REPORTS: PROPERTY-CASUALTY UNITED STATES (2000 ed. 2000).

109. *Id.* ¶ 43.

110. Complaint, ¶ 1, *Schoenleber v. Prudential Prop. & Cas. Ins. Co.*, No. 01-L-99 (filed Jan. 18, 2001).

111. *Id.* ¶ 50.

112. *Id.* ¶ 33.

113. Plaintiff's Motion for Class Certification, ¶ 2, *Schoenleber v. Prudential Prop. & Cas. Ins. Co.*, No. 01-L-99 (filed Jan. 18, 2001).

114. *Id.* ¶ 2.

115. Telephone Interview with Prudential Service Operator (Aug. 7, 2001).

116. About Geico, *at* http://www.geico.com/infocenter/about.htm.

117. *See, e.g.*, Complaint, ¶ 18, *Edwards v. Mid-Century Ins. Co.*, No. 01-L-151 (filed Feb. 6, 2001).

118. *Id.* ¶¶ 57-6.

119. Complaint,. ¶¶ 48-49, *Hernandez v. American Family Mut. Life Ins. Co.*, No. 00-L-629 (filed July 25, 2000)

120. *Id.* ¶ 3.

121. No. 00-L-629 (filed July 25, 2000). The defendant sought to remove the case to federal court, but the district court remanded it to state court, finding that plaintiffs' claims did not meet the $75,000 amount-in-controversy minimum. *See* Order, *Hernandez v. American Mutual Ins. Co.*, No. 00-CV-0681-DRH (Dec. 14, 2000).

122. *Id.* ¶ 36.

123. *See Littleton v. Shelter Ins. Co.*, No. 99-L-864 (filed Sept. 7, 1999).

124. No. 99-L-920 (filed Sept. 15, 1999).

125. Complaint, ¶ 2, *Cunningham v. Mattel, Inc.*, No. 99-L-864 (filed Sept. 15, 1999).

126. No. 00-L-331(filed Apr. 11, 2000).

127. No. 00-L-872 (filed Sept. 6, 2000).

128. Complaint, ¶ 43, *Mizukonis v. Atl. Rich Field Co.*, No 00-L-872 (filed Sept. 6, 2000).

129. *Id.* ¶ 18.

130. *See In re: Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, No. M2188 (S.D.N.Y.).

131. *Id.*, Prayer for Relief.

132. *Id.* ¶ 32.

133. *Id.* ¶ 35.

134. *Id.* ¶ 44.

135. No. 99-L-48 (filed Jan. 20, 1999).

136. Order Granting Prelim. Approval of Settlement ¶ 1, *Unfried v. Charter Communications Inc.*, 99-L-48 (Sept. 28, 2000).

137. Charter Communications Press Release: *Charter Communications' Annual Shareholder Meeting Focuses on Significant Achievements and Aggressive Goals*, *at* http://www.onlinepressroom.net/chrtr/.

138. Complaint, ¶ 10, *Unfried v. Charter Communications, Inc.*, No 99-L-48 (Filed Feb. 11, 1999).

139. Time span calculated between filing of first Complaint (filed January 20, 1999) and granting of final order of settlement (granted December 21, 2000).

140. No. 99-L-120 (filed Feb. 11, 1999).

141. Complaint, ¶¶ 1-3, *Smith, Allen, Mendenhall, Emmons & Selby v. The Thomson Corp.*, No. 99-L-120 (filed Feb. 11, 1999).

142. Motion for Class Certification ¶ 3, *Smith, Allen, Mendenhall, Emmons & Selby v. The Thomson Corp.*, No. 99-L-120 (filed Oct. 8, 1999).

143. *Id.* ¶ 4.

144. Based on a search of Martindale-Hubbell Directory for Madison County, *at* http://www.martindale.com/locator/home.html.

145. Order, *Smith, Allen, Mendenhall, Emons & Selby v. The Thomson Corp.*, No. 99-L-120 (filed Dec. 1, 1999).

146. No. 99-L-421 (filed Apr. 30, 1999).

147. Nationwide Class Action Complaint, ¶ 11, *Poor v. Sprint Corp.*, No. 99-L-421 (filed Apr. 30, 1999).

148. *Id.* ¶¶ 22-23.

149. *FCC Releases Fiber Deployment Update*, FCC NEWS, (Sept. 9, 1999) at 14, *available at* http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1999/nrcc9065.txt.

150. *See* Memorandum And Order, *Poor v. Sprint Corp.*, No. 99-497-GPM (S.D. Ill. March 2, 2000).

151. *See* Order Granting In Part And Denying In Part The Motion For Class Certification, *Poor v. Sprint Corp.*, No. 3:00cv299 (S.D. Ill. April 6, 2001).

152. *See* Order, *Isaacs v. Sprint Corp.*, No. 01-8016 (7th Cir. Aug. 14, 2001).

153. *Id.*

154. *See* State and County Quick Facts *at* http://quickfacts.census.gov/qfd/states/48/48245.html.

155. *See* Detailed Tables, Census 2000 Redistricting Data, *at* www.factfinder.census.gov.

156. TEX. CONST. Art. V § 7.

157. Telephone Call with Beaumont Chamber of Commerce (Aug. 15, 2001).

158. Nine of these cases were removed to the U.S. District Court for the Eastern District of Texas.

159. No. A-162,152 (filed Apr. 27, 2000).

160. Plaintiff's Second Amended Original Class Petition, ¶ 21, *Lapray v. Compaq Computer Corp.*, No. A-162, 152 (filed Apr. 27, 2000).

161. *Id.* ¶¶ 5-6.

162. *Id.* ¶ 8.

163. *Id.* ¶ 18.

164. *Dell Computer No. 1 in U.S.*, MILWAUKEE JOURNAL SENTINEL, Oct. 26, 1999, Business Section, at 1.

165. No. D-162,535 (filed Apr. 25, 2000).

166. ABOUT US: The Company: BLOCKBUSTER Trivia, *at* http://www.blockbuster.com/bb/about/trivia/0,4429,,00.html.

167. BLOCKBUSTER: LOCATE A STORE, *at* http://www.blockbuster.com/bb/store_locator/locate_store_enter/0,4301,,00.html.

168. Households in Jefferson County reported, 2000 U.S. Census, *at* http://quickfacts.census.gov/qfd/states/48/48245.html.

169. Plaintiff's First Amended. Class Action Complaint, ¶ 4.2, *Scott v. Blockbuster, Inc.*, No. D-162, 535 (filed on Apr. 25, 2000).

170. *See* David Koenig, *Blockbuster tried to settle class-action lawsuits over late fees*, ASSOCIATED PRESS, June 6, 2001.

171. Wendy Wilson, *Blockbuster to settle suits on late fees*, DAILY VARIETY, June 4, 2001, at 10.

172. Cynthia Corzo, *Blockbuster Settles Class-Action Lawsuit in a Smart Business Move*, THE MIAMI HERALD, June 10, 2001.

173. Monica Roman, *A Blockbuster of a Legal Bill*, BUSINESS WEEK, June 18, 2001, at 46.

174. No. E-159,403 (filed July 15, 1998). Defendants sought to remove this case to federal court, but the matter was remanded because one of the companies sued is based in Texas. The federal district court rejected defendants' arguments that the Texas company was fraudulently joined. *See* Order Remanding Case To State Court, *Rawls v. Mentor Corp.*, No. 1:98cv1818 (E.D. Tex. Nov. 13, 1998).

175. Plaintiff's Original Petition, § III, *Rawls v. Mentor Corp.*, No. E-159, 403 (filed July 15, 1998).

176. *See* Corporate Profile *at* http://investor.mentorcorp.com/profile.cfm.

177. *See* About Us, *at* www.bestbuy.com/About/index.asp?b=0&m=435.

178. No. B-163,429 (filed Aug. 4, 2000).

179. Plaintiff's Original Petition, ¶ 12(e)-(f), *Brew v. Best Buy Co., Inc.*, No. B-163, 429 (filed Aug. 4, 2000).

180. Id. ¶ 8.

181. *Id.* ¶ 9.

182. No. D-162,802 (filed Apr. 28, 2000).

183. *Strasen v. Allstate Insurance Co.*, No. 99-L-1040 (filed Oct. 26, 1999); *Ellis v. Allstate Ins. Co.*, No. 00-L-493 (filed June 2, 2000).

184. Plaintiff's Original Petition, ¶ 20, *Pego v. Allstate County Mut. Ins. Co.*, No. D-162,802 (filed Apr. 28, 2000).

185. About Allstate, *at* http://www.allstate.com/About (stating that Allstate insures one in eight autos and homes in the United States).

186. No. A-162,049 (Plaintiffs' First Amended. Class Action Petition (filed Feb. 1, 2000)). This case was removed to federal court, but the federal district court remanded the case to state court after rejecting defendants' arguments that the plaintiffs had fraudulently joined a Texas-based defendant to defeat removal. *See* Order Granting Plaintiffs' Motion To Remand And Denying Defendants' Motion To Sever, *Shields v. Allstate County Mutual Insurance Co.*, No. 1:00-CV-147 (E.D. Tex.).

187. Plaintiff's First Amended Class Action Petition., ¶ 2, *Shields v. Allstate County Mut. Ins. Co.*, No. A-162,049 (filed Feb. 1, 2000).

188. *Ellis v. Allstate Ins. Co.*, No. 00-L-493 (filed June 2, 2000); *Richardson v. Progressive Premier Ins. Co. of Illinois*, No. 01-L-149 (filed Feb. 6, 2001); *Edwards v. Mid-Century Ins. Co.*, No. 01-L-151 (filed Feb. 6, 2001).

189. *Id.* ¶ 21.

190. *See* Defendants' Motion To Transfer Venue And Motion To Sever, *Shields v. Allstate County Mutual Insurance Co.*, No. A-162,049 (filed July 31, 2000). There was no order in the file indicating how the judge ruled on the motion. The case did not appear on the electronically available Dallas County court docket on Aug. 6, 2001.

191. No. A-161,090 (Plaintiffs' First Amended. Original Class Action Petition, filed June 25, 1999). This case was removed to federal court but was remanded because one of the companies sued is based in Texas and the federal district court rejected defendants' arguments that the Texas company was fraudulently joined. *See* Order, *Dunn v. Boise Cascade Corp.*, No. 1:99cv499 (E.D. Tex. Oct. 29, 1999).

192. Plaintiff.' First Amended Original Class Action Petition ¶ 7, *Dunn v. Boise Cascade Corp.*, No. A-161,090 (filed June 25, 1999).

193. *Id.* ¶ 4.

194. Boise Cascade Corporation, Answers to Frequently Asked Questions, *at* http://www.bc.com/other/faqs.html#loc.

195. Boise Cascade Corporation, SEC Form Q-10, filed Aug. 11, 2000.

196. Jefferson County Election Results, *available at* http://co.jefferson.tx.us/cclerk/election/results_2000.htm.

197. 2000 Official Presidential General Election Results, *available at* http://fecweb1.fec.gov/pubrec/2000presgeresults.htm.

198. *See* Profile of General Demographic Characteristics: 2000, *at* http://factfinder.census.gov.

199. *See* Information About Palm Beach County, *at* http://www.pbcgov.com/Budgetnew/final00/info_about_palm_beach_county.htm.

200. FLA. CONST., Art. V § 10 (2000).

201. No. 98-2244 AB (filed Mar. 11, 1998). The parties voluntarily dismissed the case in July 2000.

202. Class Action Compl. ¶¶ 27-32, *Foster v. Cabot Money Mgmt., Inc.* No. 002244 (filed Mar. 11 1998).

203. *Id.* ¶ 20.

204. *Id.* ¶¶ 2, 21.

205. No. 00-7021 AF (filed July 20, 2000).

206. Am. Compl. ¶ 1, *Greenfield v. Rexall Sundown, Inc., No.* 00-7021 AF (filed July 20, 2000).

207. *Id.* ¶¶ 1, 11.

208. Complaint for Injunction and Other Equitable Relief, ¶ 8, Exhibit E, *FTC v. Rexall Sundown, Inc.*, No. 00-7016-Civ-Feguson (filed July 19, 2000).

209. After the Palm Beach County plaintiff was dropped, the case was renamed *LaRaia v. Rexall Sundown, Inc.*, No. 00-7021AF (Consolidated Compl. (filed Mar 21, 2000)).

210. Consolidated Compl. ¶¶ 2-7, *La Raia v. Rexall Sundown, Inc.*, No. 00-7021AF (filed Mar. 21, 2000).

211. *Id.* ¶ 36.

212. The researchers also discovered another class action pending against Rexall in Palm Beach County. This one was brought on behalf of all holders of Rexall common stock, and alleges that Rexall breached its fiduciary duty to shareholders by agreeing to unfavorable merger terms. The case is captioned *Peccatiello v. Desantis, et al.*, No. CL 00-4284AO (filed May 1, 2000) and seeks to recover on behalf of a nationwide class.

213. *FTC v. Rexall Sundown, Inc.*, No. 00-7016-CIV-Ferguson (filed July 19, 2000).

214. No. 00-2023 AO (filed Feb. 28, 2000). Defendants removed the case to the U.S. District Court for the Middle District of Florida on the ground that the plaintiffs' claims were preempted by ERISA and that the case therefore raised a "federal question." The district court remanded the case, however, finding that ERISA preemption did not apply because the named plaintiff would not have standing to sue the defendant under federal law. *See* Order Remanding Action To State Court, *Beer v. United Health Group, Inc.*, No. 00-8550-CIV-GOLD (Sept. 21, 2000).

215. Compl. ¶ 3, *Beer v. United HealthCare, Inc.*, No. 00-2023AO (filed Feb. 28, 2000).

216. *Id.* ¶ 20.

217. *Id.* ¶ 9(a).

218. *Id.*

219. *Id.*

220. *Id.* ¶¶ 10, 12.

221. About UnitedHealthcare: Business description, *at* http://www.unitedhealthcare.com/about/index.html#description.

222. Phil Galewitz, *HMO Agrees to $65,000 Payment*, The Palm Beach Post, Dec. 28, 2000, Business at 1D.

223. *Id.* ¶ 8.

224. *Id.* ¶ 16.

225. *Id.* ¶¶ 35, 53.

226. No. 98-009402 (filed Oct. 22, 1998).

227. *Kantor* Compl. ¶ 10, *Kantor v. Vivra Specialty Partners, Inc.*, No. 98-009402 (filed Oct. 22, 1998).

228. *Id.* ¶ 9.

229. *Id.* ¶ 6.

230. *Schachter v. Mut. Benefits Corp.*, No. 98-4490 AI (filed July 28, 1998); *Thum v. Accelerated Benefits Corp.*, No. 98-9389 AN (filed Oct. 21, 1998); *Schwartz v. Dedicated Res., Inc.*, No. 98-9393 AD (filed Oct. 21, 1998); *Chancellor v. Future First Fin. Group, Inc.*, No. 99-4429 AE (filed May 6, 1999); *Brackman v. Dedicated Res., Inc.*, No. 99-9361 (filed September 30, 1999).

231. Complaint,. ¶ 11, *Chancellor v. Future First Fin. Group, Inc.*, No. 99-4429AE (filed May 6, 1999).

232. Complaint., ¶ 7, *Schachter v. Mut. Benefits Corp.*, No. 98-4490 AI (filed July 28, 1998).

233. Complaint, ¶¶ 11, 15, *Chancellor*, No. 99-4429 AE.

234. Complaint, ¶ 17, *Schachter*, No. 98-4490 AI. Similarly, according to the *Brackman* Motion for Class Certification, "members of the [c]lass are geographically diverse, residing all over the nation." Mot. For Class Certification at pg. 5, *Brackman v. Dedicated Res. Inc.*, No. 99-9361 (filed Sept. 30, 1999).

235. Mutual Benefits Corporate Profile, *at* http://mutualbenefitscorp.com/company.html.

236. Complaint, ¶¶ 37-46, *Schachter*, No. 98-4490 AI.

237. No. 98-4460 AO (filed May 18, 1998).

238. *See Wolfe & Irizarry v. Fla. Marlins Baseball Ltd.*, No. 98 004460 AO (Amended. Complaint. & Demand For Jury Trial, filed June 25, 1998).

239. Amended. Complaint, ¶ 18, *Wolfe & Irizarry v. Fla. Marlins Baseball Ltd.*, No. 98004460 AO (filed June 25, 1998).

240. *Id.* ¶ 18.

241. No. 98-5853 AJ (filed July 1, 1998).

242. Because this case alleges a violation of federal law, First Union might have been able to remove it to federal court. It is unclear from the docket whether it attempted to do so, or if not, why. A federal docket search did not yield any references to this case.

243. Amended Complaint, ¶ 6, *Elliot v. First Union National Bank*, No. 98-5853 AJ (filed July 1, 1998).

244. *Id.* ¶¶ 5-6.

245. *Id.* ¶ 7.

246. *Id.* ¶ 2.

247. *Id.*

248. *Id.* ¶ 3.

249. *Id.* ¶¶ 44-47.

250. *Id.* ¶ 47.

251. No. CL 00-4170AN (filed Apr. 27, 2000).

252. The other case is *Berman v. Travelers Group, Inc.*, No. CL-00-2334A0 (filed Mar. 7, 2000).

253. Complaint, ¶ 1, *Josephs v. Smith Barney, Inc.*, No. CL-00-4170AN (filed Apr. 27, 2000).

254. *See* Defendants' Motion To Stay Or Dismiss This Action, *Josephs v. Smith Barney, Inc.*, No. CL-00-4170 AN (June 12, 2000).

255. Complaint, ¶ 12, *Josephs*, No. CL-00-4170 AN.

256. *Id.* ¶ 42.

257. *Id.* ¶ 6.

258. *Id.* ¶ 9.

259. *Id.* ¶ 63.

260. Senate Report at 20.

The mission of the Center for Legal Policy (CLP) is to advance reform of the civil justice system through offering incisive, rigorous, and sound analysis of the problems, as well as effective, practical solutions.

CLP sponsors a series of books written by senior fellows Peter Huber and Walter Olson, such as *The Litigation Explosion*, *Judging Science*, *The Excuse Factory*, and *Hard Green*. These interesting and accessible publications have established CLP fellows as leading national authorities who communicate as much to the layperson as to senior policy makers. In addition, the CLP hosts conferences, lectures, and luncheon forums designed to present critical legal reform issues to a prominent and diverse audience of legal scholars, attorneys, industry representatives, and media. The CLP publications are the *Civil Justice Report*, which publishes innovative legal research by prominent scholars, and the *Civil Justice Forum*, which publishes transcripts from CLP events.

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A14 MONDAY, AUGUST 27, 2001 R DM VA

The Washington Post

AN INDEPENDENT NEWSPAPER

Actions Without Class

"These arrangements have enabled Microsoft Corporation to exclude other developers of Intel-compatible PC operating systems from obtaining the supply of such generic drugs' active pharmaceutical ingredient('API')." —from one of the 118 class-action lawsuits pending against Microsoft.

You don't need to sympathize with the embattled software giant to be taken aback by the number of class actions it faces and by the slipshod fashion in which complaints have been filed. Plaintiffs' lawyers smelled blood in the water, and they rushed to file complaints quickly, producing—in this instance—an inept cut-and-paste job from a prior suit against a drug company. The error is emblematic. No portion of the American civil justice system is more of a mess than the world of class actions. None is in more desperate need of policymakers' attention.

The idea behind class actions is reasonable. When many people have the same claim against the same defendant, litigating those claims together is more efficient. In the hands of public interest groups, class actions have prodded enforcement of laws that government has neglected. Class actions also can aggregate small claims that would individually not be worth filing but that address significant, sometimes even dangerous, corporate misconduct.

But class actions are unusually prone to abuse, and the incentive structure of modern class-action litigation encourages bad behavior by lawyers who are accountable to nobody. Normally, lawyers answer to their clients. To bring a suit, somebody must feel genuinely aggrieved, and at the end the client must be convinced settlement is in his or her best interest. In many class actions, however, the clients are something of a fiction of self-appointed lawyers, who have identified some alleged product deficiency that caused some small monetary damage to an identifiable group of consumers. The overwhelming majority of these "clients" may have no complaint, but they become plaintiffs unless they affirmatively opt out of a class they may not even know exists. Essentially the lawyers are representing themselves.

Having invented a client, the lawyers also get to choose a court. Under the current absurd rules, national class actions can be filed in just about any court in the country. Unsurprisingly, they are filed disproportionately in specific state courts with elected judges supported by lawyers' campaign donations. A still unpublished study by the Manhattan Institute recently looked at three class-action-rich counties in three states. Cases filed in these counties generally didn't involve defendant corporations based there, nor were the lawyers generally local. Yet the judges who hear these cases are becoming the regulators of products and services sold far beyond the borders of their states.

Merely by filing a claim that survives dismissal, the plaintiffs' lawyers get wide-ranging discovery—the right to ask intrusive questions and demand reams of information from the defendants. Because litigating is costly and the discovery can be embarrassing, companies often settle even cases that have no merit. Class counsel tend to do well for themselves, while far too often their "clients" get coupons for product upgrades. Should a case fail, the lawyers are generally out no more than the cost of the litigation; sanctions for meritless cases are rare.

The structure of the modern class-action system, in short, encourages litigation at every step and provides no significant disincentives. For a certain segment of the bar, prospective class actions have come to present a simple investment question: Is a given suit likely to pay off and to what degree? That's a bad question.

The focus of tort reform should be to inject the world of class actions with more accountability to real clients and with some consequences to lawyers who file frivolous claims. The first step is to make it easier to shift state court cases into the federal system. This would ensure that national classes get handled by a court system that operates according to reasonable rules and is accountable to the entire country. A bill to do that is pending in Congress. Passing it would be a place to start.

TECHNOLOGY INDUSTRY SUPPORTS THE CLASS ACTION FAIRNESS ACT

Dear Members of Congress:

As America's high-tech industry has grown in recent years, it has experienced a dramatic increase in frivolous class action lawsuits.

While technology companies have long been a prime choice in securities suits, plaintiffs' attorneys now are moving aggressively into other areas, including defective product and privacy claims. Based on our past experience, we have no doubt that this is only the beginning, and that we will see more meritless suits filed against us if something is not done.

These suits invariably are brought as class actions because the injury is trivial, speculative, or entirely nonexistent. The vast majority of them are frivolous and are initiated in multiple state forums around the country, simply to force "deep-pocket" defendants into settlements.

We believe that the system can be made simpler, fairer, and faster for all parties involved, so that meritless claims can be eliminated without erecting barriers to plaintiffs' legitimate claims. That is why we ask your support for H.R. 2341, the Goodlatte-Boucher Class Action Fairness Act, and its Senate companion which should be introduced shortly.

Bipartisan, commonsense reforms like the Class Action Fairness Act can go a long way toward protecting consumers while also stopping many costly, frivolous suits. The bill would require judicial scrutiny of coupon settlements to ensure that they are fair, reasonable, and adequate for class members. It would also require that notices be written in plain English, so that people understand their rights. At the same time, the Class Action Fairness Act would allow large class actions between citizens of different states to be moved from state to federal court.

Please stand up for plaintiffs and defendants alike. Cosponsor the Class Action Fairness Act.

Craig R. Barrett
President/CEO
Intel Corporation
California
85,000 employees

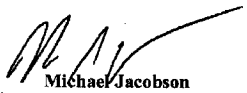
A. Eugene Sapp, Jr.
Chairman/CEO
SCI Systems, Inc.
Alabama
32,000 employees

Gary Fazzino
Vice President, Government & Public Affairs
Hewlett-Packard Company
California
40,000 employees in U.S.

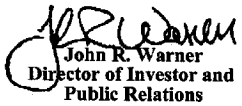
Kirk Pond
President/CEO/Chairman of the Board
Fairchild Semiconductor
Maine
11,000 employees

W.J. Sanders III
CEO/Chairman
AMD
California
15,000 employees

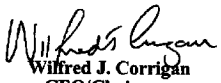
G. Daniel McCarthy
Vice President/Deputy General Counsel, Government Affairs
Compaq Computer Corporation
Washington, DC
65,000 employees in U.S.



Michael Jacobson
Senior Vice President, Legal Affairs
eBay Inc.
California
2,200 employees



John R. Warner
Director of Investor and Public Relations
Kemet Corporation
South Carolina
10,000 employees



Wilfred J. Corrigan
CEO/Chairman
LSI Logic Corporation
California
7,000 employees

Gary Shapiro
President/CEO
Consumer Electronics Association
Virginia
120 employees/650 member companies

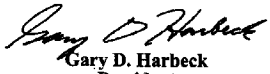
Thomas R. Lavelle
Vice President/General Counsel/
Secretary
Xilinx, Inc.
California
2,000 employees

Ray Stata
Chairman
Analog Devices, Inc.
Massachusetts
9,400 employees

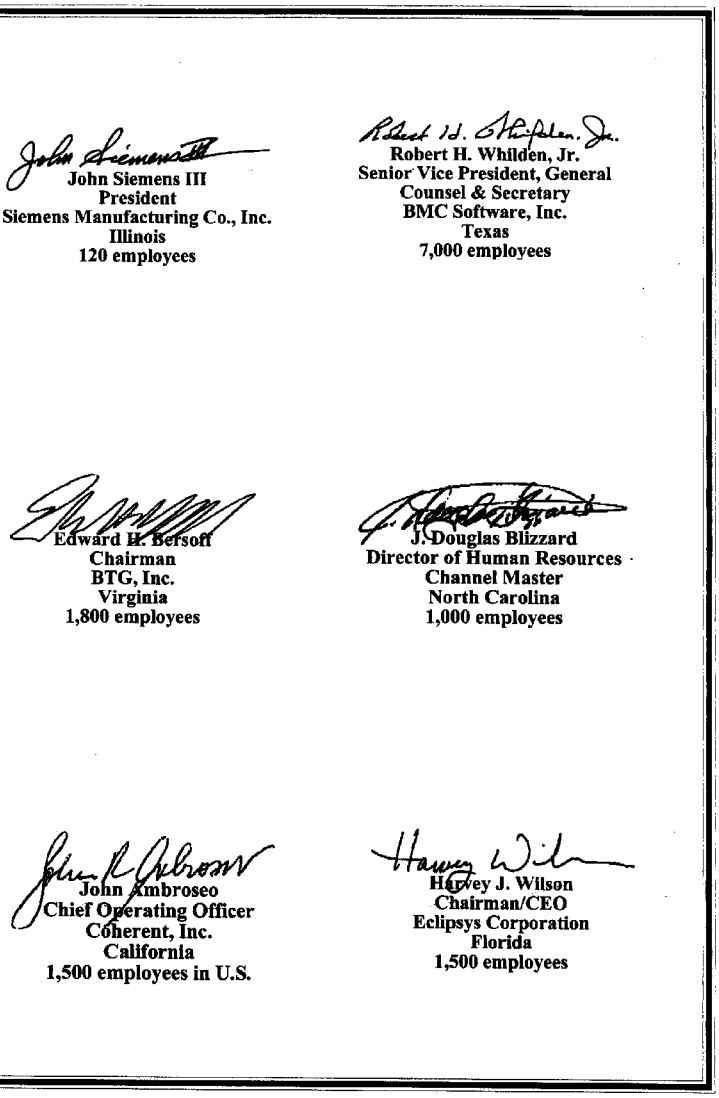
Michael K. Leslie
Corporate Vice President
FCI Electronics
Pennsylvania
16,000 employees

Wayne M. Fortun
CEO
Hutchinson Technology, Inc.
Minnesota
4,200 employees

Andrew B. Steinberg
Executive Vice President
Corporate Secretary
Travelocity.com
Texas
1,600 employees



Gary D. Harbeck
President
Voice Mail, Inc.
Florida



John Siemens III
President
Siemens Manufacturing Co., Inc.
Illinois
120 employees

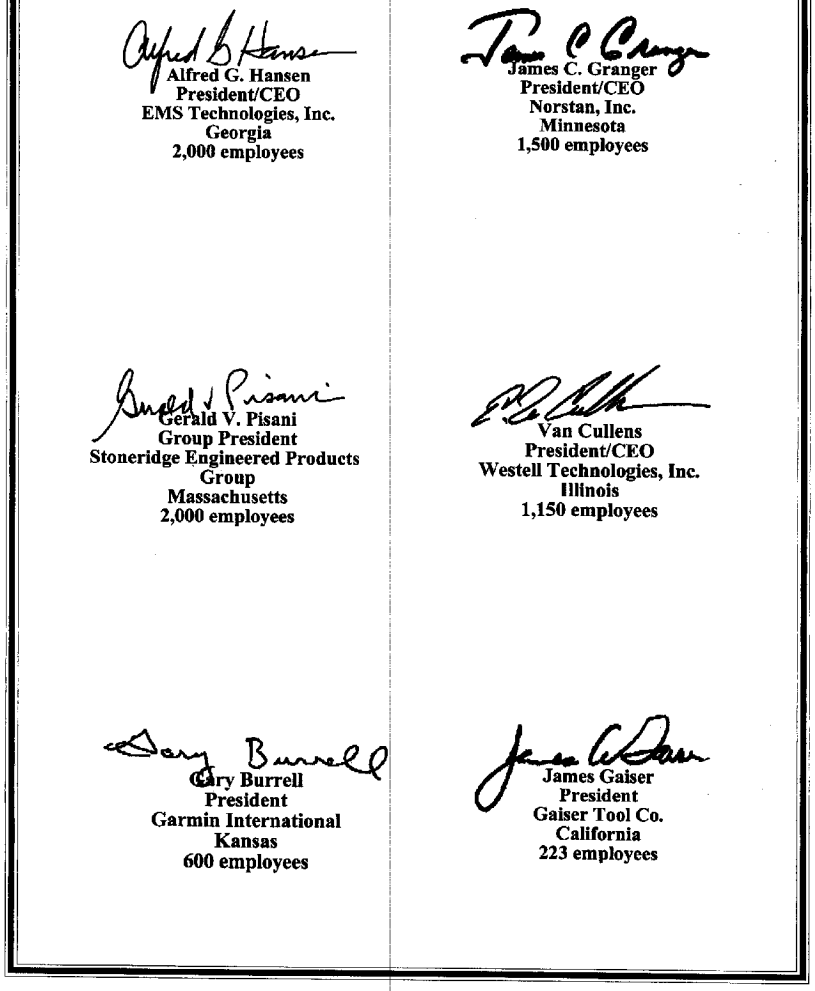
Robert H. Whilden, Jr.
Senior Vice President, General
Counsel & Secretary
BMC Software, Inc.
Texas
7,000 employees

Edward H. Bersoff
Chairman
BTG, Inc.
Virginia
1,800 employees

J. Douglas Blizzard
Director of Human Resources
Channel Master
North Carolina
1,000 employees

John Ambroseo
Chief Operating Officer
Coherent, Inc.
California
1,500 employees in U.S.

Harvey J. Wilson
Chairman/CEO
Eclipsys Corporation
Florida
1,500 employees



Alfred G. Hansen
President/CEO
EMS Technologies, Inc.
Georgia
2,000 employees

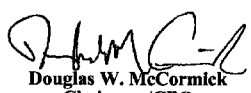
James C. Granger
President/CEO
Norstan, Inc.
Minnesota
1,500 employees

Gerald V. Pisani
Group President
Stoneridge Engineered Products Group
Massachusetts
2,000 employees

Van Cullens
President/CEO
Westell Technologies, Inc.
Illinois
1,150 employees

Gary Burrell
President
Garmin International
Kansas
600 employees

James Gaiser
President
Gaiser Tool Co.
California
223 employees

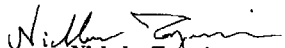


Douglas W. McCormick
Chairman/CEO
iVillage.com
New York
200 employees

David W. Hanna
Chairman
Hanna Capital Management
4,000 employees

Luke E. Fichthorn III
Chairman/CEO
Bairnco Corporation
Florida
900 employees

Raymon Thompson
CEO/President/Chairman of the
Board of Directors
Semitool, Inc.
Montana
1,200 employees



Nicholas Tagaris
President
Datel, Inc.
Massachusetts
600 employees

Robert Schechter
CEO/President
NMS Communications
Massachusetts
600 employees

Warren J. Johnson
President/COO
Alpha Technologies, Inc.
Washington
400 employees

Brian DuPell
Executive Vice President
Dielectric Laboratories
New York
400+ employees

William A. Schneider
President/CEO
TURCK, Inc.
Minnesota
340 employees

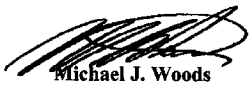
John L. Wallace
President
Deringer Manufacturing Co.
Illinois
300 employees

Scott Harmon
CEO
Motive Communications
Texas
340 employees

Thomas K. Bills
Vice President
Furst Teleservice
Nebraska
300 employees

Thomas G. Hood
President/CEO
Southwall Technologies, Inc.
California
300 employees

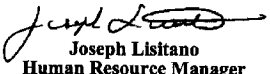
George Moilanen Sr.
CEO
Great Lakes Technologies Group
Michigan
258 employees



Michael J. Woods
President/CEO
Telesource Services, LLC
Michigan
250 employees

Andre Galliath
President
NOVACAP, Inc.
California
240 employees

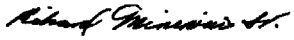
Ivonne Barrios-Alzate
Director of Human Resources
Dynacircuits, LLC
Illinois
200 employees



Joseph Lisitano
Human Resource Manager
Times Microwave Systems
Connecticut
170 employees

William Gill, Jr.
President/CEO
DNE Systems
Connecticut
160 employees

Ralph H. Anderson
CEO
General Technology Corporation
New Mexico
160 employees

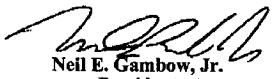


Richard Minervino, Sr.
Chairman/CEO
Minervino Companies
Connecticut
150 employees

Byron C. Roth
Chairman/CEO
Roth Capital Partners
California
150 employees

W.C. Martin
CEO
SV Microwave, Inc.
Florida
150 employees

William D. Kessenich
President
Unlimited Services
Wisconsin
150 employees

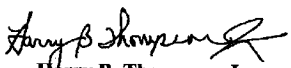


Neil E. Gambow, Jr.
President
Post Glover Resistors, Inc.
Kentucky
140 employees

M. Lynn Pike
President/CEO
WVT Communications
New York
140 employees

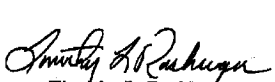
Alex Razmjoo
President/CEO
Procom Technology, Inc.
California
150 employees

William H. Spence
General Counsel
ActionPoint, Inc.
California
150 employees

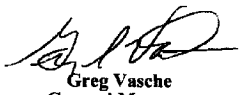


Harry B. Thompson, Jr.
President/CEO
Mnemonics, Inc.
Florida

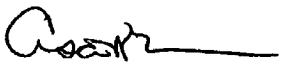
Allen Gerth
CEO
Mobilcomm Inc.
Ohio



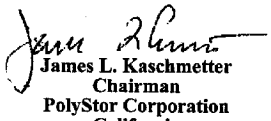
Timothy L. Rashleger
President
Milltronics Manufacturing
Minnesota



Greg Vasche
General Manager
California Micro Devices
Arizona



Asa W. Lanum
President/CEO
Fortel Inc.
California

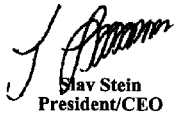


James L. Kaschmetter
Chairman
PolyStor Corporation
California

Christopher Stone
CEO
Tilion, Inc.
Massachusetts
83 employees

Steven Jorissen
General Manager
Vansco Electronics, Inc.
North Dakota

Tadashi Sato
President/CEO
Data-Ray Corporation
Colorado

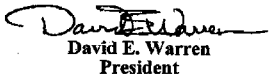


Slav Stein
President/CEO
AESP, Inc.
Florida

Linda Lammi
Vice President
Product Development and
Technology Services
Datawatch Corporation
Massachusetts

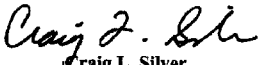
Robert H. Plontz
Plant Manager
Sparton Electronics
New Mexico

Christopher Greene
President/CEO
Greene Engineers
California



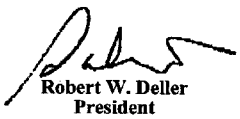
David E. Warren
President
Circle Consulting Services, Inc.
Georgia

R. Tom Nelson
Chief Operating Officer
Webroot Software, Inc.
Colorado

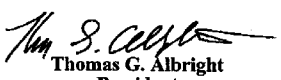


Craig L. Silver
President
IT Enclosures Inc.
Maryland

Michael A. Gilbert
General Counsel
iVillage, Inc.
New York

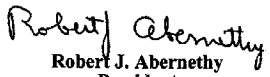


Robert W. Deller
President
Markess International, Inc.
Maryland



Thomas G. Albright
President
Albright Industries, Inc.
North Carolina

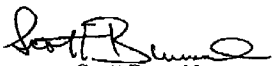
Betty L. Ferguson
President/CEO
Applied Data Systems, Inc.
Missouri



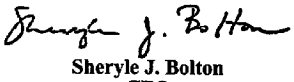
Robert J. Abernethy
President
American Standard
Development Company
California

J. Michael Davis
CTO
Electronic Traderservices, LLC
Colorado

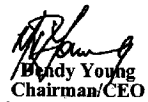
Kent Walker
Senior Vice President/ General Counsel
Liberate Technologies
California



Scott Burnside
Senior Vice President
Regulatory and Government Affairs
RCN Corporation
Pennsylvania



Sheryle J. Bolton
CEO
Scientific Learning
California



Bendy Young
Chairman/CEO
GTSI Corporation
Virginia
650 employees

Joseph Lazzara
President/CEO
Scientific Technologies, Inc.
California
250 employees

Teresa Johnson
Director
San Jose Silicon Valley
Chamber of Commerce
California
2,000 members

George Scalise
President
Semiconductor Industry
Association

Dave McCurdy
President
Electronic Industries Alliance

Piper Cole
Vice President, Global Public
Policy
Sun Microsystems, Inc.
California
43,000 employees

Jerry J. Jasinowski
President

NAM National Association of Manufacturers

February 6, 2002

The Honorable James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

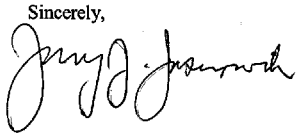
The National Association of Manufacturers – 18 million people who make things in America – strongly supports enactment of H.R. 2341, the Class Action Fairness Act, which today is the subject of hearings before the Committee on the Judiciary. On behalf of the 14,000 member companies of the NAM, I would appreciate your including this letter of support in the hearing record.

When formulated and implemented, the current judicial rules governing class action lawsuits did not contemplate that the U.S. legal system would allow nationwide, multimillion dollar cases to be heard before a single state's courts. Those rules state that removal to federal jurisdiction requires that every plaintiff be a citizen of a state different from every defendant and that the amount in controversy be at least $75,000 per plaintiff.

The reforms contained in H.R. 2341 would simply reflect the intent of the Founders – that federal jurisdiction should prevail when the litigation involves citizens from different states. In order to ensure that the cases covered are truly national in scope, the bill provides for federal jurisdiction only where: at least one plaintiff and one defendant are from different states; there are at least 100 plaintiffs; and the amount in controversy is at least $2 million. There are additional provisions to make certain that truly local cases would be heard at the local level. Finally, the bill provides protections to plaintiffs in whose name class action lawsuits are brought.

The Class Action Fairness Act does not make any changes to substantive law. Rather, it is a reasonable response to an unanticipated problem with the federal rules of judicial procedure. The NAM urges your strong support for H.R. 2341 as it moves through the legislative process.

Sincerely,



cc: Members of the Committee on the Judiciary

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

February 5, 2002

The Honorable F. James Sensenbrenner, Jr.
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

On behalf of the U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector and region, I write to indicate our strong support of H.R. 2341, the bi-partisan "Class Action Fairness Act of 2001."

H.R. 2341 is a timely piece of legislation that directly addresses the issue of abusive class action lawsuits in state courts where the rights of class members and defendants are frequently trampled. H.R. 2341 is a narrowly tailored bill that allows large interstate class actions to more easily be heard in federal court rather than in state courts selected through "forum shopping." In addition, H.R. 2341 provides enhanced protections for consumers and class members, such as increased scrutiny of coupon settlements and plain-notice requirements. The legislation also does not change the substantive rights of either plaintiffs or class members to proceed with a lawsuit nor would it hinder any litigation resulting from the bankruptcy of Enron. I have enclosed a recent monograph published by the U.S. Chamber Institute for Legal Reform discussing the numerous problems with the current class action system.

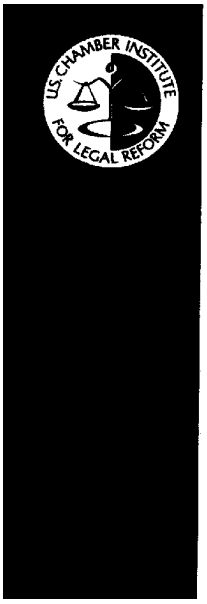
The Class Action Fairness Act is needed because the significant increase of national class actions filed in state courts has significant adverse effects to our economy such as higher prices for goods and services, increased insurance premiums, lowered earnings, and reduced innovation. Small businesses suffer because local suppliers, agents, retailers, dealers and other small businesses are brought into the litigation to prevent removal of the cases to federal court. In short, small businesses are named as defendants and must defend themselves, even though they have nothing to do with the case.

Because of the importance of class action reform to consumers, employees, and businesses across the country, the U.S. Chamber of Commerce strongly supports H.R. 2341 and looks forward to working with you as the bill moves through the legislative process.

Sincerely,

R. Bruce Josten

Enclosure



CONSIDERED OPINION

CLASS ACTION LITIGATION ABUSE IN AMERICA

James M. Wootton

JAMES M. WOOTTON

President, *Institute for Legal Reform U. S. Chamber of Commerce*

James Wootton was selected to head the Institute by U.S. Chamber of Commerce President & CEO Thomas J. Donohue in November 1999. The Institute advocates significant changes in the civil justice system at both the federal and state levels designed to reduce frivolous, wasteful and excessive litigation. Mr. Wootton was president of two related non-profit corporations that he formed in 1992 –the Safe Streets Alliance, a public charity dedicated to education about crime and creating youth leadership opportunities, and the Safe Streets Coalition, a public advocacy group with over 130,000 members.

Mr. Wootton graduated in 1973 from the University of Virginia with a Bachelor of Arts degree with High Honors in Economics and then in 1976 from the University of Virginia Law School. He is a member of the Virginia State Bar Association. He joined the Reagan Administration in early 1981 and was appointed Deputy Administrator of the Office of Juvenile Justice and Delinquency Prevention in 1983. While at the Department of Justice, he helped create the National Center for Missing and Exploited Children, the National Center for the Analysis of Violent Crime at the FBI Academy, and the National Court Appointed Special Advocate Program.

In 1986, Mr. Wootton was appointed to the Legal Services Corporation as Director of Policy, Communications and Legislative Affairs, and was later named Counselor to the President. Articles by Mr. Wootton have appeared in *Newsweek* magazine and newspapers across the country. In addition, he has appeared on, among others, the *Today Show, Good Morning America, NBC Nightly News,* C-Span, CNN, ESPN, CNBC, Court-TV, Fox Morning News, Dateline NBC, and numerous radio talk shows. Mr. Wootton authored two backgrounders for the Heritage Foundation on truth-in-sentencing and juvenile crime and edited the book *Freed to Kill.*

CLASS ACTION LITIGATION ABUSE IN AMERICA

Written by James M. Wootton

Class actions have long been a valuable aspect of the legal system, permitting the efficient resolution of suits involving multiple parties allowing for plaintiffs with limited means to pursue small but significant claims. Over the last decade, however, aspects of class action practice have gone terribly wrong. Increasingly, state courts are certifying class actions in cases where class treatment cannot reasonably be justified; class actions are being settled on terms that do not provide the class members with meaningful relief; and the potential for massive but unwarranted liability is forcing defendants to settle class action strike suits. These problems are largely attributable to two developments --the unprecedented migration of national class actions to the state courts, and the proliferation of class claims initiated by entrepreneurial lawyers on behalf of class members who have not suffered any substantial injury.

THE STATE-COURT CLASS ACTION PROBLEM.

Until the last decade, virtually all national class actions were filed in federal court. In recent years, however, there has been an explosion of class action filings in state court. Although the absence of centralized data-keeping in the state courts makes it impossible to quantify the problem precisely, the available empirical and anecdotal evidence leaves no doubt that state-court class actions against out-of-state defendants have increased many-fold since 1990. This point is not controversial: the migration of national class actions to the state courts is acknowledged by leading plaintiffs' lawyers, has been noted by federal judges, and has been widely reported in the press. This development has had a number of serious adverse consequences:

Forum-shopping. Lax enforcement of certification rules by a few jurisdictions allows plaintiffs bringing national class actions to shop around for the most favorable forum, even when that jurisdiction has little connection to the underlying dispute. As a result, a handful of states get far more than their proportionate share of class action filings. When one state cracks down on abusive class actions, the lawyers simply shift their business to other jurisdictions.

Manipulation of the rules to defeat federal jurisdiction. The lawyers are able to keep national class actions from federal court by manipulating the rules that govern federal jurisdiction. Under current law, a case may be removed from state to federal court if all of the plaintiff class representatives are citizens of a different state than all of the defendants, and if each plaintiff is seeking more than $75,000 in damages. To prevent removal, class counsel may include a named plaintiff that has the same citizenship as one of the defendants, or may name a local "straw defendant" (such as a local pharmacy in a suit against national pharmaceutical manufacturers) that has the same citizenship as one of the plaintiffs, or may "shave" their claims by forgoing damages for class members in excess of $74,999. These tactics may cause considerable expense and inconvenience for local defendants, and may severely disadvantage the class members whose lawyers have surrendered valuable claims.

Displacement of state law. State courts hearing national class actions sometimes apply the law of the forum state to govern the claims of all class members, even when many members of the class live in states whose laws differ dramatically. A local court entertaining a national class action against an auto insurer, for example, recently held that the defendant insurance company acted illegally in using "non-OEM" parts (i.e., parts not produced by the original equipment manufacturer) in preparing estimates for repairs – even though most states permit (and some states require) use of non-OEM parts in an effort to benefit consumers by keeping down repair costs. In cases like this, local courts effectively override the considered policy choices of other states, disadvantaging those states' citizens.

Ill-equipped or biased courts. In addition, many state courts have neither the experience nor the resources to handle complex class actions. They also lack any mechanism to consolidate related class suits brought in other jurisdictions, meaning that defendants often are required to defend against multiple class actions filed in state courts across the country. Federal courts, in contrast, have the expertise and resources necessary to deal adequately with multi-party litigation, and also are able to consolidate related class actions into a single proceeding. At the same time, there is little doubt that local courts sometimes give favorable treatment to local plaintiffs, at the expense of out-of-state class action defendants; indeed, the Framers of the Constitution provided for diversity jurisdiction in the federal courts to guard against precisely that danger of bias against out-of-state parties.

The migration of national class actions into state courts that provide inadequate scrutiny of the certification and settlement process has greatly exacerbated other problems appearing in class action practice. Many of these abuses are related to the emergence of lawyer-driven suits in which class members have no real interest

OTHER CLASS ACTION ABUSES.

The migration of national class actions into state courts that provide inadequate scrutiny of the certification and settlement process has greatly exacerbated other problems appearing in class action practice. Many of these abuses are related to the emergence of lawyer-driven suits in which class members have no real interest:

Strike suits that aggregate many trivial or non-existent claims. Increasingly, class actions involve lawyer-generated suits challenging asserted misconduct that caused no real injury, and produce judgments from which class members derive no real benefit. In such suits, the attorneys recruit the class representatives and then attempt to work out settlements with the defendants in which the absent class members receive essentially worthless coupons or other minimal benefits, while the lawyers receive seven- or eight figure fees. Although the amounts at stake in these cases for individual class members are minimal, the enormous size of the classes, along with the unpredictability of juries in some jurisdictions, make such suits bet-the-company propositions for the defendant. This reality, combined with the substantial expense of litigating a massive class action, often places insurmountable pressure on the defendant to settle.

Class members are supposed to receive notices informing them of their rights and giving them the opportunity to opt out of any settlement. In practice, however, class notices are often indistinguishable from junk mail and in many cases are virtually incomprehensible.

Collusive settlements. Small-claimant class actions also are vulnerable to collusive settlements. The class representatives in such suits do not monitor the litigation, freeing plaintiffs' counsel to pursue their interests at the expense of the class. The result is that defendants may buy off class counsel in return for a settlement that provides nothing of value to the class members. Indeed, because multiple class actions may be filed in different jurisdictions by different sets of lawyers, the defendant may seek out the plaintiffs' attorney who will offer it the best deal, that is, the cheapest settlement.

Payment of "bounties" to class representatives. The problem of unfaithful attorneys is magnified by the growing practice of giving enhanced payments (or "bounties") to class representatives, offering them a share of the settlement award that is disproportionately larger than that provided to absent class members. Such a settlement leads to a divergence of interests between the class representatives – who will receive the bounty only if the settlement is approved – and the absent class members, who receive no bounty at all. In such circumstances, class representatives cannot be expected to look out for the interests of other members of the class.

Incomprehensible class notices. Class members are supposed to receive notices informing them of their rights and giving them the opportunity to opt out of any settlement. In practice, however, class notices are often indistinguishable from junk mail and in many cases are virtually incomprehensible. As a consequence, class members are left unaware of rights that they may be surrendering and unable to gauge the adequacy of class settlements.

HISTORICAL BACKGROUND: THE ORIGINS OF THE PROBLEM

THE ORIGINAL RULE 23.

Federal Rule of Civil Procedure 23, which governs class action practice in the federal courts, was first promulgated in 1938. The Rule's drafters intended to encourage resolution in a single proceeding of what otherwise would have been multiple lawsuits, and to extend the class procedure, traditionally used only in equitable actions, to suits seeking monetary relief.[1] To accomplish this purpose, the Rule divided class actions into three categories, which came to be called "true," "hybrid," and "spurious."[2] "True" class actions involved claims asserting joint or common rights, addressing matters such as derivative suits or actions by a trustee on behalf of trust beneficiaries; "hybrid" class actions involved so-called "several" rights affecting specific property, such as claims to a common fund.

The final category, "spurious" class actions, involved suits in which the claims of class members presented common questions of law and fact. But these "spurious" suits were not what we would now regard as real class actions at all. Most courts treated the "spurious" class action merely as a mechanism for facilitating

permissive joinder of suits presenting similar claims, so that the "spurious" action amounted to little more than "an invitation to others affected to join in the battle."[3] This meant that the "spurious" class action operated on what today would be termed an opt-in basis, binding class members (and allowing them to benefit from the judgment) only if they affirmatively came forward and chose to participate in the litigation.

In practice, the original version of Rule 23 proved confusing and difficult to apply, using terms that the 1966 Civil Rules Advisory Committee described in its Notes as "obscure and uncertain."[4] Moreover, the Rule left unclear the circumstances in which class action judgments would have a binding effect on persons who were not named as parties to the action.[5] Indeed, because most courts treated the "spurious" class suit as "little more than a liberal joinder device," the judgments in such cases generally were treated as binding only the named parties.[6] As a consequence, "[s]ince a great majority of cases fell into the spurious category, this [interpretation] ... effectively frustrated the drafters' objective of determining all questions in one suit."[7]

The Rule's drafters intended to encourage resolution in a single proceeding of what otherwise would have been multiple lawsuits, and to extend the class procedure, traditionally used only in equitable actions, to suits seeking monetary relief.

THE 1966 AMENDMENTS

To address these and other perceived problems, Rule 23 was substantially revised in 1966.[8] Among other changes, Rule 23(b) was amended to establish three new categories in which class actions could be maintained. The first two categories were narrow and relatively uncontroversial: Rule 23(b)(1) was revised to permit class treatment when separate actions might subject the defendant to inconsistent obligations or prejudice absent class members, while amended Rule 23(b)(2) permitted class treatment when injunctive relief against the defendant would be applicable to the class. The third category – the successor to the "spurious" class action – provided in Rule 23(b)(3) that class treatment would be allowed when questions common to the class predominate and a class action provides the superior method of resolving the controversy. In addition, and significantly, new Rule 23(c)(2) provided that the judgment in Rule 23(b)(3) class actions would bind all class members who do not take affirmative steps to opt out of the class after receiving notice.

Given post-1966 developments in class action practice, it is important to note that these changes were not intended to facilitate the initiation of suits in which each of the class members had suffered only minimal injury. Although the possibility of such litigation was anticipated, the drafters of Rules 23(b)(3) and (c)(2) were principally concerned with expanding the res judicata effects of class actions (that is, with having the class judgment bind as many potential litigants as possible) and with encouraging the consolidation of what otherwise likely would have been many lawsuits brought – possibly in many jurisdictions – by individuals having similar claims.[9]

More presciently, perhaps, the Reporter to the Advisory Committee also was quoted as saying that "it will take a generation or so before we can appreciate the scope, the virtues, and the vices of the new Rule 23."

As John Frank, a member of the Committee that proposed the 1966 amendments, recently explained, "this was not the conception of the 'opt-out' of today because the really large class action had not yet been conceived of."[10] In 1966:

> It was here assumed that opt-out was the actual conscious choice of a person who had a meaningful alternative to bring his own cause of action. The concept of thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future.[11]

The drafters of amended Rule 23 thus gave very little thought to creating a mechanism by which many small claims that would not have been brought individually could be consolidated into one massive action.

The Advisory Committee's Reporter predicted that the new Rule 23 would bring "economy of effort and uniformity of result without undue dilution of procedural safeguards."[12] He also opined that Rule 23(b)(3) "[was] well-confined" and would not mark a "violent change injurious to the defendant."[13] Indeed, he predicted that the new Rule would benefit defendants, "in that it attempts to conclude the case" by having all claims resolved in one proceeding.[14] Another prominent contemporaneous commentator likewise was of the view that there would not be "very many actions which the court permits to be maintained as (b)(3) class actions."[15] More presciently, perhaps, the Reporter to the Advisory Committee also was quoted as saying that "it will take a generation or so before we can appreciate the scope, the virtues, and the vices of the new Rule 23."[16]

THE EXPANSION OF CLASS ACTION LITIGATION

In fact, the 1966 amendments - in particular, the combination of Rules 23(b)(3) and (c)(2), which created a system in which all persons described by the plaintiffs' lawyers become members of the class unless they take affirmative steps to opt out, transformed class action practice. Some aspects of this change were immediate. As a 1999 study by the RAND Institute for Civil Justice observed, with the promulgation of the 1966 amendments, "[o]vernight the scope of money damage lawsuits - and hence the financial exposure of the corporations against whom they usually were brought - multiplied many times over."[17] Indeed, within the first years after the promulgation of the amendments, one of the most respected judges on the U.S. Court of Appeals for the Second Circuit opined that they had produced a "Frankenstein monster,"[18] while an academic commentator concluded that the amended Rule 23 validated a form of "legal blackmail."[19] And a 1972 report by the American College of Trial Lawyers found that in 1971, four times as many class actions were filed in a sample jurisdiction as had been commenced just four years earlier.[20]

The frequency and significance of class action litigation continued to increase in the ensuing decades as litigants found new ways to employ the device. Many of the immediate post-1966 suits involved antitrust or securities

claims. But changes in substantive law gave plaintiffs' lawyers a greatly expanded canvass on which to paint. Beginning in the early 1970s, lawyers were able to initiate class suits invoking federal and state consumer protection statutes, while the 1980s saw the advent of mass tort class actions.[21] Thus, as one commentator stated, "class actions have been instituted that are extraordinary both in terms of their magnitude and their subject matter."[22]

The drafters of the 1966 amendments did not anticipate this expansion of class action litigation. As a member of the 1966 Advisory Committee later explained:

> This was a world in which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law was still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but...they were expected to be too big for the new rule.[23]

This was a world in which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law was still in the offing.

THE RECENT EXPLOSION OF STATE-COURT CLASS ACTION LITIGATION

This already notable increase in class action litigation speeded up exponentially in the 1990s. With most states having enacted procedural rules that mirror the amended federal Rule 23, the last ten years have witnessed a veritable explosion in state-court class action litigation, a development that was utterly unexpected by the drafters of the Rule 23 amendments. This dramatic migration of class action suits to the state courts has occurred both because state tribunals offer plaintiffs attractive opportunities for manipulation and because current law significantly restricts federal jurisdiction over class actions.

NATIONAL CLASS ACTIONS ARE NOW FREQUENTLY INITIATED IN STATE COURT

Although the absence of centralized or systematic data-keeping in the state courts makes it impossible to quantify the problem precisely, the available empirical and anecdotal evidence leaves no doubt that "a tidal wave of new class actions is hitting corporate defendants."[24] The Federal Judicial Conference's Advisory Committee on Civil Rules thus reported that, during a three-year period in the mid-1990's, U.S. companies experienced a 300% to 1,000% increase in the number of putative class actions filed against them.[25] The RAND Institute for Civil Justice likewise found that many corporations experienced during that period a doubling or tripling of the number of putative class actions in which they were named as defendants.[26]

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Most importantly, there is no question that, as the RAND study also determined, this latest increase in class action litigation has been "concentrated in the state courts."[27] Indeed, this is not a controversial proposition. As one prominent class action plaintiffs' attorney candidly acknowledged, "[i]t is no secret that class actions - formerly the province of federal diversity jurisdiction - are being brought increasingly in the state courts."[28] Judges have noted the same trend: Judge John Nangle, who stepped down last year as chair of the federal Judicial Panel on Multidistrict Litigation, observed recently that "[p]laintiffs' attorneys are increasingly filing nationwide class actions in various state courts."[29] The Wall Street Journal offered a typical report on this phenomenon:

> Plaintiffs' lawyers are going out of their way to sue big companies these days. All the way to backwaters like Plaquemine, La., Union County, Tenn., and Eutaw, Ala. A growing number of big lawsuits are landing in small towns. Rural courts offer lawyers a strategic advantage. In major metropolitan areas, judges are assigned to cases by lottery, but small communities have only one or two judges in town. Unlike federal judges, many state judges are popularly elected, raising the possibility of bias.[30]

The available empirical evidence confirms that the number of state-court class actions has skyrocketed. For example, the Vice President-General Counsel of Ford Motor Company testified before Congress that the number of class action lawsuits pending against Ford escalated from eight in 1990, to 50 at the end of 1995, to over 100 by the end of 1997; he explained that "the majority of class actions against Ford and other companies in recent years has been filed in state courts."[31] Confirming that view, a broader study showed that the number of class actions pending in state court increased 1,042% from 1988 to 1998, while the number pending in federal court increased "only" 338% during that same period.[32]

LIMITATIONS ON FEDERAL JURISDICTION OVER CLASS ACTIONS

For reasons explained below, self-interest leads plaintiffs' lawyers to file class action suits in state court - but it is the existing restrictions on federal court jurisdiction that generally make it impossible for defendants (or even plaintiff class members, if they wish) to remove those class actions to federal court. The federal courts, of course, have limited jurisdiction; they may hear only cases that fall within the so-called federal question or diversity jurisdiction. Federal question jurisdiction extends to claims based on federal causes of action.[33] Diversity jurisdiction extends to cases between "citizens of different States," where "the matter in controversy exceeds... $75,000."[34]

As a general rule, a defendant sued in state court may remove to federal court any civil action over which the federal court would have had federal question or diversity jurisdiction.[35] Although millions of dollars

may be at stake and thousands of class members may be involved, however, most state-court class actions may not currently be removed to federal court by defendants. The bulk of class actions filed today do not fall within federal question jurisdiction because

> [w]ith increasing frequency, plaintiffs are filing putative class actions that lack any federal question claim. These class actions plead state common law and state statutory counts. Typical examples of non-federal question class actions include: insurance market conduct, product liability, consumer fraud, toxic tort, asbestos, tobacco, and mass tort.[36]

Thus, most cases may not be removed unless the federal court is able to exercise diversity jurisdiction.

The federal courts, of course, have limited jurisdiction; they may hear only cases that fall within the so-called federal question or diversity jurisdiction. Federal question jurisdiction extends to claims based on federal causes of action.

But current rules governing diversity sharply limit its application to class actions. First, under the "complete diversity rule," a federal court may exercise diversity jurisdiction only if all of the defendants in the suit are citizens of different states than all of the named plaintiffs.[37] Accordingly, there is no diversity jurisdiction over a class action if even a single one of the named plaintiffs is from the same state as any one of the defendants. Because it is almost always possible in a national class action to a find non-diverse plaintiff or defendant, diversity jurisdiction almost always will be defeated in such suits.

Second, a federal court may exercise diversity jurisdiction only if the "amount in controversy" for each class member's individual claim exceeds $75,000.[38] This limitation forecloses the exercise of federal jurisdiction in virtually all consumer class actions; although the class may seek total damages amounting to millions or even billions of dollars, the named plaintiffs' claims typically are each too low to meet the amount in controversy requirement.[39]

These rules limiting the scope of diversity jurisdiction do not find any clear basis in policy. To the contrary, the U.S. Court of Appeals for the Eleventh Circuit recently noted that the reason "[w]hy we look to the value of each plaintiff's claim, rather than to the defendant's total exposure [in determining the amount in controversy], is lost in the mists of antiquity; no Supreme Court case that this court has been able to locate explains the rationale behind this seemingly arbitrary rule."[40] Leading commentators agree that "[t]he traditional principles in this area have evolved haphazardly and with little reasoning. They serve no apparent policy."[41] Indeed, Judge Nangle has described them as "antiquated, out-of-date judicial theories."[42] But however indefensible they may be as a matter of policy, the current diversity rules serve to exclude a great many interstate class actions from federal court.

These rules limiting the scope of diversity jurisdiction do not find any clear basis in policy.

SPECIFIC PROBLEMS ASSOCIATED WITH CLASS ACTION LITIGATION IN STATE COURT

This dramatic expansion in state-court class action litigation is much more than a curiosity. To the contrary, it has placed strains on the legal system that have disadvantaged both plaintiff class members and defendants.

THE CURRENT SYSTEM ENCOURAGES MANIPULATIVE FORUM SHOPPING

To begin with, the migration of class actions to state courts - and the fact that lawyers putting together a nationwide class may choose to bring suit virtually anywhere - has encouraged manipulation and forum-shopping. It is inarguable that "[s]tate courts in a number of jurisdictions have exhibited a laissez-faire attitude toward class action lawsuits - that is, many local courts are willing to certify for class treatment cases that do not comport with basic class action requirements."[43] This phenomenon, while widespread, is demonstrated most starkly by the increasing number of cases in which state courts have certified nationwide class actions that federal courts, or courts in other states, already have concluded lack the basic prerequisites for class action treatment.[44]

This lax enforcement of class-action rules by courts in a few jurisdictions has significant implications for all national institutions. It permits plaintiffs' class action attorneys to engage in forum-shopping, filing their cases in jurisdictions considered friendly to class actions, even when those jurisdictions "have little or no connection with the underlying dispute."[45] As a consequence, there is no doubt that certain states have entertained far more than their proportionate share of class action filings. One survey found that, in 1998, 69% of the class actions brought against 32 Fortune 500 companies were filed in five states, including Alabama, Texas, and Louisiana.[46] The same study found that class action filings in Texas state courts alone rose by 820% between 1988 and 1998.[47] A study by the RAND Institute for Civil Justice similarly found a "pattern" of filings in "Gulf region" states, particularly Alabama and Louisiana.[48]

Alabama's experience illustrates the dramatic effect of forum-shopping. In the 1990s, Alabama courts became notorious for lax enforcement of limitations on class actions. Most notably, in 1995, the State's intermediate appellate court approved the practice of "conditionally certifying" class action lawsuits as soon as they were filed, without notice to the defendants.[49] These ex parte certification rulings were viewed as assisting Alabama filers in any "race to the courthouse" with competing class actions, but they severely prejudiced defendants.

A study of Alabama class actions conducted by Stateside Associates demonstrated the effects of this and other questionable rulings.[50] The study was based on a review of trial records for 1995-1997 in six of

Alabama's 55 counties.[51] In the period covered, a total of 91 putative class actions were filed in these six Alabama counties.[52] Class actions were certified in some 43 cases – 30 of them by a single judge – and no motions for class certification were denied.[53]

Not surprisingly, class action filings increased for each year under review. Many of the suits were filed against major, out-of-state corporations, and at least 28 of them proposed multistate or nationwide plaintiff classes.[54] In fact, according to its authors, the "most striking finding" of the study was "the frequency with which class actions are brought against national companies ... in the trial courts of this single state."[55] Many of the nationwide class actions involved out-of-state class counsel, including lawyers from as far away as New York and California.[56] The complaints were often crafted to avoid removal to federal court:

> Complaints against foreign corporations typically include Alabama companies or individual Alabama residents as codefendants, state that no individual class member seeks or will accept damages, including interest, costs and attorney fees, that are not less than the federal amount-in-controversy (now $75,000), claim no punitive damages, and state that there are no federal causes of action.[57]

The migration of class actions to state courts – and the fact that lawyers putting together a nationwide class may choose to bring suit virtually anywhere – has encouraged manipulation and forum-shopping.

Thus, as a result of forum-shopping, the lax class certification practices of a single state – and even a single judge – disadvantaged defendants nationwide. Moreover, when one "problem state" begins to crack down on abusive class actions, other jurisdictions quickly emerge as hospitable to them. For example, in December 1997, a trial court in Williamson County, Illinois, certified a nationwide consumer class action against State Farm.[58] The court's decision confirming its conditional certification order in December 1997 produced a spate of filings of putative class actions in southern Illinois counties, many of them purportedly on behalf of national classes of consumers.[59] The October 1999 verdict for plaintiffs in the State Farm action produced an even more dramatic response. In the last three months of 1999, at least ten consumer class actions were filed in Madison County, Illinois, most of them on behalf of putative nationwide classes.[60]

Similarly, verdicts that the press has described as "Lotto-like" are now "enticing out-of-state lawyers and clients to sue [in Mississippi]"; "[n]ews of Mississippi's multimillion-dollar verdicts has attracted trial lawyers from other states, particularly Texas and Alabama."[61] As a consequence, "[t]here have been so many lawsuits filed [in Jefferson County, Mississippi] since 1999 that the total number of plaintiffs has outnumbered the total number of people in the county."[62]

Thus, as a result of forum-shopping, the lax class certification practices of a single state - and even a single judge - disadvantaged defendants nationwide.

THE CURRENT DIVERSITY RULES ALLOW FOR MANIPULATION OF THE SYSTEM TO DEFEAT FEDERAL JURISDICTION

One would imagine that defendants could avoid the jurisdiction of these local kangaroo tribunals by removing nationwide class actions to more neutral federal courts. But as the Alabama experience described above illustrates, the existing diversity rules are easily manipulated by plaintiffs' lawyers to destroy federal jurisdiction. In fact, Judge Nangle, the recently retired chair of the Judicial Panel on Multidistrict Litigation, has noted "a growing trend in class action litigation in this country" that sees plaintiffs' attorneys "carefully crafting the language in the[ir] petitions or complaints in order to avoid the amount in controversy requirement of the federal courts."[63]

To avoid federal question jurisdiction, class counsel may draft the complaint to obscure issues of federal law, or may waive federal claims altogether - even though such claims may have great value for members of the class.[64] Class counsel also have "enormous discretion to manipulate the pleadings either to create or destroy diversity."[65] To eliminate complete diversity, for example, class counsel may simply include one named plaintiff that has the same citizenship as one of the defendants, a step that almost always is possible in a nationwide class action.[66] Conversely, the lawyers may name a "straw defendant" (such as a local pharmacy in a suit against national pharmaceutical manufacturers), who is dismissed from the case after diversity is defeated.[67] Similarly, class counsel may manipulate the pleadings so that the complaint does not satisfy the amount in controversy requirement; they may accomplish that end by specifically forgoing compensatory damages in excess of $74,999, and/or by giving up claims for punitive damages on behalf of the class.[68] Again, this may severely disadvantage class members, who may find themselves surrendering potentially valuable claims.

This is a recurring phenomenon. The U.S. Court of Appeals for the Eleventh Circuit recently reprinted the following example of what it termed a typical " 'do not remove me' disclaimer" that appeared in a complaint filed in Alabama state court:

> Notwithstanding any allegation made within this complaint, this action is brought solely pursuant to the common law and statutory law of the state of Alabama. No claim is made under or for any cause of action arising under the constitution or laws of the United States of America. Further, notwithstanding any allegation contained herein, the Plaintiff and each and every member of the class defined herein expressly waive and forego [sic] any claim for punitive damages and limit their claims solely to compensatory damages. Plaintiff and each class member also expressly waive any claim for damages over seventy-five thousand dollars ($75,000). This class [sic] is a money damage case brought only under rule 23(b)(3), Alabama rules of civil procedure; therefore, any class member who wishes to pursue punitive damages in an amount greater than seventy-five thousand dollars ($75,000) may opt-out [sic] and do so.[69]

Although the defendant attempted to remove the case to federal court despite this "disclaimer," the Eleventh Circuit had no choice but to remand the suit to state court for lack of jurisdiction. In doing so, however, the court issued an extraordinary "[a]pologia,"[70] explaining that it would "make sense and be fair" to vest jurisdiction over such suits in the federal courts.[71]

THE CURRENT SYSTEM ALLOWS LOCAL COURTS IN ONE JURISDICTION TO OVERRIDE THE LAWS OF 49 OTHER STATES, DISPLACING THE POLICY CHOICES MADE BY THE CITIZENS OF THOSE STATES

In their willingness to adjudicate the claims of nationwide classes, some state courts have run roughshod over the laws of other states. Federal courts generally have been reluctant to certify multistate class actions that would require application of the differing laws of many jurisdictions.[72] State courts, however, have been much more willing to certify nationwide classes despite variations in state law.[73]

In the Williamson County action against State Farm, for example, the court certified a class action, involving millions of claimants from 48 states, alleging that State Farm had committed fraud and breach of contract by specifying the use of "aftermarket" or "non-OEM" (i.e., not made by the original equipment manufacturer) crash parts in preparing estimates for repairs of insured motor vehicles - even though a federal court in Tennessee and another Illinois court previously had refused to certify even statewide classes asserting identical claims.[74] The vast majority of the approximately forty states to have addressed the issue allow (and some states actually require) the use of non-OEM parts if the practice is disclosed to consumers; this approach was recommended by the National Association of Insurance Commissioners.[75] Nevertheless, the Williamson County court and jury together awarded a total of more than $1 billion in compensatory and punitive damages against State Farm, effectively finding that State Farm's use of non-OEM parts violated the laws of all 48 states involved. Thus, a single state court, "in a single decision, has placed the insurance regulations of forty-seven other states in question."[76] Not surprisingly, in the wake of this verdict, several insurance companies ceased their use of non-OEM parts - perhaps forecasting "a return to the days when competition in parts was non-existent."[77]

MANY STATE COURTS ARE ILL-EQUIPPED TO HANDLE COMPLEX, MULTISTATE CLASS ACTIONS

In addition, state courts often are ill-equipped to deal with multistate class actions. A state court's physical resources may simply be overwhelmed by the demands of complex, multiparty litigation.[78] More substantively, "many state courts have neither the complex litigation experience nor the support staff necessary to address the complex, technical issues normally presented by class actions."[79] And, "perhaps

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most importantly, they lack any mechanism for coordinating parallel litigation."[80] As one observer described the problem:

> Once one case is certified, plaintiffs' counsel in other states (who are often working in concert) often file "copycat" lawsuits in other states, and use the grant of class certification in the first state to bolster their case. Because state courts have no mechanism to consolidate cases...defendants are unfairly required to expend substantial resources defending multiple lawsuits. In such circumstances, there is no mechanism for achieving coordination and avoiding inconsistencies in results. Indeed, in some instances, the two state courts are forced to compete, each vying to control the litigation. Besides being wasteful, this situation is quite unfair, potentially giving the same classes several bites at the apple against a class action defendant.[81]

By contrast, the federal courts have both the resources to handle large, complex litigation and the ability to consolidate related class actions. Federal Rule of Civil Procedure 42(a) permits partial or complete consolidation of related actions pending in the same district for both pretrial and trial purposes.[82] Furthermore, the Judicial Panel on Multidistrict Litigation is authorized to transfer civil actions pending in more than one district and involving one or more common questions of fact to any district for coordinated or consolidated pretrial proceedings upon the court's determination that transfer "will be for the convenience of [the] parties and witnesses and will promote the just and efficient conduct of such actions."[83] Accordingly, multiple class actions in federal court may be brought before a single judge and resolved, without waste of resources, in a manner most beneficial both to defendants and to the class.

LOCAL COURTS MAY BE BIASED AGAINST OUT-OF-STATE DEFENDANTS

Finally, it bears emphasis that the original purpose of diversity jurisdiction was to protect out-of-state parties against being treated unfairly by local courts. Alexander Hamilton wrote emphatically in the Federalist Papers that:

> The national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion or subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.[84]

The Supreme Court thus has made clear that "[t]he object of the provisions of the constitution and statutes of the United States in conferring upon the courts of the United States jurisdiction of controversies

between citizens of different States of the Union, was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant resides.[80]

There is no doubt that these concerns apply with special force to foreign defendants in class actions. The U.S. Court of Appeals for the Eleventh Circuit recently noted in the class action context that "[a]n 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," adding that "[o]ne would think that [a class action against an out-of-state defendant] is exactly what those who espouse the historical justification for [the diversity statute] would have had in mind."[81] And commentators agree that:

> State court class action defendants are routinely facing the kind of "locality discrimination" that motivated the creation of diversity jurisdiction. Corporate defendants in those cases most assuredly are also being victimized by prejudices against out-of-state business entities and the perceived ability to secure monetary awards without injuring local interests.[82]

Yet the peculiarities of the diversity rules routinely deny a neutral federal forum to out-of-state defendants in class actions — a result that seems particularly irrational in light of the extraordinarily high stakes of many class action suits. After all, it hardly makes sense for a $75,001 auto accident dispute between a New Jersey and a New York resident to be removable to federal court, while that same federal court lacks authority to hear a $2 billion motor vehicle defect dispute between a Michigan-based manufacturer and hundreds of thousands of vehicle owners residing in all 50 states.

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OTHER CLASS ACTION ABUSES

The migration of national class actions to state court also has greatly exacerbated a related set of problems that flow, in large part, from the peculiar characteristics of large class actions involving relatively small individual claims. Such class actions, initiated and run by entrepreneurial plaintiffs' lawyers with little input from either named plaintiffs or absent class members, are prone to multiple abuses. Moreover, they often provide immaterial benefits to, or even affirmatively harm, class members.

TURNING TRIVIAL CLAIMS INTO MASSIVE STRIVE STRIKE SUTIS

Some of the most serious abuses of the class action process involve lawyer-driven lawsuits in which class members have no real interest, that challenge asserted misconduct causing no actual injury, and that produce judgments from which the class members derive no real benefit. In such suits, the attorneys recruit the class

The possibility of aggregating many trivial – or even non-existent – claims into a massive class encourages strike suits that benefit attorneys rather than class members.

representatives and then work out settlements with the defendants in which the absent class members receive essentially worthless coupons or other minimal benefits – while the lawyers receive seven-or eight-figure fees. There are many examples of this sort of litigation. A small, illustrative sampling includes:

In a recent suit, a nationwide class action was 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; it is literally the case that "not one" of Toshiba's customers "has ever reported a problem attributable to this 'defect,'" and Toshiba could "replicate the alleged data-loss problem only by saving a file to a floppy disk and simultaneously doing other memory-intensive tasks, such as playing a video game."[88] But facing potential liability of some $10 billion, Toshiba settled the case by giving most class members small cash payments and coupons, paying the two named plaintiffs $25,000 apiece, and paying the plaintiffs' lawyers $147.5 million in fees, an amount that is 200,000 times greater than the recovery received by any individual member of the class (with the exception of the two named plaintiffs).[89] Commenting on what the plaintiffs' attorneys did to earn this enormous fee, Prof. Lester Brickman commented: "The single most important thing these lawyers did was to bring the case in Beaumont."[90] The suit was so successful that the same plaintiffs' lawyers initiated an identical action against Compaq; two years and millions of dollars in litigation expenses later, that suit was dismissed because the plaintiffs failed to establish the requisite injury.[91]

Blockbuster Video was faced with 23 class actions brought in 13 jurisdictions across the country challenging the fairness of its late-fee policy – even though the policy had been fully disclosed to customers and even though the company already had prevailed in similar suits brought in California and Alabama. To dispose of the pending cases, however, Blockbuster recently agreed to settle a national class action filed in state court in Beaumont, Texas. Under the settlement, customers receive coupons for free rentals or dollar-off certificates, with a maximum value of less than $20, which they may obtain only by visiting Blockbuster outlets. Blockbuster estimates that fewer than 10% of the coupons will be used.[92] In contrast, the plaintiffs' attorneys receive $9.25 million in fees, which means, as *The New York Times* reported, that "The only cash beneficiaries would be the lawyers who filed the suits."[93] In addition, Blockbuster did not change the assertedly misleading policy.[94] *Business Week* thus concluded that "the real winners in the settlement are the lawyers who sued the company," who are paid "in cash, not coupons."[95]

In a just settled action against a film processor, most class members received one roll of film or a dollar off future processing charges, the six named plaintiffs each received $2500, and plaintiffs' counsel received $320,000.[96]

In a suit ostensibly brought on behalf of defrauded fans of lip-synchers Milli Vanilli, the class members received no more than $3 per claimant, while the lawyers got $650,000 in fees.[97]

Ten class actions were recently initiated in California state court against movie studios and production companies, alleging that the defendants defrauded the public by providing "press junkets" to movie critics whose reviews subsequently were quoted in movie advertising.[98] The complaints seek both compensatory and punitive damages. These suits follow on the heels of an earlier class action seeking damages on behalf of moviegoers who saw "A Knight's Tale" because advertising for that movie quoted a fictitious reviewer.

Such suits offer no real benefit to the plaintiff class members, who have not suffered any real injury. Instead, the class members are used as unwilling (often, unknowing) props by lawyers who are interested in generating quick fees. In fact, public opinion research indicates that although half of all American adults have received notices indicating that they are class members, the benefits provided by the litigation generally are so trivial that most recipients have not even bothered to take steps necessary to share in the judgment – and of those who did take such steps, most believe that they did not receive anything meaningful. This sort of litigation is a perversion of Federal Rule of Civil Procedure 23, which was not designed to facilitate suits complaining of utterly trivial injuries. These suits clog the courts and divert judicial resources from more serious matters.

Some of the most serious abuses of the class action process involve lawyer-driven lawsuits in which class members have no real interest, that challenge asserted misconduct causing no actual injury, and that produce judgments from which the class members derive no real benefit.

Such litigation is particularly problematic because, although the amounts at stake for individual class members are trivial, the enormous size of many classes, along with the unpredictability of juries in some jurisdictions, may make such suits bet-the-company propositions for defendants. As Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit recently explained, "a grant of class status can propel the stakes of a case into the stratosphere."[99] Accordingly, both courts and commentators have observed that class certification "creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."[100] And even apart from that risk, the expense of litigating a massive class action may be enormous.

The result is that defendants often pay off the plaintiffs' lawyers with large fees simply to extricate themselves from expensive strike suits. Indeed, "[d]efendants and plaintiffs' attorneys agree to settle virtually all class actions that survive motions to dismiss and motions for summary judgment."[101] In such cases, often no one benefits but plaintiffs' counsel. Even when plaintiffs receive a monetary award, in many class actions, "recovery...[is] spread so thinly over a broad plaintiff's class as to produce little or no meaningful benefit to individual class members."[102] This reality prompted John Frank to observe that "[t]he disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque."[103] Defendants, on the other hand, bear the enormous costs of defending and settling the actions – of which the largest part may be the cost of paying class counsels' fees. And, inevitably, these

In a suit ostensibly brought on behalf of defrauded fans of lip-synchers Milli Vanilli, the class members received no more than $3 per claimant, while the lawyers got $650,000 in fees.

costs are borne by consumers in the form of higher prices, or by shareholders in the form of lower dividends or stock values.

THE CURRENT SYSTEM ENCOURAGES COLLUSIVE SETTLEMENTS THAT HARM CLASS MEMBERS

At the same time, the nature of class actions - especially small-claimant suits - makes them extraordinarily vulnerable to collusive (i.e., non-adversarial) settlements. In today's class actions, "there is a general recognition that the named plaintiff is largely a figurehead who plays little or no part in the initiation or prosecution of the class claim."[104] Moreover, none of the class members in such cases "expect a recovery sufficient to justify the cost of monitoring" the litigation.[105] Yet "[t]he absence of client monitoring raises the specter that the entrepreneurial [plaintiffs'] attorney will serve her own interest at the expense of the [class]."[106]

As one would expect under these circumstances, in many instances plaintiffs' counsel and defendants agree to settlements "by which the defendants receive a 'cheaper' than arm's length settlement and the plaintiffs' attorneys receive in some form an above-market attorneys' fee."[107] The paradigmatic example of such seemingly collusive agreements can be found in many of the so-called "coupon settlements," in which class members obtain only a discount on future purchases from the defendant or some non-pecuniary benefit, while class counsel receive substantial cash compensation.[108] "Often, the discount is no greater than what an individual plaintiff could receive for a volume purchase, or for a cash sale, or for using a particular credit card."[109]

But coupon settlements are not the worst of it. In one particularly stark case of a questionable settlement, a nationwide class of mortgage holders received "benefits" on the order of a few pennies or dollars to compensate them for the Bank of Boston's asserted withholding of excessive surplus funds in their escrow accounts, but then had deducted from their escrow accounts attorneys' fees of many times that amount. One plaintiff who later sued unsuccessfully to challenge the settlement, for example, received a credit of $2.19 as his "settlement payment," while his account was debited $91.33 to pay "his" lawyers. This settlement was approved by the Alabama courts.[110]

A related but distinct aspect of this problem, which is greatly compounded by the availability of state courts that give insufficient scrutiny to class certification and settlement, is the collusive "race to the bottom." The class action opt-out mechanism allows attorneys to "capture" clients by the simple expedient of finding a single named plaintiff and then purporting to file a class action on behalf of a nationwide class of similarly situated unnamed persons. As is noted above, plaintiffs' lawyers use this tactic to file competing class actions when they discover what they believe to be a lucrative claim, with each attorney seeking to represent the same enormous class of plaintiffs.[111] This gives the defendant an opportunity to select the

lawyers who will provide the cheapest settlement for the class - typically, in return for a hefty attorneys' fee. At best, when the underlying claims in such a suit are insubstantial, this phenomenon allows the lawyer to extort a settlement from the defendant; at worst, when the class members have suffered real injury, the race to the bottom allows the defendant to buy cheap res judicata against a class of plaintiffs who will be denied a real opportunity to present their claims.

THE PAYMENT OF "BOUNTIES" TO NAMED CLASS REPRESENTATIVES INFRINGES ON RIGHTS OF ABSENT CLASS MEMBERS

The result is that defendants often pay off the plaintiffs' lawyers with large fees simply to extricate themselves from expensive strike suits.

The problem of collusion is exacerbated by the growing practice of giving enhanced payments - termed "bounties," "incentive awards," or "special payments" - to class representatives.[12] Such settlements, which are common in state courts, give the class representatives a share of the damages award that is disproportionately larger than that provided to absent class members. A typical example of this development is the Toshiba litigation described above, in which the settlement gave most class members cash payments ranging from $210 to $440 and coupons to use in future purchases of Toshiba products, while awarding the two named plaintiffs $25,000 apiece. Another example is the film processor litigation described above, in which the settlement provided most class members one dollar or one roll of film, while the class representatives each received $2500.

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 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. For this reason, a provision barring the payment of bounties to class representatives in securities class actions was included in the Private Securities Litigation Reform Act of 1995.

The Payment Of "Bounties" to named class representatives infringes on rights of absent class members.

Many commentators have recognized that such bounty payments "raise, at the very least, the specter of apparent collusion, as well as grave conflicts of interest between the named plaintiffs and class members."[113] And as one federal court noted:

> A class representative is a fiduciary to the class. If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.[114]

Despite the widespread recognition of the dangers presented by these incentive payments, they have been approved by many courts.[115]

INCOMPREHENSIBLE NOTICES LEAVE MOST CLASS MEMBERS UNAWARE OF THEIR RIGHTS

Finally, inadequate class notices leave class members unaware of the rights they are surrendering and unable to gauge the adequacy of class settlements. When establishing Rule 23's opt-out provisions, the drafters of the 1966 Amendments were keenly aware of the need for clear and concise class notices.[116] Because class members are bound by the terms of a class settlement unless they affirmatively opt out, it is essential that all members of the class receive a description of the settlement's terms that is intelligible and comprehensive. Yet class members often are sent class action notices that are easily mistaken for junk mail and that, on examination, are virtually incomprehensible. This is one of the most widely criticized aspects of class action practice. Indeed, recent public opinion research indicates that, although half of the adults in the United States have received such notices, many find them impossible to follow.

That conclusion is confirmed by a recent empirical study, which determined that "[m]any, perhaps most, of the notices present technical information in legal jargon," and that "most notices [were] not comprehensible to the lay reader."[117] The study further found that "notices did not appear to include sufficient information for individual class members to appraise the net value of a settlement to the class or to calculate an expected personal share in the settlement."[118] Other notices are downright misleading: two law professors analyzing the class notice relating to the Bank of Boston escrow settlement concluded that it would be impossible to determine from the notice the fact that many class members would have deducted from their accounts attorneys' fees far exceeding the benefits they received from the settlement.[119]

CONCLUSION

The valuable purposes served by the class action device should not obscure the serious flaws in the current system. State and local courts now routinely decide national class actions involving plaintiffs from all 50 states and affecting the national economy. Yet these courts, which are ill-equipped to handle such complex proceedings, are often manipulated by the lawyers. The result is a system that does not benefit consumers, that places unwarranted burdens on defendants, and that generates wasteful litigation.

FOOTNOTES

1 7A Wright, Miller, & Kane, FEDERAL PRACTICE & PROCEDURE § 1752, at 15 (1986).

2 B. Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 HARV. L. REV. 356, 378 (1967).

3 All American Airways, Inc. v. Elderd, 209 F.2d 247, 248 (2d Cir. 1954). Other courts took a somewhat broader approach, indicating that members of the "spurious" class should be notified if the class action were successful and asked whether they wanted to take advantage of the result. See, e.g., Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945).

4 See also P. Noonan, State Personal Jurisdictional Requirements and the Non-Aggregation Rule in Class Actions, 1987 U. ILL. L. REV. 445, at 448.

5 See Kaplan, supra, 81 HARV. L. REV. at 378.

6 Noonan, supra, 1987 U. ILL. L. REV. at 449; see also 7A Wright, Miller & Cooper, supra, § 1752, at 29. ("It frequently was observed that the subdivision was merely a device for permissive joinder of parties").

7 Noonan, supra, 1987 U. ILL. L. REV. at 449.

8 Aside from technical amendments in 1987 and 1998, Rule 23 has not been amended since.

9 Kaplan, supra, 81 HARV. L. REV. at 388-396.

10 Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Mar. 5, 1998) ("Class Action Hearings") (testimony of John Frank) ("Frank statement") < http://www.senate.gov/~judiciary/5499jf.htm.

11 Ibid. (emphasis added).

12 See Kaplan, supra, 81 HARV. L. REV. at 390.

13 Id. at 395, 397.

14 Id. at 397.

15 C. A. Wright, Judicial Conference - Third Circuit: Recent Changes to the Federal Rules of Civil Procedure, 42 F.R.D. 437, 567 (Sept. 9, 1966).

16 M. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 52 (1967).

17 D. Hensler, et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (1999), executive summary at 1.

18 Eisen v. Carlisle & Jaqueline, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J., dissenting).

19 Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits — the Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV. 1, 9 (1971).

20 American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure 13 (March 15, 1972).

21 Hensler, supra, at 1-2.

22 7A Wright, Miller, & Cooper, supra, § 1753 at 47.

23 See 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 12 ("Working Papers"), at xi. See also ibid. (statement of Prof. Arthur Miller) ("the rule was not thought of as having the kind of implication that it now has"); P. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 CORNELL L. REV. 941, 945-946 (1995) (explaining that, as of 1969, the term "mass tort" had not yet been coined).

24 Class Action Hearings, 1998 WL 8993262 (Statement of John L. McGoldrick) ("McGoldrick Statement").

25 See Working Papers, at x.

26 D. Hensler, et al., Preliminary Results of the RAND Study of Class Action Litigation 15 (1997).

27 Ibid.

28 E. J. Cabreser, Life After Amchem: The Class Struggle Continues, 31 LOY. L. A. L. REV. 373, 386 (1998).

29 David v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring).

30 R. Schmitt, Justice RFD: Big Suits Land in Rural Courts, WALL ST. J., Oct. 10, 1996, at B1.

31 Class Action Hearings (statement of John Martin, Jr.) ("Martin Statement").

32 Class Action Litigation - A Federalist Society Survey, 1 CLASS ACTION WATCH, at Figure 1 (January 1999).

33 28 U.S.C. § 1331 (creating federal jurisdiction for cases "arising under the Constitution, laws, or treaties of the United States").

34 Id. § 1332(a). Federal courts also may exercise discretionary supplemental jurisdiction to hear related claims that "form part of the same case or controversy" as claims based on federal question or diversity jurisdiction. Id. § 1367(a).

35 Id. § 1441(a) (removal permitted in any case where "the district courts of the United States have original jurisdiction").

36 J. Feldman, Class Certification Issues for Non-Federal Question Class Actions: Defense Perspective, 612 PLI/LIT 41, 49 (1999).

37 See, e.g., Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291, 296 (2d Cir. 2000) ("a class action may be maintained in

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federal court so long as the representative parties are completely diverse"). The complete diversity rule originated in the Supreme Court's interpretation of the 1789 Judiciary Act. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). The Court has since made it clear that the Article III of the Constitution requires only minimal diversity: if Congress were to allow it, the federal courts could constitutionally exercise diversity jurisdiction "so long as any two adverse parties are not co-citizens." State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967).

[38] See Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (each individual class member must meet jurisdictional amount); Snyder v. Harris, 394 U.S. 332, 341-342 (1969) (claims of individual class members may not be aggregated to meet jurisdictional amount). In Zahn, the Supreme Court held that a federal court may not exercise supplemental jurisdiction over claims of class members that do not satisfy the amount in controversy requirement. There is now a conflict among the federal judicial circuits concerning whether the enactment of the supplemental jurisdiction provision, 28 U.S.C. § 1367, overruled Zahn and allows federal courts to exercise jurisdiction over other class members if at least one class member's claim satisfies the jurisdictional amount. Compare, e.g., Free v. Abbott Labs, 51 F.3d 524, 527-29 (5th Cir. 1995) (finding that § 1367 legislatively overruled Zahn), aff'd by an equally divided court, 529 U.S. 333 (2000) (per curiam), and Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 930 (7th Cir. 1996) (same), with Leonhardt v. Western Sugar Co., 160 F.3d 631, 640-41 (10th Cir. 1998) (holding that § 1367 did not overrule the Zahn requirement in class actions) and Trimble v. Asarco, Inc., 232 F.3d 946, 961 (8th Cir. 2000) (same). The Supreme Court has so far been unable to resolve the question definitively. See Free, 120 S. Ct. 1578 (affirming by an equally divided vote). Of course, jurisdiction would not exist even under the broader reading of § 1367 if all persons with claims exceeding $75,000 were excluded from the class.

[39] See, e.g., Cohen v. Office Depot, Inc., 204 F.3d 1069, 1073-1077 (11th Cir. 1995) (dividing $10 million punitive damages claim among 89,000 class members and holding that the amount in controversy requirement was not satisfied).

[40] David v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 796 (11th Cir. 1999).

[41] 14B Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3704, at 127 (3d ed. 1998).

[42] David v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring).

[43] Martin Statement.

[44] Compare, e.g., Mack v. General Motors Acceptance Corp., 169 F.R.D. 671, 677-678 (M.D. Ala. 1996) (denying class certification after dubbing case "the antithesis of a class action") with Ex Parte Ford Motor Credit Corp., 697 So. 2d 464, 464-465 (Ala. 1997) (Hooper, C.J., dissenting) (refusing to review trial court's certification of class action raising identical claims); Murray v. State Farm Mut. Auto Ins. Co., No. 96-2585 (W.D. Tenn. Aug. 19, 1997) (denying certification of a single-state class action challenging insurer's use of after-market parts in auto repairs) with Avery v. State Farm Mut. Auto Ins. Co., No. 97-L-114 (Ill. Cir. Ct. 1997) (certifying 48-state class action raising identical claims).

[45] T. Woods, Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform, 75 N.Y.U. L. REV. 507, 515 (2000).

[46] See Class Action Litigation – A Federalist Society Survey, Part III, 1 CLASS ACTION WATCH 1, 3 (1999).

[47] See id. at Figure 1.

[48] See Hensler, CLASS ACTION DILEMMAS, at 7.

[49] See, e.g., Ex Parte Voyager Guar. Ins. Co., 669 So. 2d 198 (Ala. Civ. App. 1995).

[50] See Stateside Associates, Class Actions In State Courts: A Report On Alabama (Feb. 26, 1998), Hearing Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 105th Cong., 2d Sess. (Mar. 5, 1998), Serial No. 141, at 254 < http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.htm>.

[51] Id. at 255.

[52] Id. at 256.

[53] Ibid.

[54] Ibid.

[55] Id. at 257.

[56] Id. at 256.

[57] Ibid.

[58] Avery v. State Farm Mutual Automobile Ins. Co., No. 97-L-114 (Ill. Cir. Ct. 1997).

[59] See, e.g., Vollmer v. Publishers Clearing House, No. 98-L-100B (St. Clair County, filed Feb. 3, 1998); Longstreet v. State Farm Mut. Auto. Ins. Co., No. 98-MR77 (Madison County, filed Feb. 27, 1998); Crockett v. Michigan Bulb Co., No. 98-L-1054 (St. Clair County, filed Dec. 11, 1998); Crockett v. Seta Corp., No. 98-L-1055 (filed Dec. 11, 1998); Crockett v. Time, Inc., No. 98-L-1056B (St. Clair County, filed Dec. 11, 1998); Crockett v. United States Purchasing Exchange, No. 98-L-1057 (St. Clair County, filed Dec. 11, 1998); Coco v. State Farm Mut. Auto. Ins. Co., No. 99-L-394A (St. Clair County, filed April 28, 1999); Turner v. Vistakon, Inc., No. 99-L-669 (Madison County, filed June 6, 1999); Reichmann v. Archer Daniels Midland Co., No. 99-L-800 (Madison County, filed Aug. 6, 1999); Nagel v. Archer Daniels Midland Co., No. 99-L-801 (Madison County, filed Aug. 6, 1999); Littleton v. Shelter Ins. Co., 99-L-864 (Madison County, filed Sept. 7, 1999); Shemwell v. The Farmers Ins. Group of Cos., No. 99-L-865 (Madison County, filed Sept. 11, 1999).

[60] See, e.g., Paul v. Country Mut. Ins. Co., No. 99-L-995 (Madison County, filed Oct. 13, 1999); Stone v. SBU, Inc., No. 99-L-977 (Madison County, filed Oct. 7, 1999); Arnold v. State Farm Mut. Auto. Ins. Co., No. 99-L-0896 (St. Clair County, filed Oct. 22, 1999); Strasen v. Allstate Ins. Co., No. 99-L-1040 (Madison County, filed Oct. 26, 1999); Phillips v. Ford Motor Co., No. 99-L-1041 (Madison County, filed Oct. 26, 1999); Hobbs v. State Farm Mut. Auto. Ins. Co., No. 99-L-1068 (Madison County, filed Nov. 2, 1999); Rios v. St. Paul Fire and Marine Ins. Co., No. 99-L-1125 (Madison County, filed Nov. 16, 1999); Capone v. General Motors Corp., No. 99-L-1127 (Madison County, filed Nov. 17, 1999); Siler v. State Farm Mut. Ins. Co., No. 99-L-863 (Madison County, filed Nov. 30, 1999); Winn v. Associates First Capital Corp., No. 99-L-1227 (Madison County, filed Dec. 23, 1999).

[61] Mitchell, Out-of-state cases, in-state headaches, CLARION-LEDGER (June 17, 2001). This article offered the example of a suit brought by in Mississippi by Texas plaintiffs against a New Jersey defendant; so long as a single Mississippi plaintiff could be added, the state court would take jurisdiction over the case.

[62] Mitchell, Jefferson County ground zero for cases, CLARION-LEDGER (June 17, 2001).

[63] David v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring).

[64] See V. Schwartz, M. Behrens, & L. Lorber, Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform, 37 HARV. J. ON LEGIS. 483, 486 (2000).

[65] Woods, supra, 75 N.Y.U. L. REV. at 511-512. See also, e.g., G. M. Vairo, Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?, 54 FORDHAM L. REV. 167, 180 (1985) (discussing tactics class counsel may employ to "insure" federal forum).

[66] See, e.g., Gray v. H.A.S., 18 F. Supp. 2d 1320, 1322 (M.D. Ala. 1998) (recognizing such manipulation as a "prevalent concern"); H.R. Rep. No. 106-320, at 7 (1999) (finding that counsel often names "irrelevant parties" or "recruit[s] a [nondiverse] plaintiff" to destroy diversity); The Interstate Class Action Jurisdiction Act of 1999: Hearings Before the House Comm. on the Judiciary, 106th Cong. (July 1999), 1999 WL 528443 (statement of former Solicitor General Walter E. Dellinger) ("[Counsel] can easily evade federal jurisdiction by adding to the class of plaintiffs or to the list of defendants in order to ensure that at least one plaintiff and defendant share a common state citizenship").

[67] For example, the Bankston Drug Store – the only pharmacy in Jefferson County, Mississippi – "has been named [as a defendant] in nearly every suit alleging the defective manufacture of consumer drugs." M. Ballard, Mississippi Becomes a Mecca For Tort Suits, NAT'L L. J. (Apr. 30, 2001). The store has been sued in such actions at least six times in the last year. See Mitchell, supra, Out-of-state cases, in-state headaches; Kraft, Pharmacies often in the middle, CLARION-LEDGER, (June 17, 2001). Such local straw defendants typically are dropped from the suit after one year because removal to federal court on the basis of diversity must be effected within one year after initiation of the action. See 28 U.S.C. § 1446(b). In the interim, however, the straw defendants are forced to run up substantial litigation and insurance costs. By the same token, plaintiffs typically amend their complaints to seek punitive damages "after the one year removal window has closed." David v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 799 (11th Cir. 1999) (Nangle, J., concurring).

[68] See Woods, supra, 75 N.Y.U.L.REV. at 513; July 1999 Hearings, Statement of John Beisner (discussing counsel's tactic of "shaving" claims).

[69] David v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 793-794 (11th Cir. 1999) (sics added by the court). The preposterous nature of the plaintiffs' claim may explain why they were so anxious to keep the case in state court. As described by the Eleventh Circuit, "[t]he plaintiffs here, and the class they ask to represent, are purchasers of extended service contracts on General Motors vehicles. According to the plaintiffs, General Motors Acceptance Corporation, in conspiracy with GM dealerships, fraudulently concealed that the dealerships make a profit on such contracts." Id. at 793 (emphasis added).

[70] Id. at 797.

[71] Id. at 798.

[72] See generally J. Feldman, Class Certification Issues for Non-Federal Question Class Actions: Defense Perspective, 612 PLI/LIT 41, 70-82 (Aug. 1999). See also, e.g., Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 349 (D.N.J. 1997) ("no federal court ha[s] tried a class action which would require the application of the laws of fifty-one jurisdictions"); Chin v. Chrysler Corp., 182 F.R.D 448, 461 (D.N.J. 1998) (legal variation of state law claims means that plaintiffs "have not established a predominance of common legal issues as required by Rule 23(b)(3)"); In re Masonite Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 423-424 (E.D. La. 1997) (identifying "differences in applicable state substantive laws" as basis for denying class certification).

[73] Compare, e.g., Masonite Hardboard, supra (denying class certification because of variation in applicable state law) with Ex Parte Masonite Corp., 681 So. 2d 1068, 1090 (Ala. 1996) (refusing to reverse trial court's certification of class action raising identical claims). See also L. Kramer, Choice of Law in Complex Litigation, 71 N.Y.U. L. REV. 547, 575 (1996) (observing that certification of nationwide classes by state courts "has been increasing in recent years").

[74] See Murray v. State Farm Mut. Auto Ins. Co., No. 96-2585 (W.D. Tenn. Aug. 19, 1997); Rios v. Allstate Ins. Co., No. 94CH 11396 (Cook County Cir. Ct. Jan. 27, 1998).

[75] For example, Massachusetts mandates the use of non-OEM parts except in specific limited circumstances. Mass. Regs. Code tit. 211, § 133.04. Hawaii strongly encourages the use of non-OEM parts by requiring insureds to pay the price differential if they insist on receiving OEM parts. Haw. Rev. Stat. Ann. § 431:10C-313.b(a). See generally M. Zeman & M.

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Duncan, Class Action Lawyers: The New Insurance Regulators, LEGAL BACKGROUNDER (Washington Legal Foundation, June 9, 2000).

[76] M. Liffick, Avery v. State Farm: The Potential For Abuse of the Class Action and Its Extraordinary Impact on insurer and Insured, 13 LOY. CONSUMER L. REV. 88, 92 (2001).

[77] See Zeman & Duncan, supra.

[78] For example, in the mid-1990's, a nationwide class action involving alleged defects in polybutylene plumbing systems was litigated at the Greene County courthouse in Eutaw, Alabama. Court officials complained that the courthouse "was not made to accommodate such large cases." E. Curran, Greene County became "a magnet for purported class actions." MOBILE REGISTER (Dec. 28, 1999). The courtroom was too small to accommodate all of the attorneys and associated personnel; the filings "created a tremendous storage problem"; and the workload of court personnel increased an estimated 50%. See id.

[79] Martin Statement.

[80] Ibid.

[81] Ibid.

[82] See, e.g., Wellman v. Dickinson, 79 F.R.D. 341, 348 (S.D.N.Y. 1978) (certifying five class actions and consolidating them for all purposes).

[83] 28 U.S.C. § 1407(a) (1994).

[84] THE FEDERALIST No. 80, at 537-538 (Hamilton) (J. Cooke, ed. 1961).

[85] Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898). See, e.g., Pease v. Peck, 59 U.S. 595, 599 (1855) (diversity jurisdiction "has its foundation in the supposition that, possibly[,] the state tribunal might not be impartial between their own citizens and foreigners").

[86] Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 797 (11th Cir. 1999) (emphasis added).

[87] McGoldrick Statement.

[88] S. Taylor, How I Hit the Jackpot: Me and My Toshiba Laptop Meet the Class Action Settlement, LEGAL TIMES, at 76 (Nov. 15, 1999). See also No class [l]awsuit frenzy; Blockbuster settlements, THE CINCINNATI ENQUIRER, at B10 (June 21, 2001) ("[I]t's never happened. It's a hypothetical flaw. No user has ever reported data loss."). The suit is Shaw v. Toshiba America Information Systems, Inc., No. 1:99CV0120 (E.D. Tex.). Making the suit even more remarkable, one of the plaintiffs' principal causes of action was the federal anti-hacking statute, which provides for the imposition of civil and criminal penalties on anyone who "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer." 18 U.S.C. § 1030(a)(5)(A). Although this statute was enacted to proscribe the transmission of computer viruses, the plaintiffs argued that it applied to Toshiba because, by selling its product, Toshiba "transmitted" defective software that damaged the purchaser's computer (that is, the laptop itself).

[89] See Taylor, supra, at 76.

[90] D. Fisher, Billion-dollar Bluff, Forbes Global (Apr. 16, 2001).

[91] See Fisher, supra.

[92] Hale, Blockbuster to Settle Lawsuits Over Late Fees, LOS ANGELES TIMES, at Pt. 3, 1 (June 6, 2001).

[93] Fabrikant, Blockbuster Settles Suits On Late Fees, THE NEW YORK TIMES, at C1 (June 6, 2001).

[94] Id.

[95] A Blockbuster of a Legal Bill, BUSINESS WEEK 46 (June 18, 2001). Some members of the class have declared that they "see nothing wrong with the company's policies, and are insulted to be included in the legal 'class' of numskulls who were outraged to discover they owed hefty fees for failing to return videos on time." Carroll, You Get a Coupon, He Gets a Fortune, ROCKY MOUNTAIN NEWS, at 6B (June 16, 2001). The case has been described as "a frivolous class-action lawsuit by a bunch of whiners who think they paid too much in late fees. (Hey, folks, read your rental agreements before you sign them!)" Epstein, Blockbuster settlement could mean free flicks, THE GAZETTE (COLORADO SPRINGS) (June 27, 2001).

[96] Drinkard v. Photo Works, Inc., No. 00-2-09552-OSEA (Wa. Super. Ct., King County).

[97] See A. Fegelman, Court Oks fees for rock-fraud attorneys/But thousands of Milli Vanilli fans still await refunds, S.F. EXAMINER (July 27, 1992), at B2.

[98] Shprintz, Curb Your Blurbs; Class-action suits vs. studios decry junketeers, DAILY VARIETY, at 18 (July 3, 2001).

[99] Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999).

[100] Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted). See also Blair, 181 F.3d at 834 (class certification "can put considerable pressure on the defendant to settle, even when the plaintiffs' probability of success on the merits is slight"); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) (explaining that, once cases are certified as class actions, defendants confront "intense pressure to settle" rather than "roll the dice" on a trial and risk bankruptcy); Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 797 (11th Cir. 1999) (Nangle, J., concurring) ("Facing the possibility of an Alabama jury which occasionally brings in 'gigantic awards' in cases of this sort...the

defendants in this case will be under extreme pressure to settle with the only potential obstacle to settlement being plaintiffs' attorneys fees. Thus, the stage is set for a coupon settlement, with the only cash involved flowing directly to plaintiffs' attorneys."); S. Hill, Small Claimant Class Actions: Deterrence and Due Process Examined, 19 AM. J. TRIAL ADVOC. 147, 150 (1995) (the "vast majority of class actions settle before an adjudication on the merits"); McGoldrick Statement ("even a meritless case with only a 5 percent chance of success at trial must be settled, from the defendant's point of view, if the class complaint alleges hundreds of millions of dollars in damages"). These observations have been borne out empirically. For example, a quantitative analysis of class action litigation in four federal districts found that, "[a]cross the four districts, certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified." J. Willging, L. Hooper, R. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. REV. 74, 143 (1996). "The percentage of certified class actions terminated by class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Ibid. (footnote omitted). A study of class action certification in Texas state court similarly found that cases that had been certified as class actions were more than twice as likely to settle as cases that had not yet been certified. Class Action Watch, Vol. 1, No. 1, at Figure 5.

[101] E. Weiss & J. Beckerman, Let the Money do the Monitoring: How Institutional Investors Can Reduce Agency Costs In Securities Class Actions, 104 YALE L. J. 2053, 2098 (1995).

[102] J. Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1369 (1995).

[103] Frank Statement.

[104] J. Burns, Decorative Figureheads: Eliminating Class Representatives In Class Actions, 42 HASTINGS L. J. 165, 179 (1990). See, e.g., Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir. 1982) (class representative found adequate despite the fact that he "displayed a complete ignorance of facts concerning the transaction that he was challenging"); J/H Real Estate v. Abramson, 1996 U.S. Dist. LEXIS 1546, at *8 n.3 (E.D. Pa. Feb. 9, 1996) ("class counsel, not the class representative, guides and orchestrates the litigation").

[105] J. Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. CHI. L. REV. 877, 88r (1987).

[106] J. Macy & G. Miller, The Plaintiffs' Attorney's Role in Class Action And Derivative Litigation: Economic Analysis and Recommendation for Reform, 58 U. CHI. L. REV. 1, 3 (1991).

[107] Coffee, 95 COLUM. L. REV. at 1367. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 803 (3d Cir. 1995); In re Ford Motor Co. Bronco Prods. Liab. Litig., 1995 U.S. Dist. LEXIS 3507, at *27-28 (E. D. La. Mar. 15, 1995).

[108] See generally Note, In-Kind Class Action Settlements, 109 HARV. L. REV. 810 (1996).

[109] Coffee, 95 COLUM. L. REV. at 1367. "These settlements typically involve the extension or expansion of an existing warranty or coupons for rebates on future purchases from defendants." Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 798 n.1 (11th Cir. 1999) (Nangle, J., concurring). For example, a class action in state court against a computer manufacturer was settled in 1997 with the award of a $13 coupon to each plaintiff, while the attorneys received $5.8 million. JOURNAL OF COMMERCE (Oct. 26, 1999), at 12. Similarly, The New York Times described class actions settlements awarding class members a $25 rebate in air fares, a $400 credit toward a car purchase, and a free box of Cheerios. B. Meier, Fistfuls of Coupons, N.Y. TIMES (May 26, 1995), at D1. See also, e.g., In re Cuisinart Food Processor Antitrust Litig., 38 Fed. R. Serv. 2d 446, 449 (D. Conn. 1983) (approving settlement in which class members received coupon valued at 50% of product's list price); In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 308 (N.D. Ga. 1993) (awarding coupons between $10 and $200 for flights costing between $50 and $1500); New York & Maryland v. Nintendo of Am., Inc., 775 F. Supp. 676, 681 (S.D.N.Y 1991) ($5 coupon for video game costing $100).

[110] For a description of the case, see S. Koniak & G. Cohen, Under Cloak of Settlement, 82 VA. L. REV. 1051, 1057-1068 (1996); Karnilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir. 1996).

[111] These multiple filings often are triggered by a public event, such as the announcement of a government investigation or a corporate accounting restatement.

[112] See I. Warren & D. Stuckey, Recent Developments In Class Actions: Attorneys' Fees, Partial Settlements, and Awards to Named Plaintiffs, 430 PLI/Lit 625, 663 (1992).

[113] J. Benedict & M. Seidel, Special Compensation to Named Plaintiffs in Securities Class Actions, 24 REVIEW OF SECURITIES & COMMODITIES REGULATION 195, 200 (Nov. 13, 1991); see also C. Krislov, Scrutiny of the Bounty: Incentive Awards for Plaintiffs In Class Litigation, 78 ILL. B. J. 286, 286 (1990) ("[m]any commentators have said that awarding representatives any more than their proportionate amount of the class recovery creates an unacceptable conflict between the class and representatives").

[114] Weseley v. Spear Leeds & Kellogg, 711 F. Supp. 713, 720 (E.D.N.Y 1989).

[115] See Warren & Stuckey, supra, 439 PLI/Lit. at 665.

[116] See, e.g., Kaplan, supra, 81 HARV. L. REV. at 394.

[117] Willging, et al., 71 N.Y.U. L. REV. at 134.

[118] Id. at 133.

[119] See Koniak & Cohen, supra, 82 VA. L. REV. at 1057-1068.

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