**Calendar No. 117**

108TH CONGRESS, *1st Session* | SENATE | REPORT 108–123

# THE CLASS ACTION FAIRNESS ACT OF 2003

JULY 31 (legislative day, JULY 21), 2003.—Ordered to be printed

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

# R E P O R T

together with

## MINORITY VIEWS

[To accompany S. 274]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 274) to amend title 28, United States Code, to allow the application of the principles of federal diversity jurisdiction to interstate class actions, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

CONTENTS

## I. LEGISLATIVE HISTORY

The Senate began consideration of the Class Action Fairness Act in the 105th Congress when the Senate Judiciary Subcommittee on Administrative Oversight and the Courts convened a hearing on October 30, 1997. John H. Church, Jr., John C. Coffee, Jr., Lewis H. Goldfarb, Paul V. Niemeyer, Martha Preston, and Brian Wolfman testified at the hearing on issues such as unfair class settlements, attorneys' fees, and State court abuses. On September 28, 1998, the Subcommittee on Administrative Oversight and the Courts approved S. 2083, the "Class Action Fairness Act of 1997," introduced by Senators Charles Grassley (R–IA) and Herb Kohl (D–WI), with an amendment in the nature of a substitute. No further action was taken on S. 2083 in the 105th Congress.

On February 3, 1999, S. 353, "The Class Action Fairness Act of 1999," was introduced in the 106th Congress by Senators Charles Grassley (R–IA), Herb Kohl (D–WI), and Strom Thurmond (R–SC). S. 353 was referred to the Senate Committee on the Judiciary. On May 4, 1999, the Judiciary Subcommittee on Administrative Oversight and the Courts held a legislative hearing (S. Hrg. 106–465) on the bill, and received testimony from Eleanor D. Acheson, John H. Beisner, Richard A. Daynard, E. Donald Elliot, John P. Frank, and Stephan G. Morrison.

On June 29, 2000, the Judiciary Committee approved S. 353 with an amendment in the nature of a substitute, offered by Chairman Orrin G. Hatch (R–UT), Senators Charles Grassley and Herb Kohl, by a rollcall vote of 11 yeas and 7 nays. S. 353 was then ordered favorably reported by the Committee without additional amendment.

The Senate continued consideration of the Class Action Fairness Act in the 107th Congress when Senator Charles Grassley (R–IA), on November 15, 2001, introduced S. 1712 along with Senators Kohl, (D–WI), Hatch (R–UT), Carper (D–DE), Thurmond (R–SC), Chafee (R–RI), and Specter (R–PA). While S. 1712 contained similar provisions from its predecessor bills, S. 1712 included some new provisions. On July 30, 2002, the Senate Judiciary Committee, which was then chaired by Senator Leahy (D–VT), held a hearing to discuss class actions generally, during which S. 1712 was discussed at length by Committee Members. The committee received testimony from Paul Bland, Thomas Henderson, former Solicitor General Walter E. Dellinger III, (Insurance) Commissioner Laurence Mirel, Shaneen Wahl and Hilda Bankston. No further action was taken on S. 1712 during the 107th Congress.

On February 4, 2003, Senator Charles Grassley (R–IA) introduced S. 274, the "Class Action Fairness Act of 2003." Senators Herb Kohl (D–WI), Orrin Hatch (R–UT), Thomas Carper (D–DE), Arlen Specter (R–PA), Lincoln Chafee (R–RI), and Zell Miller (D–GA) joined the bill as original cosponsors. On April 11, 2003, the Judiciary Committee reported S. 274 favorably, with amendments, after two days of mark-up.

## II. VOTES OF THE COMMITTEE

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each Committee is to announce the results of rollcall votes taken in any meeting of the Committee on any measure or

amendment. The Senate Judiciary Committee, with a quorum present, met on April 10 and 11, 2003 to mark up S. 274. The Committee rejected six amendments and accepted two amendments, one of which was accepted conditionally by unanimous consent.[1] The following rollcall votes occurred on S. 274.

A Feinstein/Hatch/Kohl/Grassley amendment to modify the jurisdictional structure governing whether a class action will be considered in Federal or state court was accepted 11 yeas to 8 nays.

| YEAS | NAYS |
|---|---|
| Grassley | DeWine |
| Specter | Leahy (Proxy) |
| Kyl | Kennedy |
| Sessions | Biden (Proxy) |
| Graham | Feingold |
| Craig (Proxy) | Schumer (Proxy) |
| Chambliss (Proxy) | Durbin |
| Cornyn | Edwards (Proxy) |
| Kohl | |
| Feinstein | |
| Hatch | |

A Durbin amendment to exclude from the Act class action claims relating to tobacco products was rejected 8 yeas to 11 nays.

| YEAS | NAYS |
|---|---|
| DeWine | Grassley |
| Leahy (Proxy) | Specter (Proxy) |
| Kennedy | Kyl |
| Biden (Proxy) | Sessions |
| Feingold | Graham |
| Schumer (Proxy) | Craig (Proxy) |
| Durbin | Chambliss (Proxy) |
| Edwards (Proxy) | Cornyn |
| | Kohl (Proxy) |
| | Feinstein (Proxy) |
| | Hatch |

[1] The Committee approved by unanimous consent a Specter/Feinstein amendment to strike 1332(d)(9)(i) and 1332(d)(i)(ii) from the bill on condition that the Committee would develop compromise language as a substitute before floor consideration of S. 274. The Chairman proposed this solution because the Specter/Feinstein amendment was not circulated in advance of the mark-up, thus giving the Committee little time to consider alternative language. Following the mark-up session, discussions between Judiciary Committee staff for Senators Hatch, Grassley and Specter were held to address Senator Specter's concerns and legislative language was agreed upon, to be included in a manager's amendment on the Senate floor.

A Kennedy amendment to exclude from the Act class action claims relating to civil rights violations was rejected 7 yeas to 11 nays.

| YEAS | NAYS |
|---|---|
| Leahy (Proxy) | Grassley |
| Kennedy | Kyl |
| Biden (Proxy) | DeWine |
| Feingold | Sessions |
| Schumer (Proxy) | Graham |
| Durbin (Proxy) | Craig |
| Edwards (Proxy) | Chambliss (Proxy) |
| | Cornyn |
| | Kohl (Proxy) |
| | Feinstein (Proxy) |
| | Hatch |

A Kennedy amendment to exclude from the Act class action claims relating to firearms injury was rejected 7 yeas to 11 nays.

| YEAS | NAYS |
|---|---|
| Leahy (Proxy) | Grassley |
| Kennedy | Kyl |
| Biden (Proxy) | DeWine |
| Feingold | Sessions |
| Schumer (Proxy) | Graham |
| Durbin (Proxy) | Craig |
| Edwards (Proxy) | Chambliss (Proxy) |
| | Cornyn |
| | Kohl (Proxy) |
| | Feinstein (Proxy) |
| | Hatch |

A Feingold amendment to permit cases that fail to meet federal class action certification requirements to proceed in state court if state certification can be met was rejected 7 yeas to 11 nays.

| YEAS | NAYS |
|---|---|
| Leahy (Proxy) | Grassley |
| Kennedy (Proxy) | Kyl |
| Biden (Proxy) | DeWine |
| Feingold | Sessions |
| Schumer (Proxy) | Graham |
| Durbin | Craig |
| Edwards (Proxy) | Chambliss (Proxy) |
| | Cornyn |
| | Kohl (Proxy) |
| | Feinstein (Proxy) |
| | Hatch |

A Feingold amendment to exclude from the Act class action claims arising from State consumer protection laws was rejected 7 yeas to 11 nays.

| YEAS | NAYS |
|---|---|
| Leahy (Proxy) | Grassley |
| Kennedy (Proxy) | Kyl |
| Biden (Proxy) | DeWine |
| Feingold | Sessions |
| Schumer (Proxy) | Graham |
| Durbin | Craig |
| Edwards (Proxy) | Chambliss (Proxy) |
| | Cornyn |
| | Kohl (Proxy) |
| | Feinstein (Proxy) |
| | Hatch |

A Leahy amendment to exclude from the Act class action claims arising from state environmental protection statutes was rejected 7 yeas to 11 nays.

| YEAS | NAYS |
|---|---|
| Leahy (Proxy) | Grassley |
| Kennedy | Kyl |
| Biden (Proxy) | DeWine |
| Feingold | Sessions |
| Schumer (Proxy) | Graham |
| Durbin (Proxy) | Craig |
| Edwards (Proxy) | Chambliss (Proxy) |
| | Cornyn |
| | Kohl (Proxy) |
| | Feinstein (Proxy) |
| | Hatch |

Motion to report favorably S. 274. The motion was approved 12 yeas to 7 nays.

| YEAS | NAYS |
|---|---|
| Grassley | Leahy (Proxy) |
| Specter | Kennedy (Proxy) |
| Kyl | Biden (Proxy) |
| DeWine | Feingold |
| Sessions | Schumer (Proxy) |
| Graham | Durbin |
| Craig | Edwards (Proxy) |
| Chambliss | |
| Cornyn | |
| Kohl | |
| Feinstein | |
| Hatch | |

## III. PURPOSES

Our current class action system is plagued by numerous problems and abuses that threaten to undermine the rights of both plaintiffs and defendants. One key reason for these problems is that most class actions regardless of their nationwide scope are currently adjudicated in state courts, where the governing rules are

applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements. Moreover, current law enables lawyers to "game" the procedural rules to trap nationwide or multi-state class actions in certain state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests. In this environment, consumers are the big losers: in too many cases, judges are readily approving class action settlements that offer little—if any—meaningful recovery to the class members, and simply enrich class counsel. Often, the settlement notice in such cases is so confusing that the plaintiff class members do not understand what—if anything—the settlement offers, or how they can opt out of it. To make matters worse, multiple class action cases purporting to assert the same claims on behalf of the same people often proceed simultaneously in several different state courts, causing judicial inefficiencies and promoting collusive activity between plaintiffs' attorneys and defendants. Indeed, many state courts freely issue rulings in class action cases that have nationwide ramifications, thus overturning well-established laws and policies of other jurisdictions.

The Class Action Fairness Act of 2003 is a modest, balanced bill to address some of the most egregious problems in class action practice. The Committee emphasizes, however, that the Act is not intended to be a "panacea" that will correct all class action abuses. The Act has three key components:

First, S. 274 includes a consumer class action bill of rights, with multiple components. One element prohibits federal courts from approving coupon or "net loss" settlements without making written findings that such settlements benefit the class members. The bill's notice provisions require that notices be in plain English and easily understandable. These provisions complement recently promulgated rules under the Rules Enabling Act that also seek to improve notices in class actions. Another element requires special scrutiny of settlements in which the named plaintiffs (i.e., the persons who are supposed to be negotiating on behalf of the class) receive special compensation beyond that being given to the other class members. Yet another element of the consumer bill of rights provides an additional mechanism to safeguard plaintiff class members' rights by requiring that notice of class action settlements be sent to appropriate state and federal officials, so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens.

Second, S. 274 corrects a flaw in the current diversity jurisdiction statute (28 U.S.C. § 1332) that prevents most interstate class actions from being adjudicated in federal courts. One of the primary historical reasons 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."[2] Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court. To that end, this bill (a) amends section 1332 to

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

allow federal courts to hear more interstate class actions on a diversity jurisdiction basis, and (b) modifies the federal removal statutes to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts if any of the real parties in interest (including the unnamed class members or the defendants) so desire. Thus, S. 274 makes it harder for plaintiffs' counsel to "game the system" by trying to defeat diversity jurisdiction, increases efficiency of the judicial system by allowing overlapping and "copycat" cases to be consolidated in a single federal court, and places the determination of more interstate class action lawsuits in the proper forum—the federal courts.

Third, S. 274 directs the Judicial Conference of the United States to conduct a review of class action settlements and attorneys' fees and to present Congress with recommendations for ensuring that attorneys' fees are determined in a fair and reasonable way. This provision will help address the problem of excessive attorneys' fees and will provide legislative oversight of the Judicial Conference's efforts in this area.

## IV. Background and Need for Legislation

As set forth in Article III of the Constitution,[3] the Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving persons from multiple jurisdictions, particularly cases in which defendants from one state are sued in the local courts of another state. Interstate class actions—which often involve millions of parties from numerous states—present the precise concerns that diversity jurisdiction was designed to prevent: the potential for local prejudice by the court against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation. Yet, because of a technical glitch in the diversity jurisdiction statute (28 U.S.C. § 1332), such cases are usually excluded from federal court. The glitch is not surprising given that class actions as we now know them did not exist when the statute's concept was crafted in the late 1700s.

This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses, and are thwarting the underlying purpose of the constitutional requirement of diversity jurisdiction. S. 274 addresses these concerns by establishing "balanced diversity"—a rule allowing a larger number of class actions into federal courts, while continuing to preserve primary state court jurisdiction over others.

### *A. A Brief History of Class Actions*

Although class actions have some roots in common law, the general concept was first codified in 1849.[4] Early class actions merely required that numerous parties demonstrate a common interest in law or fact.

Rule 23 of the Federal Rules of Civil Procedure, the rule governing federal court class actions, was initially adopted in 1938.[5]

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[3] In the words of Article III, "[t]he judicial power shall extend * * * to Controversies * * * between citizens of different States."

[4] See Newberg on Class Actions 3d §§ 13–14 to 13–17 (1997).

[5] For a more comprehensive history of Rule 23, see e.g., The Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Administrative Oversight and the Courts of the

Continued

However, the concept of class actions that are a familiar part of today's legal landscape did not arise until 1966, when Rule 23 was substantially amended to expand the availability of the device. Under Rule 23, a class action can be brought in federal court if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, a proponent must show that the proposed class meets one of three additional requirements set forth in Rule 23(b). For example, for a Rule 23(b)(3) damages class action to be certified, a proponent must show 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." [6]

As originally envisioned, class action lawsuits were to be primarily a tool for civil rights litigants seeking injunctions in discrimination cases.[7] Prof. John P. Frank, a member of the 1966 Advisory Committee on Civil Rules that proposed amending Rule 23 to its current form, testified that those who wrote the new class action rule thought it would rarely (if ever) apply to product liability or mass torts cases.[8] In the 1980s, however, some plaintiffs' lawyers successfully persuaded judges to expand class actions to the area of mass torts.[9] These courts began to expand the types of claims they were willing to certify as class actions because they feared that the large number of individual mass tort cases could slow or stop the judicial system.[10] Thus, class actions have evolved from their original primary purpose—to counter civil rights abuses—and have become a common tool for plaintiffs' attorneys bringing personal injury or product liability claims. While the landscape of class actions has changed dramatically, the procedural rules regarding which courts can hear class actions, and con-

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Senate Comm. on the Judiciary, 106th Cong. (1999) (hereinafter "Hearings on S. 353"), Prepared Statement of John P. Frank.

[6] Fed.R.Civ.P. 23(b)(3). Alternatively for a Rule 23(b)(1) class, the class proponent must show that the prosecution of separate actions by or against individual members of the class would create a risk of either (i) inconsistent or varying adjudication which would establish incompatible standards of conduct for the party opposing the class or (ii) adjudications which, as a practical matter, would be dispositive of the interests of the other members not parties to the adjudications or which would substantially impair or impede their ability to protect their ability to protect their interests. Id. at 23(b)(1). To obtain certification of a Rule 23(b)(2) class, the proponent is required to show that "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." Id. at 23(b)(2).

[7] See Hearings on S. 353, Prepared Statement of John P. Frank ("If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.").

[8] Administrative Office of the U.S. Courts, Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 (Vol. 2) ("Advisory Committee Working Papers"), at 260 (1997). Another member of the 1966 Advisory Committee—Hon. William T. Coleman, Jr.—has testified to a similar effect. Id. (Vol. 3), 11/22/96 Public Hearing Tr. at 204 ("I assure you that what the courts have done with respect to Rule 23(b)(3) is far beyond what we * * * ever intended. To the extent that there's difficulty [with class actions, it] is not because of anything that was drafted in 1966, but [because] of how the rule has been handled since that time.").

[9] See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1358 (1995).

[10] Id. at 1356–58, 1363–64.

sequently, which procedural law will apply to such cases, generally have remained the same since 1966.

### *B. Federal Diversity Jurisdiction and Removal Provisions*

#### *1. The basics of diversity jurisdiction*

The Constitution extends federal court jurisdiction to cases of a distinctly federal character—for instance, cases raising issues under the Constitution or federal statutes, or cases involving the federal government as a party—and generally leaves to state courts the adjudication of local questions arising under state law. However, the Constitution specifically extends federal jurisdiction to encompass one category of cases involving issues of state law: "diversity" cases, or suits "between citizens of different States." [11]

According to the Framers, the primary purpose of diversity jurisdiction was to protect citizens in one state from the injustice that might result if they were forced to litigate in out-of-state courts.[12] Quoting James Madison, Judge Henry Friendly explained that diversity jurisdiction is essential to a strong union because it "may happen that a strong prejudice may arise in some state against the citizens of others, who may have claims against them." [13] Justice Frankfurter expressed a similar understanding of Madison's concerns: "It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim." [14]

In addition to protecting individual litigants, diversity jurisdiction has two other important purposes. In testimony several years ago before the Subcommittee on Administrative Oversight and the Courts, Prof. E. Donald Elliott of the Yale Law School expressed the view that diversity jurisdiction was designed not only to protect against actual discrimination, but also "to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents." [15] In addition, several legal scholars have noted that the Framers were concerned that state courts might discriminate against interstate businesses and commercial activities, and thus viewed diversity jurisdiction as a

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[11] U.S. Const. art. III, sec. 2.

[12] See *Pease* v. *Peck*, 59 U.S. (18 How) 595, 599 (1856) ("The theory upon which jurisdiction is conferred on the court of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."); see also *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347 (1816); *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); *Barrow S.S. Co.* v. *Kane*, 170 U.S. 100 (1898) ("The object of the provisions of the Constitution and statutes of the United States in conferring upon the Circuit 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 of the litigant resides."); The Federalist No. 80, at 537–38 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961) ("In order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which 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 on which it is founded.").

[13] H. J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 492–93 (1928).

[14] *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting).

[15] Hearings on S. 353, Prepared Statement of E. Donald Elliott, May 4, 1999; see also, Adrienne J. Marsh, Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts, 48 Brooklyn L. Rev. 197, 201 (1989).

means of ensuring the protection of interstate commerce.[16] As former Acting Solicitor General Walter Dellinger testified last year before the Committee, "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."[17] Both of these concerns—judicial integrity and interstate commerce—are strongly implicated by class actions.

Over the years since the First Congress enacted provisions in the Judiciary Act of 1789 setting forth the parameters of federal diversity jurisdiction, two statutory limitations on that jurisdiction have been constants. The first is the "amount in controversy" requirement (currently $75,000), which Congress enacted in order to ensure that diversity jurisdiction extends only to non-trivial state-law cases.[18] The second is the "complete diversity" requirement, a rule that federal jurisdiction lies only when all plaintiffs are diverse as to all defendants.[19] It is important to recognize that these procedural limitations regarding interstate class actions were policy decisions, not constitutional ones. In fact, the U.S. Supreme Court has repeatedly acknowledged that the complete diversity and minimum amount-in-controversy requirements are political decisions not mandated by the Constitution.[20] Indeed, as Professor Dellinger noted in his testimony before this Committee last year, class action legislation expanding federal jurisdiction over class actions "would fulfill the intentions of the Framers because the rationales that underlie the diversity jurisdiction concept apply with equal—if not greater—force to interstate class actions."[21] It is therefore the prerogative of Congress to modify these technical requirements as it deems appropriate.

*2. How diversity cases arrive in federal court*

A diversity case can be taken to federal court in two ways: (1) by the plaintiffs' initial decision to file the case in federal court, or (2) by the defendants' decision to remove the case to federal court. The concept of "removing" cases from state courts to federal courts is based largely on the same core premise as diversity jurisdiction—i.e., that an out-of-state defendant in a state court proceeding should have access to an even-handed federal forum.[22] The general removal statute, 28 U.S.C. § 1441(a), provides that any civil action brought in a state court may be removed by the defendant(s) to federal court if the claim could have originally been brought in federal court. In other words, so long as a federal district court could exercise original jurisdiction over a claim, a defendant may remove the case to federal court.

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[16] See generally John P. Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Probs. 3, 22–28 (1948); H. J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928).

[17] See Class Action Litigation: Hearing on Class Actions Before the Senate Comm. on the Judiciary, 107th Cong. (2002) (hereinafter "Hearing on Class Actions"), Prepared Statement of Walter E. Dellinger, III.

[18] See 28 U.S.C. § 1332(a).

[19] See *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

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

[21] See Hearing on Class Actions, Prepared Statement of Walter E. Dellinger, III.

[22] See David P. Currie, Federal Jurisdiction 115–116 (4th ed. 1999).

Section 1446(b) of Title 28 outlines the procedure for removal. Under this provision, a defendant must file papers seeking removal to federal court within 30 days after receiving a copy of the initial pleading (or service of summons if a pleading has been filed in court and is not required to be served on the defendant). If the original complaint was not removable, but the plaintiff subsequently amends the pleadings in such a way that removal becomes proper, then the notice of removal must be filed within 30 days of receipt by the defendant of "a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case [is removable]."[23] Under current law, however, a case can only be removed on diversity jurisdiction grounds within a year from commencement of the action.[24]

*C. How Diversity Jurisdiction and Removal Statutes are Abused*

The current rules governing federal jurisdiction have the unintended consequence of keeping most class actions out of federal court, even though most class actions are precisely the type of case for which diversity jurisdiction was created because of their interstate character.[25] In addition, current law enables plaintiffs' lawyers who prefer to litigate in state courts to easily "game the system" and avoid removal of large interstate class actions to federal court.

This gaming problem exists for two reasons. The first reason is the "complete diversity" requirement. Although the Supreme Court has held that only the named plaintiffs' citizenship should be considered for purposes of determining if the parties to a class action are diverse, the "complete" diversity rule still mandates that all named plaintiffs must be citizens of different states from all the defendants.[26] In interstate class actions, plaintiffs' counsel frequently and purposely evade federal jurisdiction in multi-state class actions by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity. For example, it is quite common in insurance cases for plaintiffs to name a few local insurance agents in a nationwide class action against an out-of-state insurance company, even though the vast majority of proposed class members had no dealings with these agents.[27] Similarly, in product liability cases against automobile manufacturers, plaintiffs often name a local dealer even though only a few class members purchased their cars from that dealer.[28] One witness at last year's hearing on class actions testified that her drug store was named as a defendant in "hundreds of lawsuits" so that "the lawyers could keep the case in a place known for its lawsuit-friendly environment."[29] If all it takes to keep a class action in state court is to name one local retailer, it is no surprise that few interstate class actions meet the complete diversity requirement.

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[23] 28 U.S.C. § 1446(b).

[24] Id.

[25] See generally, Victor E. Schwartz, Mark A. Behrens & Leah Lorber, Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform, 37 Harv. J. Legis. 483 (Summer 2000).

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

[27] See, e.g., *Blanke* v. *Lincoln National Corp.,* 1997 U.S. Dist. LEXIS 20384 (E.D. La. Dec. 18, 1997).

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

[29] See Hearing on Class Actions, Prepared Statement of Hilda Bankston.

The second reason that lawyers are able to game the system is the amount-in-controversy requirement. In interpreting 28 U.S.C. § 1332(a), some federal courts of appeals, relying on a 1974 Supreme Court decision,[30] have held that the amount-in-controversy requirement is normally met in class actions only if each of the class members individually seeks damages in excess of the statutory minimum.[31] That means federal courts can only hear class actions in which each plaintiff claims damages in excess of $75,000.[32] The Committee believes that requiring each plaintiff to reach the $75,000 mark makes little sense in the class action context. After all, class actions frequently involve tens of millions of dollars even though each individual plaintiff's claims are far less than that amount. Moreover, class action lawyers sometimes misuse the jurisdictional threshold to keep their cases out of federal court. For example, class action complaints often include a provision stating that no class member will seek more than $75,000 in relief, even though certain class members may be entitled to more and the class action seeks millions of dollars in the aggregate.

This leads to the nonsensical result under which a citizen can bring a "federal case" by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states and alleging claims against a manufacturer that are collectively worth $15 billion currently must usually be heard in state court. In other words, under the current jurisdictional rules, federal courts can assert diversity jurisdiction over a typical state law claim arising out of an auto accident between a driver from one state and a driver from another, but cannot assert jurisdiction over claims covering large-scale, interstate class actions involving thousands of plaintiffs from multiple states, defendants from many states, the laws of several states, and hundreds of millions of dollars.

There is a growing chorus of authoritative sources declaring that something is badly amiss with the manner in which federal diversity jurisdictional requirements are applied to class actions:

• The leading federal civil procedure law treatise has noted: "The traditional principles [regarding federal diversity jurisdiction over class actions] have evolved haphazardly and with little reasoning. They serve no apparent policy and their application to a certain degree turns on a mystifying conceptual test."[33]

• In a recent Minnesota state appellate court decision upholding a grant of class certification, a concurring judge noted that the nationwide class action before the court was a "poster child for na-

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[30] See *Zahn* v. *International Paper Co.,* 414 U.S. 291 (1974).

[31] See *Trimble* v. *Asarco, Inc.,* 232 F.3d 946 (8th Cir. 2000); *Meritcare, Inc.* v. *St. Paul Mercury Ins. Co.,* 166 F.3d 214 (3d Cir. 1999); *Leonhardt* v. *Western Sugar Co.,* 160 F.3d 631 (10th Cir. 1998).

[32] Other federal courts of appeals have held that for a class action to be heard in federal court only one or more named plaintiffs must have claims exceeding $75,000. See, e.g., *Rosmer* v. *Pfizer, Inc.,* 263 F.3d 110 (4th Cir. 2001); *Gibson* v. *Chrysler Corp.,* 261 F.3d 927 (9th Cir. 2001); *Stromberg Metal Works. Inc.* v. *Press Mechanical, Inc.,* 77 F.3d 928 (7th Cir. 2000); *In re Abbott Labs., Inc.,* 51 F.3d 524 (5th Cir. 1995), *aff'd by an equally divided Court,* 529 U.S. 333 (2000); *Allapattah Servs.* v. *Exxon Corp.,* 2003 U.S. App. LEXIS 11628 (June 11, 2003). In the view of these courts, the value of the claims of the other class members is irrelevant—they are deemed to be part of the class as a matter of supplemental jurisdiction. The Committee stresses, however, that even in those Circuits following this rule, relatively few class actions find their way into federal court because plaintiffs offer named plaintiffs who do not have $75,000 claims or name a non-diverse plaintiff or defendant in order to prevent removal of the case to federal court.

[33] 14B Charles A. Wright, et al., Federal Practice and Procedure § 3704, at 127 (3d ed. 1998).

tional class action reform. We have here a Minnesota [state] district court, applying a New Jersey consumer fraud statute to a nationwide class of plaintiffs, with few of those plaintiffs residing in New Jersey. And, it is probably a fair assumption that the legislative authors of the New Jersey consumer protection scheme did not have in mind midwestern farmers purchasing agricultural chemicals as the protected class. * * * This is not a recipe for uniformity or consistency, it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures."[34]

- The U.S. Court of Appeals for the Eleventh Circuit apologized for sending an interstate class action back to state court, noting that "an important historical justification for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court." Observing that the out-of-state defendant in that case was confronting "a state court system [prone to] produce[] gigantic awards against out-of-state corporate defendants," the court stated that "[o]ne would think that this case is exactly what those who espouse the historical justification for [diversity jurisdiction] would have in mind * * *".[35]
- In that same case, Judge John Nangle, the former chairman of the Judicial Panel for Multidistrict Litigation, concurred: "Plaintiffs' attorneys are increasingly filing nationwide class actions in various state courts, carefully crafting language * * * to avoid * * * the federal courts. Existing federal precedent * * * [permits] this practice * * *, although most of these cases * * * will be disposed of through 'coupon' or 'paper' settlements * * * virtually always accompanied by munificent grants of or requests for attorneys' fees for class counsel * * *. [T]his judge is of the opinion that the present [jurisdictional rules] do[] not accommodate the reality of modern class litigation and settlements."[36]
- In another case, Judge Anthony Scirica (chair of the Judicial Conference's Standing Committee on Rules and Procedure) observed that although "national (interstate) class actions are the paradigm for federal diversity jurisdiction because * * * they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises, * * * the current jurisdictional statutes [put] such class actions * * * beyond the reach of the federal courts."[37]
- In a March 26, 2002 letter to the Committee, the Judicial Conference of the United States acknowledges "current problems with class action litigation." Further, in that letter, the Conference for the first time "recognizes that the use of [expanded] diversity jurisdiction may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts."[38]

The Committee notes that a number of congressional hearing witnesses (including former Carter Administration Attorney General Griffin Bell and Clinton Administration Solicitor General Walter E. Dellinger) and other legal experts agree that if Congress

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[34] *Peterson* v. *BASF Corp.,* 657 N.W. 2d 853 (Minn. App. Ct. 2003).
[35] *Davis* v. *Cannon Chevrolet-Olds, Inc.,* 182 F.3d 792, 797 (11th Cir. 1999).
[36] Id. at 798.
[37] *In re Prudential Ins. Co. America Sales Practice Litig.,* 148 F.3d 283, 305 (3d Cir. 1998).
[38] Letter from the Judicial Conference of the United States to Senator Orrin G. Hatch, (R–UT), Chairman of the Senate Committee on the Judiciary. March 26, 2003.

were to draft an entirely new federal diversity jurisdiction statute and start over in deciding which cases should be subject to federal diversity jurisdiction, Congress likely would conclude that interstate class actions are among the cases that most warrant access to the federal courts because they involve the most people, put the most money in controversy, and have the greatest implications for interstate commerce.[39] As Prof. Dellinger noted in his testimony last year before this Committee, "the rationales that underlie the diversity jurisdiction concept apply with equal—if not greater—force to interstate class actions."[40]

*D. Other Abuses With the Class Action Rules*

The ability of plaintiffs' lawyers to evade federal diversity jurisdiction has helped spur a dramatic increase in the number of class actions litigated in state courts—an increase that is stretching the resources of the state court systems. In his testimony to the Subcommittee on Administrative Oversight and the Courts several years ago, Prof. E. Donald Elliott pointed out that the flood of class actions in our state courts is too well documented to warrant significant discussion, much less debate.[41] According to recent studies, federal class action filings over the past ten years have increased by more than 300 percent. At the same time, class action filings in state courts have grown more than three times faster—by more than 1,000 percent.[42]

Notably, many of these cases are being filed in improbable jurisdictions. A recent study conducted in three venues with reputations as hotbeds for class action activity found exponential increases in the numbers of class actions filed in recent years. For example, in the Circuit Court of Madison County, Illinois, a mostly rural county that covers 725 square miles and is home to less than one percent of the U.S. population, the number of class actions filed annually grew from 2 in 1998 to 39 in 2000—an increase of 3,650 percent.[43] And a follow-up study found that the number of class actions filed in the county continued to grow dramatically in 2001 and 2002.[44]

The reason for this dramatic increase in state court class actions cannot be found in variations in class action rules; after all, the rules governing the decision whether cases may proceed as class actions are basically the same in federal and state courts. In fact, thirty-six states have adopted the basic federal class action rule (Rule 23), sometimes with minor revisions. Of the remaining states, most have rules that are guided by federal court class action policy and contain similar requirements. Two states do not have rules or statutes authorizing class actions. Thus, there are no wide variations between federal and state court class action policies.

The Committee finds, however, that one reason for the dramatic explosion of class actions in state courts is that some state court

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[39] See generally Hearing on Class Actions; Hearings on S. 353; Hearing on H.R. 1875.
[40] See Hearing on Class Actions, Prepared Statement of Walter E. Dellinger III.
[41] Hearings on S. 353, Prepared Statement of E. Donald Elliott.
[42] See Analysis: Class Action Litigation—A Federalist Society Survey, Class Action Watch at 5 (Vol. 1, No. 1 1998); Deborah Hensler, et al., Preliminary Results of the Rand Study of Class Action Litigation 15 (May 15, 1997); see also Advisory Committee Working Papers (Vol. 1) at ix–x (May 1, 1997) (memorandum of Judge Paul V. Niemeyer to members of the Advisory Committee on Civil Rules).
[43] See John H. Beisner and Jessica Davidson Miller, They're Making A Federal Case Out Of It * * * In State Court, 25 Harv. J. L. & Pub. Pol'y 1 (Fall 2001).
[44] See John H. Beisner and Jessica Davidson Miller, Class Action Magnet Courts: The Allure Intensifies, 4 BNA Class Action Litig. R. 58 (Jan. 24, 2003).

judges are less careful than their federal court counterparts when applying the procedural requirements that govern class actions. In particular, many state court judges are lax about following the strict requirements of Rule 23 or the state's parallel governing rule, which are intended to protect the due process rights of both unnamed class members and defendants. Alternatively, in a limited few jurisdictions where class action procedures do not exist—and even in some states where they do exist—some judges have nevertheless espoused a willingness to allow curious mass consolidations or mass joinders that are not capable of rigorous class certification rule scrutiny. In contrast, federal courts generally scrutinize proposed settlements more carefully and pay closer attention to the procedural requirements for certifying a matter for class treatment.[45]

Another problem is that a large number of state courts lack the necessary resources to supervise proposed class settlements properly.[46] Many state judges do not have law clerks, and the explosion of state court class actions has simply overwhelmed their dockets. Not surprisingly, abuses are much more likely to occur when state court judges are unable to give class action cases and settlements the attention they need.

The lack of a federal forum for most interstate class actions and the inconsistent administration of class actions in state courts have led to several forms of abuse. The Committee, in drafting this bill, has focused upon six major types of abuses that result in unfair treatment of litigants and consumers. First, lawyers, not plaintiffs, may benefit most from settlements. Second, corporate defendants are forced to settle frivolous claims to avoid expensive litigation, thus driving up consumer prices. Third, constitutional due process rights are often ignored in class actions. Fourth, expensive and predatory copy-cat cases force defendants to litigate the same case in multiple jurisdictions, driving up consumer costs. Fifth, class members frequently are unable to understand their rights when reading class action notice documents, and there is a need to provide them with additional protections from unfairly reached settlements. Sixth, lawyers sometimes structure settlements so that some plaintiff class members unfairly receive additional geography or bounty payments, to the detriment of all other class members.

*1. Lawyers receive disproportionate shares of settlements*

The first abuse involves settlements in which the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves. In the now infamous *Bank of Boston* class action settlement,[47] for example, the defendant bank was accused of over-collecting escrow monies from homeowners and profiting from the interest. The settlement, approved by an Alabama state court, awarded up to $8.76 each to individual class members, while the class counsel got more than $8.5 million in fees. To make matters worse, the fees were simply debited directly from individual class members' escrow accounts, leaving many of them

[45] See Hearings on S. 353, Oral Statement of Senator Charles E. Grassley.

[46] See Hearings on S. 353, Prepared Statement of Stephen G. Morrison ("I think it is clear that the explosion of class action filings can only be attributed to the fact that certain members of the plaintiffs' bar have discovered that some of our state courts can be a fertile playing field for class litigation.").

[47] *Kamilewicz* v. *Bank of Boston,* 92 F.3d 506 (7th Cir. 1996).

worse off than they were before the suit. In testimony before the Subcommittee on Administrative Oversight and the Courts, class member Martha Preston recounted how she received $4 from the settlement, but was charged a mysterious $80 "miscellaneous deduction," which she later learned was an expense used to pay the class lawyers' $8.5 million settlement fee. Ms. Preston expressed her disbelief over how "people who were supposed to be my lawyers, representing my interests, took my money and got away with it."[48]

Through several hearings over the past several years, the Committee has become aware of numerous class action settlements approved by state courts in which most—if not all—of the monetary benefits went to the class counsel, rather than to the class members those attorneys were supposed to be representing. These settlements include many so-called "coupon settlements" in which class members receive nothing more than promotional coupons to purchase more products from the defendants. The record before the Committee is replete with examples, but the common theme is the same: the lawyers get cash, while the plaintiffs get coupons or less. For example:

• In a case involving customers who alleged that they were charged excessive late fees by Blockbuster, the class members received $1 off coupons for rentals—at the same time, their attorneys divided up a $9.25 million fee award. Experts have predicted that at most, only 20 percent of the class members will redeem the coupons. However, the settlement allows Blockbuster to continue its practice of charging customers for a new rental period when they return a tape late.[49] In this settlement approved by a Texas state court, only the lawyers received cash.

• Under a settlement in a class action against American Airlines filed in state court, which resulted from allegations regarding changes in American Airlines' frequent flyer program, members of the program received vouchers good for $25 to $75 off the price of future travel, or a similarly valued reduction in the number of miles required for an award. American agreed to pay the lawyers up to $25 million in fees. One news article about the settlement quoted travel experts saying that "the practical value of those discounts will be modest," and "American could end up generating enough extra revenue to more than offset the cost of the offer."[50]

• A manufacturer offered consumers who bought a dozen Pinnacle golf balls free golf gloves. When the manufacturer ran out of the golf gloves and substituted a set of three free golf balls, it was hit with a class action. The settlement provided that the manufacturer would send each class member three more free golf balls. Meanwhile, by order of a state court, the attorneys who brought the lawsuit received $100,000 in fees and the persons who served as class representatives each received $2,500.[51]

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[48] See Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearing before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary, Serial No. J–105–62 (S. Hrg. 105–504), 105th Cong., 1st Sess. (Oct. 30, 1997), Prepared Statement of Martha Preston.

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

[50] American Airlines Settles Lawsuits Over Frequent Flier Program, Fort Worth Star-Telegram, June 22, 2000.

[51] Enough Already With the Lawsuits, Kansas City Star, July 10, 1999.

• A class action alleged that certain "zip drives" supposedly contained a defect that sometimes caused the failure of the drives or the zip disks. The plaintiffs' attorneys received $4.7 million in fees, while the estimated 28 million purchasers of an Iomega Zip drive between 1995 and March 19, 2001 received coupons for a rebate of between $5 and $40 on future purchases of Iomega products. In addition, the settlement called for the defendant to donate $1 million of its products to schools.[52]

• In a suit involving port charges, a sea cruise line agreed to give vouchers worth $25 to $55 off a future cruise to 4.5 million people who sailed on its cruises between April 19, 1992 and June 4, 1997. The vouchers can be used for a future cruise or redeemed for cash at 15 or 20 percent of face value.[53] In this state court class action settlement, only the lawyers received cash payments.

• In a case alleging flawed television sets, Thomson Consumer Electronics agreed to reimburse customers who had receipts documenting repairs, to provide $50 rebates on the purchase of future products for consumers who did not repair their problems or did not have receipts, and to provide $25 rebates on future products to consumers who did not experience a problem. Thus, those plaintiffs with actual injuries were required to split awards with those without any injury whatsoever. The lawyers reportedly received $22 million in fees and costs.[54]

• In one state court class action involving faulty pipes, lawyers for a group of Alabama plaintiffs received more than $38.4 million in fees, and lawyers for a class of Tennessee plaintiffs received $45 million, or the equivalent of about $2,000 an hour. In contrast, the homeowners only received 8 percent rebates toward new plumbing—and to get those rebates, they had to first prove that they had suffered leaks and then go out and buy a new system.[55]

• In March 1995, a computer manufacturer settled multiple state court class actions alleging a chip flaw that would arise only once in 27,000 years for the average spreadsheet user. It essentially agreed to do what it was already doing: offer free replacements, maintain service centers, operate toll-free phone numbers, and provide diagnostic computer programs. Meanwhile, class counsel received $4.27 million in fees.[56]

• In another case, an Illinois state court approved a coupon settlement of a class action filed against Southwestern Bell Mobile Systems, Inc., alleging that the company failed to fully disclose the fact that it rounded up customer calls to the next minute. Under the state court settlement, the class members received $15 vouchers toward Cellular One products, while the class lawyers took home more than $1 million in fees.[57]

• In a state court class action alleging that Coca-Cola improperly added sweeteners to apple juice, the defendant agreed to distribute

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[52] *Rinaldi* v. *Iomega Corp.* (No. 98C–09–064–RRC, Delaware); Utah-Based Tech Company Settles Lawsuit With Rebate Offer, Standard-Examiner, Apr. 14, 2001.

[53] Carnival Cruise Settles Lawsuit, Florida Today, Mar. 16, 2001.

[54] Thomson Antes Up $100 Million Settlement, Indianapolis Business Journal, Mar. 12, 2001.

[55] See Richard B. Schmitt, Leaky System: Suits Over Plastic Pipe Finally Bring Relief, Especially for Lawyers, Wall St. J., Nov. 20, 1995, at A1.

[56] See The (San Francisco) Recorder, Jan. 4, 1996.

[57] See Michelle Singletary, Coupon Settlements Fall Short, Wash. Post, Sept. 12, 1999, at H01.

50-cent coupons toward the purchase of apple juice. Meanwhile, class counsel received $1.5 million.[58]

• A California state court approved a settlement under which class members, who had alleged that manufacturers misrepresented the size of computer monitor screens, received a $13 rebate if they purchased new monitors. The class attorneys, however, received approximately $6 million in fees.[59]

• The Chicago Tribune reported that in a state court class action against a record company to recover the prices paid for albums by the group Milli Vanilli (that contained the voices of other performers), class members were given a settlement of $1 to $3 each. The Illinois state court awarded the lawyers $675,000, but the lawyers turned around and petitioned the court for an increase to $1.9 million.[60]

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

• In a settlement of a state court antitrust class action involving cellular service, coupons and small service credits were offered. But counsel obtained agreement to be paid up to $9.5 million.[62] Virtually all the cash paid in the settlement went to lawyers.

• In another case, class action plaintiffs alleged that discount stores overstated the value of software bundles that came with computers. In a class settlement approved by a state court, consumers received coupons worth the lesser of a 7 percent or $25 discount off future purchases of products from the defendants' stores. The attorneys received $890,000 in fees.[63]

Examples of abusive settlements in which attorneys receive fees that are disproportionate to any client benefits can be found in both state and federal court; however, such abuses tend to occur predominantly in state court. Too often, the current system results in settlements where only lawyers are rewarded, and plaintiffs are left unprotected.

*2. Judicial blackmail forces settlement of frivolous cases*

The current system also permits the use of the class device as "judicial blackmail" in cases that are clearly frivolous. Such a result drives up prices for all consumers, because corporate defendants are forced to settle these frivolous cases.

Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. The reason for this unbounded leverage in such jurisdictions is because, as a general rule, the question of whether a class is properly certified can only be appealed following a costly, and risky, trial. Thus, the Hobson's choice is to either settle a frivolous suit, or invest in expensive litigation. Consequently, such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather

[58] Lawyers Get $1.5 Million, Clients Get 50 Cents Off, Fulton County Daily Report, Nov. 21, 1997.
[59] Coupon Settlements Fall Short, Washington Post, Sept. 12, 1999.
[60] See $675,000 Approved for Lawyers In Milli Vanilli Lip-Sync Lawsuit, Chicago Tribune, July 24, 1992.
[61] Cereal Plan Called Soggy, National Law Journal, May 22, 1995.
[62] Judge OK's Plan For Class Members, The Recorder, Feb. 24, 1998.
[63] Los Angeles Times, June 8, 1998, at D3. For more examples of coupon settlements, *See* Hearings on S. 353, Prepared Testimony of Stephan G. Morrison.

than litigating—frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool rather than a mechanism that affects the substantive outcome of a lawsuit. Nonetheless, state court judges often are inclined to certify cases for class action treatment, not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial.[64] As Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has explained, "certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability. * * * [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."[65] Hence, when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success.

Not surprisingly, the ability to exercise unbounded leverage over defendant corporations and the lure of huge attorneys' fees have led to the filing of many frivolous class actions. The Committee has learned of several shocking examples of frivolous cases:

• As District of Columbia Insurance Commissioner Lawrence Mirel testified before the Committee last year, insurance companies are often forced to settle lawsuits even though the challenged actions were fully in accordance with state law—or encouraged by state policies.[66] For example, two automobile insurance companies, worried about mounting legal expenses and negative publicity, settled a lawsuit for nearly $36 million over a long-standing industry-wide practice of rounding insurance premiums up to the nearest dollar, even though the premiums were calculated according to specific instructions from the Texas Department of Insurance.[67]

• Within days after the fight in which Mike Tyson bit Evander Holyfield's ear, for example, lawsuits were filed. These were not actions by Holyfield, the only person who really got hurt—they were class actions filed on behalf of pay-per-view cable television subscribers alleging that they did not get their money's worth because the fight was cut short.[68]

• A suit was brought against Ford Motor Company in New York state court by the Milberg Weiss firm, one of the better known plaintiffs' class action firms in the country, that involved an inadvertent mistake made by Ford—it had put a slightly overstated price on the window stickers on certain vehicles. As soon as Ford discovered the mistake, the company began sending letters to the affected customers apologizing for the error and enclosing checks that more than compensated them. Nonetheless, fully knowing that

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

[65] *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1298, 1299 (7th Cir. 1995). See also *Blair* v. *Equifax Check Svcs., Inc.,* 181 F.3d 832, 834 (7th Cir. 1999) ("a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight.").

[66] See Hearings on Class Actions, Statement of Lawrence Mirel.

[67] Id.

[68] Although plaintiffs succeeded in certifying their class in a lower court, the class action was rejected by an appellate court. See *Castillo et al.* v. *Tyson;* No. 3133 (NY Sup. Ct., App. Div., Jan. 20, 2000). See also NY Court Rejects Claim That Boxer's Bite Was A Rip-off, Entertainment Litigation Reporter, February 29, 2000.

this refund program was already well underway, the Milberg Weiss law firm filed a class action lawsuit charging that Ford had committed fraud. Even worse, it asked the court immediately to enjoin Ford from continuing its refund efforts—presumably so that the lawyers could get a cut of the refund money. In this case, the court properly dismissed the action; nonetheless, Ford was required to waste time and corporate resources on a lawsuit that clearly served no legitimate purpose.[69]

*3. Current class action rules can ignore due process rights*

A third type of class action abuse occurs when state courts ignore the due process rights of out-of-state defendants by denying them the opportunity to contest the plaintiffs' claims against them. One expert witness who testified before the Subcommittee on Administrative Oversight and the Courts blamed this phenomenon on a "laissez faire" attitude of some state courts.[70] The most egregious examples of this are the so called "drive-by class certification" cases, in which a class is certified before the defendant has a chance to respond to the complaint, or in some cases, has even received the complaint. The Committee learned of several examples of due process violations, a few of which are listed below.

- In one lawsuit filed against an auto manufacturer in a Tennessee state court, the complaint was filed on July 10, 1996. Plaintiffs filed several inches of documents with their complaint. Amazingly, by the time the court closed that same day, the judge had entered a nine-page order granting certification of a nationwide class of 23 million members. The defendant was not even notified about the lawsuit before the certification and thus had no opportunity to tell its side of the story.[71] The defendant later discovered that a group of record companies had the same experience with the same judge in an antitrust class action filed several days earlier.[72]
- In another case, a Kentucky state court ordered injunctive relief in favor of the class before the defendant was even notified of the lawsuit.[73]
- It is not uncommon for state courts to certify classes in cases where federal courts find that the claims are uncertifiable. In one case, for example, a state court judge certified a nationwide class of persons who claimed that the house siding they had purchased was defective. Later, a federal district court judge presented with the same case rejected any prospect of certifying a class in that manner, finding that affording class treatment in that case would clearly violate the due process rights of the defendants and the purported class members.[74]

Thus, the current system allows the due process rights of defendants to be ignored, with little or no recourse. Such an abuse harms those defendants, consumers, and ultimately a public that relies upon firmly-held constitutional due process rights for an orderly administration of justice by the courts.

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[69] See *Faden-Bayes Corp.* v. *Ford Motor Co.,* Index No. 97–601076 (N.Y. Sup. Ct. County of New York) (filed Feb. 28, 1997).

[70] See Hearings on S. 353, Prepared Statement of John H. Beisner.

[71] Hearings on S. 353, Prepared Statement of Stephen G. Morrison.

[72] Id.

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

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

*4. Copycat class actions clog the courts and permit forum shopping*

Yet another common abuse is the filing of "copy cat" class actions (i.e., duplicative class actions asserting similar claims on behalf of essentially the same people). Sometimes these duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers. In other instances, the "copy cat" class actions result from 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. When these similar, overlapping class actions are filed in state courts of different jurisdictions, there is no way to consolidate or coordinate the cases. The "competing" class actions must be litigated separately in an uncoordinated, redundant fashion because there is no mechanism for consolidating state court cases.

The result is enormous waste—multiple judges of different courts must spend considerable time adjudicating the same claims asserted on behalf of the same people.[75] As a result, state courts and class counsel may "compete" to control the cases, often harming all the parties involved. Class counsel may offer a defendant a "sweetheart deal" in an effort to draw that defendant into a binding settlement so that the counsel can obtain their share of the award. The deal, however, may well be the worst result for plaintiffs. The opposite can also occur, whereby a defendant might seek to entice class counsel with a sham deal that favors the lawyers in order to buy a binding settlement. This "race to the bottom" that copycat cases presents is harmful to class members.

Copycat cases also clog the court system. They involve multiple courts, judicial personnel, and even juries, administering and adjudicating essentially the same claims between the same parties. Such an inefficient result—especially where the likely outcome for the majority of the cases will be dismissal in favor of a single case that settles—takes valuable judicial resources away from other claims working their way through the state court systems.

By contrast to the state courts, when overlapping cases are pending in different federal courts, they can be consolidated under one single judge to promote judicial efficiency and ensure consistent treatment of the legal issues involved. Consequently, the copycat problem does not exist in the federal system.

*5. Inadequate notice and representation harm unnamed class members*

Another problem with current class action procedures is the lack of emphasis placed upon protecting unnamed class members through proper notice procedures. Without proper notice or other protections, consumers can unwittingly be bound by settlements

[75] For example, in the ongoing litigation concerning Firestone tires, approximately 100 virtually identical class actions seeking to represent the same purported class members were filed in courts all over the country. In the recently publicized HMO cases, multiple overlapping class actions were filed against each of the major health insurance companies. No less than 17 class actions have been filed against Humana, most of which assert similar allegations and claims on behalf of similarly defined nationwide classes. In the Humana example, the federal cases were consolidated for pretrial proceedings before a single judge. See *In re Humana Inc. Managed Care Litig.,* 2000 U.S. Dist. LEXIS 5099 (J.P.M.L. Apr. 13, 2000). In the 12 months ending September 30, 2002, over 7,000 federal cases were centralized for pretrial proceedings through the MDL process. There is no parallel methodology for consolidating state court class actions. See *http://www.uscourts.gov/judbus2002/tables/s19sep02.pdf.*

approved in a court thousands of miles away. Too often, consumers find themselves without redress after their legal rights are signed away in a class action settlement without their knowledge.[76]

For example, in one case filed in Chicago but involving mostly Texas class members, notice of a proposed settlement that would have the effect of waiving future rights was published in the New York Times.[77] The notion that these Texas plaintiffs could possibly be adequately notified by a New York Times ad is absurd. Notice must be adequate to inform unnamed class members of the rights they are waiving.

The lack of adequate notice has serious results. In one case in Connecticut, a woman was barred from bringing suit for defective roofing materials because she had been part of a class action in Alabama.[78] Recently, the Vermont Supreme Court held that the *Bank of Boston* settlement was invalid as to Vermont residents because of inadequate notice.[79]

S. 274 addresses this concern not only by improving notice but by introducing state officials into cases to protect unnamed class members. As one witness noted, "[t]he addition of the state attorneys general is a splendid idea; it brings into the proceedings a true representative of the public, someone who is not simply trying to make money out of the situation."[80] Examples of the need for state officials to be involved in such proceedings are commonplace. For example, unrepresented plaintiffs in the *State Farm* case, discussed throughout this report, would have greatly benefited from the involvement of the various state insurance commissioners who could have advised the court of their states' particular insurance laws dealing with less expensive aftermarket parts. Likewise, Vermont citizens in the *Bank of Boston* matter would have benefited from the Vermont Attorney General's involvement in the Alabama case. The Vermont State Supreme Court subsequently found that case to be a violation of its citizens' due process rights.[81] The Constitution's Full Faith and Credit clause requires states to honor the decisions of other states' courts. For this reason, the Vermont Supreme Court was forced to attempt to unravel a settlement after it had been finalized, and was required to identify constitutional grounds in order to do so. Thus, adequate notice and other protections prior to finalizing a settlement for unnamed class members are critical.

*6. Bounties and geographic discrimination harm unnamed class members*

Bounty payments for class members—the practice of paying class representatives just for agreeing to be named in the suit—present a serious conflicts-of-interest problem because the representatives, who are supposed to guard the interests of all class members, may be self-interested at the prospect of a big payday. These payments "raise[], at the very least, the specter of apparent collusion, as well

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[76] *State of Vermont* v. *Homeside Lending, Inc., and BankBoston Corporation,* 2003 VT 17 (Feb. 21, 2003).
[77] Hearing before the Committee on the Judiciary, July 31, 2002, page 9.
[78] *Rigat* v. *GAF Materials Corp.,* 2002 Conn. Super LEXIS 272 (Jan. 25, 2002).
[79] *State of Vermont* v. *Homeside Lending, Inc., and BankBoston Corporation,* 2003 VT 17 (Feb. 21, 2003).
[80] Hearing before the Subcommittee on Administrative Oversight and the Courts, May 4, 1999, page 169.
[81] *Homeside Lending,* 2003 VT 17.

as grave conflicts of interest between the named plaintiffs and class members."[82] Thus, at best, "the class representative 'has been reduced to little more than an admission ticket to the courthouse and one anecdotal example of the class claim.' "[83] At worst, the class representative is at odds with other class members over the course of the litigation. Indeed, as one court noted, "[a] class representative is a fiduciary to the class. If class representatives expect routinely to receive special awards * * * they may be tempted to accept suboptimal settlements at the expense of the class. * * *"[84]

The results of this conflict can been seen in cases where unnamed members get little benefit from a settlement, but named class members get big bonuses. For example, in a recent case involving potential computer defects, a settlement resulted in coupons for all class members except the two named plaintiffs who received $25,000 each. It is no surprise that these representatives agreed to this settlement regardless of how it affected other class members.[85] Similarly, in a settlement where most class members received just three golf balls, the class representatives were awarded $2,500 each.[86] That's a pretty good payday for these "victims" whose sole injury missing out on the free golf gloves in a promotion undertaken by the defendant.

Another inequity that could result from the current system is geographic discrimination—where local plaintiffs are awarded a bigger chunk of settlement proceeds merely by virtue of their proximity to the courthouse. The problem exists because locally elected judges may be willing to direct a greater share of awards to their voting constituents. Such a result is clearly improper, and is unfair to other injured class members. As one witness described this favorable treatment of local plaintiffs, it is "the worst sort of 'home cooking' that is fostered by the existing system."[87] This is yet another inequity under the current system that needs to be eliminated.

### *E. National Class Actions Belong in Federal Court Under Traditional Notions of Federalism*

Many of the abuses taking place in state courts are magnified by the growing trend among plaintiffs' attorneys to bring huge class actions on behalf of hundreds of thousands or even millions of consumers. These cases, which generally involve overly broad claims, put any class members with real injuries at risk. The incentive for class lawyers to gather the largest class possible is clear: why sue on behalf of just 1,000 people when you can sue for 1 million claimants and increase your intake? The problem with such broad claims, however, is that the entire lawsuit proceeds on a lowest common denominator basis. As a result, persons with legitimate injuries will be lumped in with the "average," often meritless claims

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[82] J. Benedict and M. Seidel, *Special Compensation to Named Plaintiffs in Securities Class Actions,* 24 Review of Securities & Commodities Regulation 195, 200 (Nov. 13, 1991).

[83] Hearing before the Subcommittee on Administrative Oversight and the Courts, May 4, 1999, page 78. J. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions,* 42 Hastings L.J. 165, 166 (1990).

[84] *Weseley* v. *Spear Leeds & Kellogg,* 711 F. Supp. 713, 720 (E.D.N.Y. 1989).

[85] See *Shaw* v. *Toshiba America Information Systems, Inc.,* No. 1:99CV1020 (E.D. Tex.).

[86] See Heaster, Enough Already with the Lawsuits, Kansas City Star, July 10, 1999 at C1.

[87] Testimony of Lawrence H. Mirel, Hearing before the Committee on the Judiciary, July 31, 2002.

and will not be given individual attention for their grievances.[88] Conversely, when only a few of the plaintiffs have legitimate claims, but nevertheless a class action is certified, the defendant is frequently denied a fair trial because a jury is likely to improperly attribute the injuries of the few to the many.

The effect of class action abuses in state courts is being exacerbated by the trend toward "nationwide" class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles.[89] A recent study found that 77 percent of class actions brought in 2001 in a rural Illinois county known for its heavy class action docket sought to certify nationwide classes.[90] These cases challenged matters as diverse as MTBE in wells, telephone billing practices, chicken processing procedures, and insurance reimbursement policies. Clearly, a system that allows state court judges to dictate national policy on these and other issues from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism. In one case, for example, plaintiffs filed suit in an Alabama county court on behalf of more than 20 million people alleging that the design of federally mandated airbags is faulty.[91] From the standpoint of federalism, this suit defies logic. Why should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their cars?

The most egregious of such cases are those in which one state court issues nationwide rulings that actually contradict the laws of other states. This problem is particularly prevalent in insurance cases, which are being filed in increasingly greater numbers. As District of Columbia Insurance Commissioner Lawrence Mirel testified before this Committee last year, class actions "frequently go[] around or simply ignore[] the role of state regulators."[92]

One case reported in the New York Times, for example, involved a longstanding practice of the State Farm Insurance Companies (shared by other insurers) of using non-original equipment manufacturer (OEM) parts to repair cars.[93] The practice was fully disclosed to policyholders, and the majority of states expressly permit insurers to specify non-OEM parts. Indeed, two states, Hawaii and Massachusetts, actually require the specification of non-OEM parts. Nonetheless, plaintiffs brought suit in Illinois state court claiming that all non-OEM parts used by policyholders were inferior to OEM parts, and that State Farm had breached its contractual obligation to policyholders and committed fraud each time it specified such parts. Even though the plaintiffs eventually dropped their claim that all non-OEM parts were inferior, and conceded that this could only be determined on a part-by-part basis, the trial court still permitted the jury to reach a group judgment on the class action. The court was not even deterred by the fact that the plaintiffs in the class came from states throughout the nation with

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[88] See Hearings on S. 353, Prepared Statement of John H. Beisner.
[89] See Hearings on S. 353, Prepared Statement of John H. Beisner.
[90] See John H. Beisner and Jessica Davidson Miller, Class Action Magnet Courts: The Allure Intensifies, 4 BNA Class Action Litig. R. 58 (Jan. 24, 2003).
[91] See *Smith* v. *General Motors Corp., et al.,* Civ. A. No. 97–39 (Cir. Ct. Coosa County, AL).
[92] See Hearing on Class Actions, Prepared Statement of Lawrence Mirel.
[93] Suit Against Auto Insurer Could Affect Nearly All Drivers, N.Y. Times, Sept. 27, 1998, at 29.

widely varying laws regarding the use of non-OEM parts, including the two states—Hawaii and Massachusetts—that strongly embraced the very practice condemned by plaintiffs.[94] Indeed, in affirming a $1.3 billion verdict against State Farm in this case, an Illinois state appellate court acknowledged that it had disregarded "state insurance commissioners [w]ho testified that the laws of many of our sister states permit and in some cases * * * [even] encourage" usage of non-OEM parts.[95]

The *State Farm* case is not unique. This state court interference with the laws of other jurisdictions is becoming disturbingly common. For example:

- Just recently an Ohio court determined that it was appropriate to apply Ohio's laws to a laundry list of claims asserted against a plumbing company by a nationwide class of plaintiffs, holding that all fifty states essentially have the same laws with regard to fraud and unjust enrichment cases.[96]
- The Supreme Court of Oklahoma recently affirmed the certification of a nationwide product liability class action, applying the laws of a single state to transactions that occurred in all 50 states.[97] Thus, in this case, a state court has decided effectively to override whatever policy determinations another state's legislature or courts may have made on warranty or product liability policy to protect their own residents.
- The Minnesota Court of Appeals recently affirmed a nationwide class action where the plaintiffs alleged fraud in the marketing of an herbicide, in which the court applied the laws of a single state to transactions that occurred in many different jurisdictions (and virtually none of which occurred in the state whose laws were applied).[98] One judge who decided the case openly acknowledged that the court was engaging in the "false federalism" that has become part of the state court class action game.[99]
- A few years ago, a state trial court in Minnesota approved for class treatment a case involving millions of claimants from 44 states that would have had the effect of dictating the commercial codes of all those states.[100] The specific issue in the case was whether individuals have a state law right to recover interest on refundable deposits paid to secure an automobile lease. In certifying a class in that case, the court adopted an understanding of Minnesota's version of the Uniform Commercial Code that was contrary to the interpretation of every other state to have considered the issue under their own versions of the UCC. By certifying the class, the court decided that its unprecedented interpretation of the UCC would bind the remaining 43 states that had yet to decide the question (even though the "Uniform Commercial Code is not uniform" and is interpreted differently in different states[101]). In essence, the action of the Minnesota court proposed to dictate the in-

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[94] See *Snider* v. *State Farm Mutual Automobile Insurance Co.,* Cir. Ct. for Williamson City., IL, Docket No. 97–L–114 (1999).

[95] *Avery* v. *State Farm Auto. Ins. Cos.,* 746 N.E.2d 1242, 1254 (Ill. Ct. App. 2001).

[96] See Opinion and Order Granting Class Certification, *Linn* v. *Roto-Rooter, Inc.,* No. CV–467403 (Court of Common Please, Ohio, February 23, 2003).

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

[98] *Peterson* v. *BASF Corp.,* 657 N.W.2d 853 (Minn. App. Ct. 2003).

[99] Id. at 875.

[100] *Rosen* v. *PRIMUS Automotive Fin. Servs., Inc.,* No. CT 98–2733 (Minn. D. Ct., 4th Jud. Dist., May 4, 1999).

[101] *Walsh* v. *Ford Motor Co.,* 807 F.2d 1000, 1016–17 (D.C. Cir. 1986).

terpretation of 43 other states' UCC provisions even though the other states might well have reached a different conclusion in applying their own state's laws.

The sentiment reflected in these cases flies in the face of basic federalism principles by embracing the view that other states should abide by the deciding court's law whenever it determines that its own laws are preferable to other states' contrary policy choices. Indeed, such examples of judicial usurpation, in which one state's courts try to dictate its laws to 49 other jurisdictions, have been duly criticized by some congressional witnesses, including former Clinton Solicitor General Walter Dellinger, as "false federalism."[102] When this occurs, is poses serous problems for the courts of other states. For example, as noted earlier, the Vermont Supreme Court recently nullified an Alabama court's approval of the *Bank of Boston* case as it applied to Vermonters because it violated due process.[103]

Given the range and severity of class action abuse, it is not surprising that defendants frequently find it necessary to remove class actions against them to a federal forum—a forum where the threat of prejudice is significantly lower. Under current law, however, plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level. As noted above, the two most common tactics employed by plaintiffs' attorneys in order to guarantee a state court tribunal are: adding parties to destroy diversity and shaving off parties with claims for more than $75,000. It is not rare to see complaints in which plaintiffs sue several major corporations and then add one local supplier or dealer as a defendant merely to defeat diversity.[104] Other complaints seek $74,999 in damages on behalf of each plaintiff or explicitly exclude from the proposed class anybody who has suffered $75,000 or more in damages.[105]

The Committee believes that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy. By enabling federal courts to hear more class actions, S. 274 will help to minimize the class action abuses taking place in state courts and to ensure that these cases can be litigated in a proper forum.

*F. The Support for This Bill Is Unprecedented*

The class action abuse problem has hit critical mass. Like never before, the public, the media, and experts agree that the nation's class action system is seriously broken, and that current practices are far from what the Framers envisioned. A recent study commissioned by the United States Chamber of Commerce found unprecedented support for class action reform. Major media outlets have editorialized in favor of reform and, in many instances, in favor of this very legislation. Further, despite the contrary claims of the in-

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[102] See Interstate Class Action Jurisdiction Act of 1999: Hearing on H.R. 1875 Before the House Comm. on the Judiciary, 106th Cong. (1999) (hereinafter "Hearing on H.R. 1875), Prepared Statement of Walter E. Dellinger III.

[103] See *State of Vermont* v. *Homeside Lending, Inc. and BankBostonCorporation,* 2003 VT 17 (Vt. 2003).

[104] See Hearings on S. 353, Prepared Statement of Stephen G. Morrison.

[105] Id.

creasingly dwindling ranks of critics, the Judicial Conference of the United States has recently embraced the notion of expanded federal jurisdiction for class actions. Likewise, the American Bar Association now recognizes that federal jurisdiction for selected class actions is the right fix for the growing problem of abuses. Below is a sampling of the public and expert support this reform effort enjoys.

• An overwhelming number of Americans have been personally affected by class action lawsuits, and the majority were disappointed by the results. 50 percent have received a notice in the mail that they may be a party to a class action lawsuit. Of these, 30 percent have taken the steps necessary to participate in the lawsuit. Of those who took the steps, 53 percent report that they didn't receive anything of meaningful value.[106]

• Americans believe that their legal system is in need of reform. 44 percent think it is in need of major reform; 45 percent think it needs minor reform; while only 7 percent think it needs no reform at all.[107]

• According to a USA Today poll, 67 percent of those polled believe that class actions most benefit the lawyers, and only 9 percent believe that the plaintiffs benefit most.

• Numerous newspapers have expressed support for legal reform of the abusive class action system, including: The Washington Post, The Wall Street Journal, the Chicago Tribune, Financial Times, USA Today, The Christian Science Monitor, the Akron (Ohio) Beacon Journal, the Albany (New York) Times-Journal, The Buffalo (New York) News, The Des Moines Register, The Jacksonville (Florida) Times-Union, The Cedar Rapids (Iowa) Gazette, The Everett (Washington) Herald, The Indianapolis Star, King County (Washington) Journal, The Las Vegas Journal-Review, The Lincoln (Neb.) Journal-Star, The Santa Fe New Mexican, The St. Louis Post-Dispatch, Newsday (Long Island, New York), Northwest Arkansas Business Journal, The Odessa (Texas) American, The Omaha World-Herald, The Orlando Sentinel, The (Portland) Oregonian, The Providence (Rhode Island) Journal, and The Tyler (Texas) Morning Telegraph.

• The Judicial Conference of the United States, in a March 26, 2003 letter to the Committee, "recognize[d] that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in federal courts." The Conference encourages Congress to include limitations such as a heightened jurisdictional threshold, a role for the states for in-state class actions, and like limitations. This bill reflects those considerations in its discretionary remand section.

• In February of 2003, the House of Delegates of the American Bar Association adopted a resolution acknowledging problems with the class action system and supporting expanded federal jurisdiction to fix abuses with the system.

• The Department of Justice has expressed support for the House class action bill (H.R. 1115).

• Clinton Administration Solicitor General Walter Dellinger has testified before the Congress in support of expanded federal juris-

[106] Penn, Schoen & Berland Associates 2003 Chamber of Commerce poll.
[107] Id.

diction to curb class action abuses, and, in particular, to restore the Framers' intention that federal courts have jurisdiction over large inter-state cases.

## V. How S. 274 Works

S. 274 is a modest step toward addressing a number of the problems and abuses in the current class action system. First, S. 274 implements a consumer bill of rights that requires greater scrutiny of coupon and net loss settlements, and regulates "bounty" payments to class representatives and class members who are geographically located near the court. S. 274 also implements additional notice requirements to better inform plaintiff class members about: (a) the terms of a class action settlement, (b) the rights they will forfeit as members of the class, (c) the obligations the settlement agreement places on the defendants, and (d) the amount of attorneys' fees that will be awarded to counsel representing their interests. Furthermore, S. 274 provides an additional mechanism to safeguard plaintiff class members' rights by requiring class counsel to provide appropriate state and federal officials with notice of class action settlements, so that the state and federal governments have the opportunity to intervene in a case if they feel that a class action settlement is not in the best interests of their citizens.

Second, S. 274 modifies diversity jurisdiction and removal rules so that larger interstate class actions can be heard in federal court. In doing so, the Act also makes it harder for plaintiffs' counsel to "game the system" by inappropriately keeping class actions in state courts where certain judges are quick to certify a class regardless of due process concerns or to approve a settlement regardless of the fairness to class members. Moreover, the Act improves the efficiency of the judicial system by enabling overlapping and "copycat" cases to be consolidated in a single federal court, rather than allowing them to proceed in numerous state courts as does the current system. However, the bill ensures that matters principally involving single state issues and parties will continue to proceed in that state's courts.

Finally, S. 274 addresses the problem of unfair settlements and excessive attorneys' fees by directing the Judicial Conference of the United States to conduct a review of class action settlements and attorneys' fees and to present Congress with recommendations to improve the system.

### *A. Consumer Bill of Rights*

S. 274 contains a number of provisions to protect class members from unfair settlements and to better inform them of their rights in class action cases. For example, S. 274 requires greater scrutiny of coupon and other noncash settlements; such settlements are prohibited absent written findings by the court that they benefit the class members. This provision will protect consumers against the abusive practices that allow lawyers to enrich themselves while ignoring meaningful relief for the parties who were actually injured.

S. 274 also requires careful oversight of the payment of "bounties" to class representatives and of extra compensation to members of a class who live closer to the court. This provision will protect unnamed class members from having to unnecessarily share their awards, and will end the practice of unscrupulous lawyers

finding a perceived wrong, then shopping for a client. The Committee heard testimony about a consortium of class action lawyers that would meet to strategize and search for cases to bring long before they had an actual plaintiff on whose behalf to sue.[108] In order to better protect class members, S. 274 amends the class action rules by requiring that class counsel serve appropriate state and federal officials with notice of a proposed settlement. This notice must occur no later than 10 days after the proposed settlement is filed in federal court.

The notice to the appropriate officials would include: (1) a copy of the complaint and amended complaints, unless those materials are available through the Internet and the notice includes directions on how to access the materials on-line; (2) notice of any scheduled judicial hearing in the class action; (3) proposed or final notification to class members of their right to be excluded from the class; (4) any proposed or final class action settlement; (5) any settlement made between class counsel and defendants' counsel; (6) any final judgment or notice of dismissal; and (7) the names of the class members who reside in each respective state and the proportionate claims of such members. The designated officials would then have at least 90 days to review the proposed settlement before a court gives a settlement final approval.

Nothing in this section creates an affirmative duty for either the state or federal officials to take any action in response to a class action settlement. Moreover, nothing in this section expands the current authority of the state or federal officials. The purpose of this notice provision is to protect citizens of one state from unfair rulings by another state, such as the Alabama settlement in the *Bank of Boston* case that the Vermont Supreme Court held violated due process. Generally, under the Constitution's full faith and credit clause, one state court is bound by another court's decisions. Thus, absent a finding like the one made by the Vermont Supreme Court, consumers are bound by settlements reached before other state courts. S. 274 would help protect consumers from being bound by unfair out-of-state settlements by enabling state officials to inject themselves into federal class actions to protect their citizens, prior to a judgment being rendered, rather than having multiple states try to undo an unfair settlement after the fact.

S. 274 also aims to help class members better understand their rights in a class action, by requiring that any notice provided to class members explain in plain, easily understood language: (1) the subject matter of the class action; and (2) the legal consequences of being a member of the class action. In addition, if the notice involves a proposed settlement, it must explain, also in plain, easily understood language: (1) the benefits a settlement will offer the class; (2) the rights a plaintiff would waive through settlement; (3) the obligations a defendant would incur in the proposed settlement; and (4) the amount of the attorneys' fees or a good faith estimate of the fees being sought, and an explanation of how the fees will be calculated.

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[108] See Class Action Lawsuits—Examining Victim Compensation and Attorney's Fees: Hearing before the Subcomm. on Administrative Oversight and the Courts, Senate Comm. on the Judiciary, Serial No. J–105–62 (S. Hrg. 105–504), 105th Cong., 1st Sess. (Oct. 30, 1997), Prepared Statement of Lewis Goldfarb; Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, Serial No. 141, 105th Cong., 2d Sess. (Mar. 5, 1998), Prepared Statement of Dick Thornburgh.

The Committee believes that improved notice requirements will create a better informed plaintiff class. Not only will plaintiffs be able to more effectively monitor their own case, but the notice provisions will provide an effective deterrent against many of the types of abuse taking place in class action litigation.

The Committee is aware that pursuant to the Rules Enabling Act, the U.S. Supreme Court recently transmitted to Congress several amendments to Rule 23 of the Federal Rules of Civil Procedure.[109] Several of those amendments reflect very thoughtful efforts by the Judicial Conference of the United States, the Standing Committee on Rules and Procedure, and the Advisory Committee on Civil Rules to address this same issue of clarity of notices to class members. In reviewing those amendments carefully, the Committee believes that the notice-related provisions of S. 274 and the proposed amendments to Rule 23 are complementary.

S. 274 also requires that radio, television or Internet notice informing class members of their right to be excluded from a settlement must explain in plain, easily understood language who may be a member of the class and that class members will be subject to the class action or settlement unless they take steps to exclude themselves.

*B. Diversity Jurisdiction and Removal*

S. 274 amends the diversity jurisdiction and removal statutes applicable to larger interstate class actions. S. 274 modifies 28 U.S.C. § 1332 to incorporate the concept of balanced diversity. The bill grants the federal courts original jurisdiction to hear interstate class action cases where (a) any member of the proposed class is a citizen of a different state from any defendant and (b) the $5 million jurisdictional amount requirement (taking account of all claims of all purported class members in the aggregate, exclusive of interest and costs) is satisfied, and (c) the case involves a class of 100 or more members.

Under current law, the threshold dollar amount for bringing a federal class action varies. In some jurisdictions, so long as one class member suffered over $75,000 in damages, federal jurisdiction is satisfied if diversity is otherwise satisfied.[110] In other jurisdictions, all class members must satisfy the $75,000 jurisdictional threshold.[111] Thus, a curious disparity results: in some jurisdictions, if the named class member suffered $75,001 in damages, and no other class member suffered financial injury, the case could go to federal court. Yet in other jurisdictions, if a number of class members suffer millions in damages, yet a few do not satisfy the $75,000 threshold, the case cannot go to federal court. S. 274 draws a reasonable line, avoiding arbitrary and rigid requirements for individual class members, while focusing on the total amount in controversy in an effort to target large, national cases.

The bill, however, includes several provisions intended to ensure that state courts can adjudicate class actions that are truly local in nature, by restricting the right to remove some class actions brought in a defendant's home state. Under these provisions, class

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[109] See Amendments to Federal Procedure Rules, 71 U.S.L.W. 4253, 4254–55 (U.S. Apr. 1, 2003) (Supreme Court order amending rules pursuant to Rules Enabling Act).

[110] See *Rosmer* v. *Pfizer, Inc.,* 263 F.3d 110 (4th Cir. 2001).

[111] See *Trimble* v. *Asarco, Inc.,* 232 F.3d 946 (8th Cir. 2000).

actions filed in the home state of the primary defendants would automatically be subject to federal jurisdiction if less than one-third of the class members were citizens of that state. Conversely, if two-thirds or more of the class members are from the defendant's home state, the case would not be subject to federal jurisdiction. For cases brought in a defendant's home state in which between one-third and two-thirds of the class members were citizens of that state, federal jurisdiction would also exist; however, a federal judge could decline to exercise that jurisdiction based on consideration of five factors designed to help assess whether the claims at issue are indeed local in nature.

S. 274 also excludes from its federal jurisdiction grant: (1) class actions involving fewer than 100 plaintiff class members and (2) class actions in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief. S. 274 also exempts from its diversity jurisdiction and removal reforms any securities class action cases covered by the Securities Litigation Reform Act and corporate governance cases.

In order to better protect the rights of all class members and parties, S. 274 creates four new rules regarding the removal of class actions filed in state court. First, unnamed plaintiff class members would be able to remove class actions to federal court. Second, parties would be able to remove a class action to federal court without the consent of any other party. Third, any plaintiff or defendant would be able to remove a class action to federal court, regardless of whether that party is a citizen of the state in which the action was brought. And fourth, the current ban on removal of a class action to federal court after one year would be eliminated, although the requirement that removal occur within 30 days of notice of grounds for removal would be modified and retained. This last provision protects against the abusive practice of manipulating, and then amending, pleadings to aid plaintiffs' counsel in forum shopping.

In addition, S. 274 provides that a federal court must dismiss a class action without prejudice if it finds that the removed class action does not meet the requirements for proceeding on a class basis under Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs could then amend and refile their complaint in state court; however, the refiled case would once again be eligible for removal if original federal jurisdiction exists.

S. 274 also addresses statutes of limitations issues in two ways. First, if plaintiffs file a class action in state court and the case is then removed to a federal court, which dismisses it for failure to meet the requirements of Rule 23, the statute of limitations would not run for the period that the dismissed class action was pending in either court, provided the case is refiled in the same state court by at least one of the original named plaintiffs. Second, if a removed class action is dismissed by a federal court for failure to meet the requirements of Rule 23, the statute of limitations will not have been tolled with regard to any individual actions later brought by members of the dismissed class, regardless of where such individuals choose to sue.

*C. Report on Class Action Settlements*

In order to assist Congress in its oversight of class action settlements, S. 274 directs the Judicial Conference of the United States, with the assistance of the Federal Judicial Center and Administrative Office of the United States Courts, to prepare a report on class action settlements to be transmitted to the House and Senate Judiciary Committees. The report will include recommendations on best practices to ensure the fairness of proposed class action settlements for class members, recommendations on best practices to ensure the appropriateness of attorneys' fees and expenses, and a discussion of any actions taken or planned by the Judicial Conference to implement the recommendations in the report.

## VI. SECTION-BY-SECTION ANALYSIS

*Section 1.*—Section 1 establishes the "Class Action Fairness Act of 2003" as the short title of the bill.

*Section 2.*—Section 2 sets forth findings and purposes. The Committee is concerned that there have been abuses of the class action device over the last decade that have hurt consumers, adversely affected interstate commerce, and undermined public respect for our judicial system. In particular, the Committee is concerned about class actions that do little to benefit—and sometimes actually harm—the class members who are supposed to be the beneficiaries of such cases, while enriching their lawyers. The Committee is also concerned that this problem is exacerbated by confusing notices that make it difficult for class members to understand and effectively exercise their rights. Taken together, the Committee believes that such abuses hurt consumers by resulting in higher prices and less innovation, and that they undermine the principles of diversity jurisdiction, which were established by the Framers to promote interstate commerce.

The purposes of the Act are therefore to assure fair and prompt recoveries for class members with legitimate claims; to restore the intent of the Framers by expanding federal jurisdiction over interstate class actions; and to benefit society by encouraging innovation and lowering consumer prices.

*Section 3.*—Section 3 sets forth a "Consumer Class Action Bill of Rights" to help ensure that class actions do not hurt their intended beneficiaries. This section is intended to address a number of common abuses that were discussed by witnesses at class action hearings and have been reported on in the press—and to encourage greater judicial scrutiny of proposed class action settlements.

Abusive class action settlements in which plaintiffs receive promotional coupons or other nominal damages while class counsel receive large fees are all too commonplace. The risk of such abusive practices is particularly pronounced in the class action context because these suits often involve numerous plaintiffs, each of whom has only a small financial stake in the litigation. As a result, few (if any) plaintiffs closely monitor the progress of the case or settlement negotiations, and these cases become "clientless litigation," in which the plaintiff attorneys and the defendants have "powerful financial incentives" to settle the "litigation as early and as cheaply

as possible, with the least publicity."[112] These financial incentives create inequitable outcomes. "For class counsel, the rewards are fees disproportionate to the effort they actually invested in the case * * * For society, however, there are substantial costs: lost opportunities for deterrence (if class counsel settled too quickly and too cheaply), wasted resources (if defendants settled simply to get rid of the lawsuit at an attractive price, rather than because the case was meritorious), and—over the long run—increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers."[113]

New section 28 U.S.C. §1712 requires federal courts, before approving a proposed settlement that involves non-cash benefits or that would require class members to expend money in order to obtain benefits, to hold a hearing and make written findings that the settlement is fair, reasonable and adequate for class members. The purpose of this provision is to ensure that non-cash settlements provide real benefits to class members, consistent with the strength and validity of the claims that are proposed for settlement. This provision is intended to apply, for example, to cases in which the settlement provides coupons, requiring consumers to buy a product from the offending company at a nominally reduced price. This section is intended to address the rapidly increasing volume of class settlements in which consumers receive little or no benefit and attorneys are awarded substantial compensation. The Committee wishes to make clear that it does not intend to forbid all non-cash settlements. Such settlements may be appropriate where they provide real benefits to consumer class members (e.g., where coupons entitle class members to receive something of actual value free of charge) or where the claims being resolved appear to be of marginal merit. However, where such settlements are used, the fairness of the settlement should be seriously questioned by the reviewing court where the attorneys' fees demand is disproportionate to the level of tangible, non-speculative benefit to the class members. In adopting this provision, it is the intent of the Committee to incorporate that line of recent federal court precedents in which proposed settlements have been wholly or partially rejected because the compensation proposed to be paid to the class counsel was disproportionate to the real benefits to be provided to class members.[114]

New section 28 U.S.C. §1713 prohibits federal courts from approving a proposed settlement under which class members would be required to pay class counsel a sum of money that results in a net loss (as occurred in the *Bank of Boston* case, discussed above), unless the court makes a written finding that nonmonetary benefits to the class members substantially outweigh the monetary loss.

New section 28 U.S.C. §1714 prohibits federal courts from approving proposed settlements that provide for payment of greater sums to certain class members based on where they reside. The

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[112] Deborah Hensler, et al., Class Action Dilemmas, Pursuing Public Goals for Private Gain 10 (1999) (executive summary).

[113] Id.

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

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

New section 28 U.S.C. § 1715(a) prohibits the payment of "bounties" to class representatives. In a class action, a class representative has the responsibility of making decisions on behalf of the putative class regarding the litigation. In making such decisions, the class representative has a fiduciary duty to represent the interests of all class members and to avoid self-dealing in any respect. The Committee is concerned that in negotiating settlements on behalf of the class, the capacity of class representatives to negotiate separate deals for themselves may be inconsistent with that fiduciary obligation. Where class representatives are awarded relief in excess of what is provided to other class members in a settlement, there is an appearance that the fiduciary duty has been breached—that the class representative may have been less than zealous in representing the class interests in order to secure personal compensation for himself or herself from the defendant. This provision is intended to ensure that no breaches of this fiduciary duty occur and that there be no appearance of such breaches. Nevertheless, the Committee is aware that because of the burdens involved in being a class representative, there is a risk that legitimate claims may not be brought because of the unwillingness of any class member to undertake that role. Section 1715(b) therefore makes clear that section 1715(a) is not intended to preclude payments to class representatives for the reasonable time and costs that they have invested in serving as the class representative, so long as the court approves such payments.

The Committee wishes to stress that this provision is not intended to address injunctive relief; the section applies only to monetary relief—to the "payment of a greater share of [an] award." Thus, for example, if under the terms of a employment-related class action, a class representative is among those class members entitled to be reinstated to their former positions, section 1714 should not come into play (even though some other class members might not be reinstated under the terms of the settlement). Similarly, the Committee wishes to emphasize that section 1714 restricts only those payments that exceed a class representative's entitlement under "the formula for distribution to other class members." Thus, if a class representative was employed by a company longer than other members of the purported class, he/she might be entitled to greater benefits under the terms of an employment-related class action. Section 1714 should not preclude or otherwise affect those payments. Section 1714 is intended to regulate only those payments that are made to class representatives solely because they have that role; it is not intended to restrict payments to class representatives that are based on the value of their indi-

vidual claims as determined for settlement purposed on a class-wide basis.

New section 28 U.S.C. § 1716 mandates that plaintiffs be made aware of their rights and obligations under proposed class settlements in a manner calculated to be readily comprehended by consumer class members. Thus, settlement notices must explain in "plain, easily understood language" the subject matter of the case, the members of the class, the consequences of being a member, the benefits of settlement to the class, the rights that class members will lose through the settlement, the obligations of defendants under the proposed settlement, the dollar amount class counsel are seeking in attorneys' fees (or, if not possible, a good faith estimate of the fees that class counsel will request), and an explanation of how attorneys' fees will be calculated. The notice must also include any other material information regarding the class action. Such "material matter" would include any other information a reasonable person would want to know before deciding whether to participate in a class action or proposed settlement.

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

During hearings on class action reform, witnesses discussed the problem of conveying to the potential class member a clear understanding of the rights and obligations that accompany membership in the class. As one witness testified: "The class notices that class members receive frequently are written in small print and legalese. Since those notices typically are telling class members that they are about to give up important legal rights (unless they take appropriate action), it is imperative that they understand what they are doing and the ramifications of their actions." [115]

The Committee believes that a better-informed plaintiff class will be better able to police the abuses rampant in current class action litigation and will be better able to exercise their rights. Thus, much like the attorney general notification provision, the plain language requirement should create another layer of protection against inequitable class settlements and the "clientless litigation" problem.

The Committee is aware that pursuant to the Rules Enabling Act, the U.S. Supreme Court recently transmitted to Congress several amendments to Rule 23 of the Federal Rules of Civil Procedure. Several of those amendments reflect very thoughtful efforts by the Judicial Conference of the United States, the Standing Committee on Rules and Procedure, and the Advisory Committee on Civil Rules to address this same issue—clarity of notices to class members. In reviewing those amendments carefully, the Committee believes that the notice-related provisions of S. 274 and the proposed amendments to Rule 23 are complementary.

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[115] See Hearings on S.353, Prepared Statement of Stephan G. Morrison.

New section 1717 sets forth requirements for notification to appropriate federal and state officials of proposed class action settlements.

New section 28 U.S.C. § 1717 requires defendants to provide notice of proposed settlements to the appropriate federal official and to the appropriate state official of each state in which a class member resides. Under new section 1717(a), the appropriate federal official is the Attorney General of the United States, or in the case of depository institutions and other banks, the person who has primary federal regulatory supervisory responsibility over the defendant if some or all of the matters at issue in the litigation are subject to regulation or supervision by that person. Thus, for example, if a national bank were sued over its lending practices, notice would have to be provided to the Comptroller of the Currency. If it were sued in a nationwide lawsuit regarding the food in its cafeterias, notice would be provided to the Attorney General.

Under new section 28 U.S.C. § 1717(a), the appropriate state official is defined as the person in the state who has primary regulatory or supervisory responsibility with respect to the defendant or licenses the defendant, if some or all of the matters alleged in the class action are subject to regulation by that person. If no such state regulatory or licensing authority exists, or the matters are not subject to regulation by that person, then notice should be given to the state attorney general. Thus, for example, in a case against an insurance company involving insurance practices, such as how premiums are calculated, notice would be required to be given to the state insurance commissioner in each state where the company is licensed and where class members reside. If some class members reside in states where the company does not do business and therefore is not subject to regulation, then notice would be given to those states' attorneys general. Similarly, if the company at issue were a toy manufacturer, which is not licensed by a particular regulatory body, then notice would have to be given to the state attorney general of each state where plaintiffs reside.

New section 28 U.S.C. § 1717(c) clarifies that in the case of federal depository institutions and other non-state depository institutions, the notice requirements are satisfied by notifying the person who has primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person. No notice is required to state officials in these circumstances. Thus, for example, if a national bank were sued over its depository or lending practices, notice would have to be given to the Comptroller of the Currency, who has regulatory authority over the institution. However, no notice would be required to state officials.

With regard to state depository institutions, the notice requirements are satisfied by notifying the state banking supervisor in the state where the defendant is incorporated, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate federal official. Thus, no notice is required to state officials in other states even if some class members reside in those states.

This provision is intended to combat the "clientless litigation" problem by adding a layer of independent oversight to prohibit in-

equitable settlements. Under section 28 U.S.C. § 1717(b), class counsel must provide the notice within 10 days after the proposed settlement is filed in court. Such notice must include, according to 28 U.S.C. § 1717(b) (1)–(8): a copy of the complaint; any scheduled judicial hearings; any final judgment or notice of settlement; any proposed or final notice to the class; and the names of class members who reside in each state, if feasible. The notice would also include any written judicial decision related to settlement, a final judgment, or notice of dismissal. If disagreement arises over the feasibility of providing the names of class members and their proportional share of the proposed settlement under 28 U.S.C. 1717(b), it is the intent of the Committee that class counsel bear the burden of proving that it is not feasible to provide any of this required information.

Once the appropriate state and federal officials have received notice under 28 U.S.C. § 1717(b), they would then have at least 90 days to review the proposed settlement and decide whether to object in the interest of the plaintiff class. The state and federal officials are not required to take any affirmative action once they receive the proposed settlement according to new section 28 U.S.C. § 1717(f), nor does this section expand their current authority in any respect.

New section 28 U.S.C. § 1717(e)(1) instructs that in cases where the appropriate state and federal officials are not provided notice of the potential settlement, plaintiffs can choose not be bound by that settlement. The Committee wishes to make clear that this provision is intended to address situations in which defendants have simply defaulted on their notification obligations under this provision; it is not intended to allow settlement class members to walk away from an approved settlement based on a technical noncompliance (e.g., notification of the wrong person or failure of the official to receive notice that was sent), particularly where good faith efforts to comply occurred. In particular, the Committee wishes to note that where the appropriate officials received notification of a proposed settlement from at least one defendant, section 1717(e) should not be operative. New subsection 1717(e)(2) specifically states that a class member may not refuse to comply with a settlement if the notice was directed to the appropriate federal official and to the state attorney general or the primary licensing authority. This provision reflects the overall intent of section 1717 that a settlement should not be undermined because of a defendant's innocent error about which federal or state official should have received the required notice in a particular case.

The Committee believes that notifying appropriate state and federal officials of proposed class action settlements will provide a check against inequitable settlements in these cases. Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.

*Section 4.*—Section 4 amends 28 U.S.C. § 1332 to redesignate current subsection 1332(d) as subsection (e) and create a new subsection 1332(d).

The new subsection 1332(d)(2) gives the federal courts original jurisdiction over class action lawsuits in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, includes 100 or more members of the class, and ei-

ther (a) any member of a class of plaintiffs is a citizen of a different state from any defendant; (b) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state; or (c) any member of a class of plaintiffs is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

The Committee notes that for purposes of the citizenship element of this analysis, S. 274 does not alter current law regarding how the citizenship of a person is determined, including the provisions of 28 U.S.C. § 1332(c) specifying that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." The bill also does not alter the current law regarding when citizenship is determined for diversity purposes: the time a pleading is filed with the court. However, for removal purposes, citizenship may be reevaluated upon certification of the class.

While the core concept of the bill is that class actions filed against defendants outside their home state are subject to federal jurisdiction if citizens from different states are on opposing sides and more than $5 million is at issue, new subsections 1332(d)(3) and (d)(4)(A) address the jurisdictional principles that will apply to class actions filed against a defendant in its home state, dividing such cases into three categories. These rules are designed to direct appropriate national cases to federal court, and appropriate local cases to state court.

First, for cases in which two-thirds or more of the members of the plaintiff class and the primary defendants are citizens of the state in which the suit was filed, new subsection 1332(d)(4)(A) states that federal jurisdiction will not be extended by S. 274. Such cases will remain in state courts under the terms of S. 274, since virtually all of the parties in such cases (both plaintiffs and defendants) would be local, and local interests therefore presumably would predominate.

Second, cases in which more than two-thirds of the members of the plaintiff class and one or more of the primary defendants are not citizens of the state in which the action was filed will be subject to federal jurisdiction, pursuant to the provisions of new subsection 1332(d)(2). Federal courts should be able to hear such lawsuits because they have a predominantly interstate component—they affect people in many jurisdictions, and the laws of many states may be at issue.

Finally, there is a middle category of class actions in which more than one-third but fewer than two-thirds of the members of the plaintiff class and the primary defendants are citizens of the state in which the action was filed. In such cases, the numbers alone may not always confirm that the litigation is more fairly characterized as predominantly interstate in character. New subsection 1332(d)(3) therefore gives federal courts the discretion, in the "interests of justice," to decline to exercise jurisdiction over such cases based on the consideration of five factors:

• Whether the claims asserted are of "national or interstate interest".—If a case presents issues of national or interstate significance, that argues in favor of the matter being handled in federal court. For example, if a nationally distributed pharmaceutical product is alleged to have caused injurious side-effects and class actions

on the subject are filed, those cases presumably should be heard in federal court because of the nationwide ramifications of the dispute and the probable interface with federal drug laws (even if claims are not directly filed under such laws). Under this factor, the court would inquire as to whether the case presents issues of national or interstate significance of this sort. If such issues are identified, that point favors the exercise of federal jurisdiction. If such issues are not identified and the matter appears to be more of a local (or intrastate) controversy, that point would tip in favor of allowing a state court to handle the matter.

• Whether the claims asserted will be governed by laws other than those of the forum state.—As noted previously, the Committee believes that one of the significant problems posed by multi-state state court class actions is the tendency of some state courts to be less than respectful of the laws of other jurisdictions, applying the law of one state to an entire nationwide controversy and thereby ignoring the distinct, varying state laws that should apply to various claims included in the class depending on where they arose. Under this factor, if the federal court determines that multiple state laws will apply to aspects of the class action, that determination would favor having the matter heard in the federal court system, which has a record of being more respectful of the laws of the various states in the class action context. Conversely, if the court concludes that the laws of the state in which the action was filed will apply to the entire controversy, that factor will favor allowing the state court to handle the matter.

• Whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction.—The purpose of this inquiry is to determine whether the plaintiffs have proposed a "natural" class—a class that encompasses all of the people and claims that one would expect to include in a class action—as opposed to proposing a class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims. If the federal court concludes evasive pleading is involved, that factor would favor the exercise of federal jurisdiction. On the other hand, if the class definition and claims appear to follow a "natural" pattern, that consideration would favor allowing the matter to be handled by a state court.

• Whether the number of citizens of the forum state in the proposed plaintiff class(es) is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class(es) is dispersed among a substantial number of states.—This factor is intended to look at the geographic distribution of class members in an effort to gauge the forum state's interest in handling the litigation. To be subject to this inquiry, between one-third and two-thirds of the class members are citizens of the state in which the class action was filed and the primary defendants are also citizens of that state. If all of the other class members (that is, the class members who do not reside in the state where the action was filed) are widely dispersed among many other states (e.g., no other state accounted for more than five percent of the class members), that point would suggest that the interests of the forum state in litigating the controversy are preeminent (versus the interests of any other state). The Committee intends that such a conclusion would favor allowing the state court in

which the action was originally filed to handle the litigation. However, if a court finds that the citizenship of the other class members is not widely dispersed, the opposite balance would be indicated. A federal forum would be favored in such a case because several states other than the forum state would have a strong interest in the controversy.

• Whether one or more class actions asserting the same or similar claims on behalf of the same or other persons have been or may be filed.—The purpose of this factor is efficiency and fairness: to determine whether a matter should be subject to federal jurisdiction so that it can be coordinated with other overlapping or parallel class actions. If other class actions on the same subject are likely to be filed elsewhere that will remain in federal court, the Committee intends that this consideration would favor placing all of the matters in federal court so that all claims of all proposed classes could be handled efficiently on a coordinated basis pursuant to the federal courts' multi-district litigation process as established by 28 U.S.C. § 1407. Under that process, it is likely that all class actions filed on an issue will be handled by a single tribunal that will, in any event, be facing the challenge of interpreting the varying state laws and assessing how they should be applied to the purported class claims. Allowing a case to remain in federal court so that it may become part of that coordinated multidistrict litigation proceeding makes good sense. On the other hand, if other courts are unlikely to have to undertake the burden of handling the class claims and the state court appears positioned to handle the case in a manner that is respectful of state law variations, that consideration would favor remand of the matter to state court.

For example, if a Virginia state court class action were filed against a Virginia pharmaceutical drug company on behalf of a proposed class of 60% Virginia residents and 40% Maryland residents alleging harmful side effects attributable to a drug sold nationwide, it would make sense to leave the matter in federal court. There would be a substantial possibility that other class actions would be filed elsewhere, possibly including nationwide or other multi-state class actions that might sweep in all or most Virginia and Maryland residents in the Virginia state court action. The state laws that would apply in all of these cases would vary depending on where the drug was prescribed and purchased, such that allowing a single court to sort out such issues and handle the balance of the litigation would make sense both from an efficiency and federalism standpoint. On the other hand, if a checking account fee disclosure class action were filed in a Maryland state court against a Maryland bank located in a border city and the class consisted of 65% Maryland residents and 35% Virginia residents (who crossed the border to conduct transactions in the Maryland bank), it might make sense to allow that matter to proceed in state court. There is less likelihood that multiple actions will be filed around the country on the same subject, so as to give rise to a coordinating federal multidistrict litigation proceeding. And it is likely that Maryland banking law would apply to all claims (even those of the Virginia residents), since all of the transactions occurred in Maryland. Thus, the federalism concerns would be substantially diminished.

In sum, the Committee intends that these factors would permit a federal court, in its discretion, to allow a class action asserting primarily local claims under local law for what is primarily a local group of claimants to proceed in state court, particularly where the action has not been pleaded manipulatively to avoid federal jurisdiction and the case is not likely to become an "orphan" that cannot be coordinated with similar class actions that are or, in the future, may be pending in federal court.

New subsection 1332(d)(4) (B) and (C) specify, respectively, that S. 274 does not extend federal diversity jurisdiction to class actions in which (a) the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief ("state action" cases) or (b) the number of members of all proposed plaintiff classes in the aggregate is fewer than 100 class members ("limited scope" cases). The purpose of the "state action" cases provision is to prevent states, state officials, or other governmental entities from dodging legitimate claims by removing class actions to federal court and then arguing that the federal courts are constitutionally prohibited from granting the requested relief. This provision will ensure that cases in which such entities are the primary targets will be heard in state courts that do not face the same constitutional impediments to granting relief. The "limited scope" cases provision is intended to allow class actions with relatively few claimants to remain in state courts.[116]

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

As S. 274 was originally drafted, the jurisdictional provisions in the bill would have applied not only to class actions but also to two types of actions that are highly similar to class actions: (1) cases in which the named plaintiff (who is not a state attorney general) seeks monetary relief on behalf of its members (who are not parties to the action) or for the interests of the general public; and (2) cases in which the claims at issue seek monetary relief on behalf of 100 or more persons, on the ground that the claims involve common questions of law or fact and should therefore be jointly tried

[116] Under federal law, a purported class action may involve as few as 21 class members. See, e.g., *Cox* v. *American Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir. 1986) (noting that classes encompassing fewer than 21 persons normally are not subject to class certification); *Tietz* v. *Bowen,* 695 F. Supp. 441, 445 (C.D. Cal. 1987) (certifying class with 27 class members).

in any respect. The former definition was intended to encompass so-called "private attorney general" suits such as those in which an individual seeks to recover on behalf of the general public. The latter definition referred to "mass actions"—suits that are brought on behalf of hundreds or thousands of named plaintiffs who claim that their suits present common questions of law or fact that should be resolved simultaneously in a single proceeding in which large groups of claims are tried together, in whole or in part. Although private attorney general suits and mass action cases do not proceed under Rule 23 because they do not involve class representatives suing on behalf of unnamed persons, they function very much like class actions. Thus, the bill's original drafters were concerned that the use of these devices should not be allowed to permit an end-run around the due process and fairness considerations inherent in the federal class certification requirements.[117]

During the Committee mark-up, Senators Specter and Feinstein introduced an amendment to strike from the bill these provisions, which would have been codified as section 1332(d)(9). That amendment was accepted by Chairman Hatch, with the understanding that there would be discussions about reformulating the provision. However, the amendment included a drafting error because it struck Section 1332(d)(9)(A) but failed to strike 1332(d)(9)(B). (Because of another amendment in the bill, Section 1332(d)(9)(B) has now been redesignated as 1332(d)(10)(B).) Thus, as reported from Committee, the bill currently includes language at Section 1332(d)(10)(B) that erroneously refers to the stricken language and is thus surplusage in the reported version of S. 274.

The Committee notes that although not reflected in the bill as reported by the Committee, ensuing conferences have produced a modified provision regarding "mass actions" that Senator Specter and the bill's other sponsors reportedly agree should be added to S. 274. That modified provision tracks the original bill, authorizing removal to federal court of major "mass actions" that otherwise meet the jurisdictional requirements for class actions established by the bill. However, there are four changes:

First, the revised provision expressly does not permit removal of a "mass action" in which all claims arise from a single sudden accident (e.g., a building fire, a chemical plant explosion) that occurred in the state in which the action was filed and that allegedly resulted in injuries in that state or in states contiguous thereto. The rationale of this change is that in the event of a major sudden accident, many individual lawsuits are likely to be filed in local state courts and collected before a single court. In that narrow circumstance, moving a mass action to federal court might lessen (not increase) efficiencies, inasmuch as both federal and state courts might simultaneously be hearing what are essentially the same cases. Thus, it might be preferable to allow all such cases to proceed on a coordinated basis in state court. Further, single event accident cases do not create the risk of abuses posed by most mass actions—the potential that counsel are attempting to aggregate in a single lawsuit claims that arose in widely dispersed locations

[117] The due process-threatening abuses that often arise in such cases are detailed in Beisner, Miller, and Shors, One Small Step for a County Court . . . One Giant Calamity for the National Legal System, Civil Justice Report (Center for Legal Policy, March 2003).

under widely varying factual circumstances and have little or no relationship to the forum.

Second, the revised mass actions provision would prevent removal to federal court in cases in which the defendant (not the plaintiff) seeks to join the monetary damages claims of more than 100 persons for a single trial. This provision will prevent defendants from moving to federal courts claims that do not otherwise qualify for federal jurisdiction—something the original S. 274 mass actions provision was never intended to do.

Third, the revised mass actions provision limits the authority of the Judicial Panel on Multidistrict Litigation to transfer into MDL proceedings "mass actions" removed under this provision. Under the revised provision, such transfers would be permitted only if transfer were requested by a majority of the plaintiffs in the action, if plaintiffs asked that the matter be turned into a class action, or if the court turns the matter into a class action (by affording the matter class status). This change recognizes the fact that a mass action of this sort will itself be a major piece of litigation (perhaps larger than any parallel MDL action), such that the matter should be left in the forum in which it was originally filed (unless attempts are made to turn the matter into a class action that should be subject to the bill's removal and jurisdictional provision to ensure coordination with other parallel class actions).

Finally, the revised mass action provision confirms that the applicable statutes of limitations on mass action claims removed to federal court under this section shall be tolled while those claims are pending in federal court.

Pursuant to new subsection 1332(d)(5), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000 (exclusive of interest and costs). The Committee intends this subsection to be interpreted expansively. If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied). And if a federal court is uncertain about whether "all matters in controversy" in a purported class action "do not in the aggregate exceed the sum or value of $5,000,000," the court should err in favor of exercising jurisdiction over the case.

By the same token, the Committee intends that a matter be subject to federal jurisdiction under this provision if the value of the matter in litigation exceeds $5,000,000 either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief). The Committee is aware that some courts, especially in the class action context, have declined to exercise federal jurisdiction over cases on the ground that the amount in controversy in those cases exceeded the jurisdictional threshold only when assessed from the viewpoint of the defendant. For example, a class action seeking an injunction that would require a defendant to restructure its business in some fundamental way might "cost" a defendant well in excess of $75,000 under current law, but might have substantially less "value" to a class of plaintiffs. Some courts have held that jurisdiction does not exist in this scenario under

present law, because they have reasoned that assessing the amount in controversy from the defendant's perspective was tantamount to aggregating damages. Because S. 274 explicitly allows aggregation for purposes of determining the amount in controversy in class actions, that concern is no longer relevant.

The Committee also notes that in assessing the jurisdictional amount in declaratory relief cases, the federal court should include in its assessment the value of all relief and benefits that would logically flow from the granting of the declaratory relief sought by the claimants. For example, a declaration that a defendant's conduct is unlawful or fraudulent will carry certain consequences, such as the need to cease and desist from that conduct, which will often "cost" the defendant in excess of $5,000,000. As another example, a declaration that a standardized product sold throughout the nation is "defective" might well put a case over the $5,000,000 threshold, even if the class complaint did not affirmatively seek a determination that each class member was injured by the product.

Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any purported class member or any defendant.

As noted above, it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members. The law is clear that, once a federal court properly has jurisdiction over a case removed to federal court, subsequent events generally cannot "oust" the federal court of jurisdiction.[118] While plaintiffs undoubtedly possess some power to seek to avoid federal jurisdiction by defining a proposed class in particular ways, they lose that power once a defendant has properly removed a class action to federal court.

For purposes of class actions that are subject to subsections 1332 (d)(3) and (d)(4)(A), the Committee intends that the only parties that should be considered "primary defendants" are those defendants who are the real "targets" of the lawsuit—i.e., the defendants that would be expected to incur most of the loss if liability is found. Thus, the Committee intends for the term "primary defendants" to include any person who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes (as opposed to simply a few individual class members). For example, in a class action alleging that a drug was defective, the defendant manufacturer of the drug would be a primary defendant, since it is a major target of the allegations of the full class. However, if several physicians who had each prescribed the drug to a handful of class members were also named as defendants, they would not be primary defendants. Similarly, in a class action

[118] See, e.g., *St. Paul Mercury Indem. Co.* v. *Red Cab Co.,* 303 U.S. 283, 293 (1938).

alleging that a type of ladder was defective, both a defendant manufacturer that made 60% of the ladders at issue and a defendant manufacturer that built 20% of the ladders at issue would be primary defendants, since both are major targets of the allegations and have substantial exposure to significant percentages of the class in the case. However, if two local hardware stores that each sold a few of the ladders were named as defendants, they would not be deemed "primary defendants." Merely alleging that a defendant conspired with other class members to commit wrongdoing will not, without more, be sufficient to cause a person to be a "primary defendant" under this subsection.

It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption. Thus, if a plaintiff seeks to have a class action remanded under section 1332(d)(4)(A) on the ground that the primary defendants and two-thirds or more of the class members are citizens of the home state, that plaintiff shall have the burden of demonstrating that these criteria are met by the lawsuit. Similarly, if a plaintiff seeks to have a purported class action remanded for lack of federal diversity jurisdiction under subsection 1332(d)(4)(C) ("limited scope" class actions), that plaintiff should have the burden of demonstrating that "all matters in controversy" do not "in the aggregate exceed the sum or value of $5,000,000, exclusive of interest and costs" or that "the number of all proposed plaintiff classes in the aggregate is less than 100."

The Committee understands that in assessing the various criteria established in all of these new jurisdictional provisions, a federal court may have to engage in some fact-finding, not unlike that which is necessitated by the existing jurisdictional statutes. The Committee further understands that in some instances, limited discovery may be necessary to make these determinations. However, the Committee cautions that these jurisdictional determinations should be made largely on the basis of readily available information. Allowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of federal jurisdiction over class actions. For example, in assessing the citizenship of the various members of a proposed class, it would in most cases be improper for the named plaintiffs to request that the defendant produce a list of all class members (or detailed information that would allow the construction of such a list), in many instances a massive, burdensome undertaking that will not be necessary unless a proposed class is certified. Less burdensome means (e.g., factual stipulations) should be used in creating a record upon which the jurisdictional determinations can be made.

New subsection 1332(d)(6) clarifies that the diversity jurisdiction provisions of this section shall apply to any class action before or after the entry of a class certification order by the court. The purpose of this provision is to confirm that both pre- and post-certification class actions shall be subject to the jurisdictional and removal provisions of S. 274. This provision is not intended to alter the deadlines for removal under the Judicial Code or as established by this legislation. Instead, it is intended to indicate that the certification status of a class action should not affect its removability.

New subsection 1332(d)(7) details the procedures governing cases removed to federal court on the sole basis of new section 1332(d) jurisdiction. Pursuant to new subsection 1332(d)(7)(A), the district courts are directed to dismiss any civil action subject to federal jurisdiction if it is determined that the civil action may not proceed as a class action because it fails to satisfy the conditions of Rule 23 of the Federal Rules of Civil Procedure. Notwithstanding this subsection, new subsection 1332(d)(7)(B) clarifies that the action may be amended and refiled in federal or state court; however, if such an action is refiled in state court, it may be removed if it is an action over which the district courts of the United States have original jurisdiction. The Committee has concluded that the alternative—forbidding re-removal—would be bad policy. That approach would allow counsel effectively to ask a state court to review and overrule the class certification decision of a federal court, since federal and state court class certification standards typically do not differ radically. Allowing a state court to certify a case that a federal court has already found non-certifiable would set a troubling (if not constitutionally suspect) precedent under which state courts would serve as points of appellate review of federal court decisions. Moreover, since federal court denials of class certification typically involve explicit or implied determinations that allowing a case to be litigated on a class basis would likely result in the denial of some or all of the parties' due process rights, there should be no room constitutionally for a state court to reach a different result on class certification issues.

In addition, new subsection 1332(d)(7)(C) provides that, if a dismissed case is refiled by any of the original named plaintiffs in the same state court venue in which it was originally filed, the statute of limitations on the claims therein will be deemed tolled during the pendency of the dismissed case. A new class action filed either in a different venue or by different named plaintiffs would not enjoy the benefits of this provision.

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

Pursuant to new subsection 1332(d)(8), the Act excepts from new subsection 1332(d)(2)'s grant of original jurisdiction those class actions that solely involve claims that relate to matters of corporate governance arising out of state law. The purpose of this provision is to avoid disturbing in any way the federal versus state court jurisdictional lines already drawn in the securities litigation class action context by the enactment of the Securities Litigation Uniform Standards Act of 1998 (P.L. 105–353).

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

This exemption would apply to a class action relating to a corporate governance claim filed in the court of any state. Consequently, it would apply to a corporate governance class action regardless of the forum in which it may be filed, and regardless of whether the law to be applied is that of the State in which the claim is filed.

For purposes of this exemption, the phrase "the internal affairs or governance of a corporation or other form of business enterprise" is intended to refer to the internal affairs doctrine defined by the U.S. Supreme Court as "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders * * *." [119] The phrase "other form of business enterprise" is intended to include forms of business entities other than corporations, including, but not limited to, limited liability companies, limited liability partnerships, business trusts, partnerships and limited partnerships.

The subsection 1332(d)(8) exemption to new section 1332(d) jurisdiction is also intended to cover disputes over the meaning of the terms of a security, which is generally spelled out in some formative document of the business enterprise, such as a certificate of incorporation or a certificate of designations. The reference to the Securities Act of 1933 contained in new subsection 1332(d)(8)(A) is for definitional purposes only. Since that law contains an already well-defined concept of a "security," this provision simply imports the definition contained in the Securities Act.

New subsection 1332(d)(9) provides that for purposes of this new section and section 1453 of title 28, an unincorporated association shall be deemed to be a citizen of a state where it has its principal place of business and the state under whose laws it is organized. This provision is added to ensure that unincorporated associations receive the same treatment as corporations for purposes of diversity jurisdiction. The U.S. Supreme Court has held that "[f]or purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association." [120] This rule "has been frequently criticized because often * * * an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business." [121] Some insurance companies, for example, are "inter-insurance exchanges" or "reciprocal insurance associations." For that reason, federal courts have treated them as unincorporated associations for diversity jurisdiction purposes. Since such companies are nationwide companies, they are deemed to be citizens of any state in which they have insured customers.[122] Consequently, these companies can never be completely or even minimally diverse in any case. It makes no sense to treat an unincorporated insurance company differently

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[119] *Edgar* v. *Mite Corp*., 457 U.S. 624, 645 (1982). See also *Draper* v. *Paul N. Gardner Defined Plan Trust,* 623 A.2d 859, 865–66 (Del. 1993); *McDermott* v. *Lewis,* 531 A.2d 206, 214–15 (Del. 1987); *Ellis* v. *Mutual Life Ins. Co.,* 187 So. 434 (Ala. 1939); *Amberjack, Ltd., Inc.* v. *Thompson,* 1997 WL 613676 (Tenn. App. 1997); *NAACP* v. *Golding,* 679 A.2d 554, 559 (Ct. App. Md. 1996); *Hart* v. *General Motors Corp.,* 517 N.Y.S.2d 490, 493 (App. Div. 1987).

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

[121] See, e.g., 3A J. Moore & J. Lucas, Moore's Federal Practice, ¶¶ 17.25, 17–209 (1987 rev.) ("Congress should remove the one remaining anomaly and provide that where unincorporated associations have entity status under state law, they should be treated as analogous to corporations for purposes of diversity jurisdiction.").

[122] See *Tuck* v. *United Services Automobile Ass'n,* 859 F.2d 842 (10th Cir. 1988); *Baer* v. *United Services Automobile Ass'n,* 503 F.2d 393 (2d Cir. 1974); *Truck Insurance Exchange* v. *The Dow Chemical Co.,* 331 F. Supp. 323 (W.D. Mo. 1971).

from an incorporated manufacturer for purposes of diversity jurisdiction. New subsection 1332(d)(9) corrects this anomaly.

The definitional provisions of Section 4—as reflected in the new section 1332(d)(1)—are self-explanatory. However, the Committee notes that as with the other elements of section 1332(d), the overall intent of these provisions is to favor the exercise of federal diversity jurisdiction over class actions. In that regard, the Committee further notes that the definition of "class action" is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled "class actions" by the named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.

*Section 5.*—Section 5 establishes the procedures for removal of interstate class actions over which the federal court is granted original jurisdiction in new section 1332(d). The general removal provisions currently contained in Chapter 89 of Title 28 would continue to apply to such class actions, except where they are inconsistent with the provisions of the Act. For example, like other removed actions, matters removable under this bill may be removed only "to the district court of the United States for the district and division embracing the place where such action is pending."[123] However, the general requirement contained in section 1441(b) that an action be removable only if none of the defendants is a citizen of the state in which the action is brought would not apply to the removal of class actions under the jurisdictional provisions of section 1332(d). Imposing such a restriction on removal of class actions would subvert the intent of the Act because it would essentially allow a plaintiff to defeat removal jurisdiction by suing both in-state and out-of-state defendants. Such a restriction on removal of class actions would perpetuate the current "complete diversity" rule for class actions that new section 1332(d) rejects. The Act does not, however, disturb the general rule that a case can only be removed to the district court of the United States for the district and division embracing the place where the action is pending.[124] In addition, the Act does not change the application of the Erie Doctrine, which requires federal courts to apply the substantive law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction.[125]

New subsection 1453(b) would permit removal by any plaintiff class member who is not a named or representative class member of the action for which removal is sought. Generally, removal of an action by the plaintiff is not permissible, under the theory that as the instigator of the lawsuit, the plaintiff had the choice of forum from the outset. When a class action is filed, however, only the named plaintiffs and their counsel have control over the choice of forum, whereas the vast majority of the real parties in interest—the unnamed class members on whose behalf the action is brought and the defendants—have no voice in that decision. By specifying that the provisions of section 1446(a) governing the removal of a case by a defendant shall apply equally to unnamed plaintiff class

[123] See 28 U.S.C. §1441(a).
[124] Id.
[125] See *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938).

members, this provision gives unnamed plaintiff class members the same flexibility as defendants to choose the forum for a lawsuit.

In addition, new subsection 1453(b) provides that removal may occur without the consent of any other party. This revision to the removal rules will combat collusion between a corporate defendant and a plaintiffs' attorney who may attempt to settle on the cheap in a state court at the expense of the plaintiff class members. Similarly, this will prevent a plaintiffs' attorney from recruiting a "friendly" defendant (e.g., a local retailer) who could refuse to join in a removal to federal court and thereby thwart the legitimate efforts of the primary corporate defendant to seek a federal forum in which to litigate the pending claims. By this provision, it is the Committee's intent to overrule caselaw developed by the federal courts requiring the consent of all parties,[126] to the extent that such precedents might be applied to class actions subject to the expanded jurisdictional and removal provisions of S. 274.

New subsection 1453(c) is intended to confirm that the removal revisions are applicable to both pre- and post-certification class actions.

New subsection 1453(d) states that the requirements of section 1446, setting forth a 30-day filing period for removal notices by defendants, shall apply to plaintiffs who seek to remove a class action under Section 1453. In addition, subsection 1453(d) makes an additional change to section 1446(b), which requires that removal occur within 30 days of receipt of "paper" (e.g., a pleading, motion, order, or other paper source) from which it may be ascertained that the case is removable. Under the current statute, a defendant may remove an action beyond the 30-day limit if it can prove that prior to that time it had not received paper from which it could be ascertained that the case was removable. Section 1453(d) extends this provision to class members seeking removal, by allowing them to file removal papers up to 30 days after receiving initial written notice of the class action. The Committee intends that the term "initial written notice" refer to the initial notice of the class action that is disseminated at the direction of the state court before which the action is pending. The Committee further intends that the 30-day period referenced by this section be deemed to run as to each class member on the thirtieth day after dissemination of notice to the class, as directed by the court, is completed.

New subsection 1453(e) provides that an order remanding a class action to state court is reviewable by appeal or otherwise. As a general matter, appellate review of orders remanding cases to state court is not permitted, as specified by 28 U.S.C. §1447(d). That prohibition on remand order review was added to section 1447 after the federal diversity jurisdictional statutes and the related removal statutes had been subject to appellate review for many years and were the subject of considerable appellate level interpretive law. The Committee is concerned that if this prohibition on appellate review is applied to remand orders issued under S. 274, the new laws will never become the subject of appellate decisions that would assist in guiding the district courts in interpreting this new law. Thus, for that reason and in light of the high stakes posed by class

[126] See, e.g., *Hewitt* v. *City of Stanton,* 798 F.2d 1230 (9th Cir. 1986); *Mitchell* v. *Kentucky-American Water Co.,* 178 F.R.D. 140, 142 (E.D. Ky. 1997).

actions for both plaintiffs and defendants, section 1453(e) is intended to leave no doubt that orders remanding cases removed to federal court under the new jurisdictional and removal provisions of S. 274 should be subject to immediate, non-discretionary appellate review. Normally the review of such jurisdictional provisions is de novo, meaning that the lower court ruling is given no deference.[127] It is the Committee's intent that this standard of review be applied in this setting, particularly in reviewing any factual assessments underlying the district court's jurisdictional determination.

In order to be consistent with the exceptions to federal diversity jurisdiction granted under new section 1332(d), new subsection 1453(f) provides that the class action removal provisions shall not apply to claims involving covered securities or corporate governance litigation. In addition, claims concerning a covered security, as defined in section 16(f)(3) of the Securities Act of 1933 or section 28(f)(5)(E) of the Securities Exchange Act of 1934, are excepted from the class action removal rule as well. These are essentially claims against the officers of a corporation for a precipitous drop in the value of its stock, based on fraud. Because Congress has previously enacted legislation governing the adjudication of these claims,[128] it is the Committee's intent not to disturb the carefully crafted framework for litigating in this context. Thus, claims involving covered securities are excluded from the new section 1332(b) jurisdiction. The parameters of this subsection are intended to be coterminous with new subsection 1332(d)(7).

Section 5 also amends Section 1446(b) to clarify that the provisions in that section prohibiting the removal of cases more than one year after their commencement do not apply to class actions. Thus, removals taken under these revised provisions for class actions may be taken more than one year after an action's commencement. This change is intended to prevent plaintiffs' attorneys from engaging in the type of gaming that occurs under the current class action system. In the most extreme example, a plaintiffs' attorney could file suit under current law against a friendly defendant, triggering the start of the one-year limitation after which removal may not be sought under any condition. One year and one day after filing suit, the plaintiff's attorney could then serve an amended complaint on an additional defendant, at which time it would be too late for that new defendant to remove the case to federal court—regardless of whether diversity jurisdiction exists and irrespective of the practical merits of the case. The same unfair result would also occur if plaintiffs' counsel dismisses non-diverse parties or increases the amount of damages being pled after the one-year deadline. By allowing class actions to be removed at any time when changes are made to the pleadings that bring the case within section 1332(d)'s requirements for federal jurisdiction, this provision will ensure that such fraudulent pleading practices can no longer be used to thwart federal jurisdiction. It is not the intention of the Committee to change section 1446(b)'s requirements that an action must be removed within thirty days of being served with the initial

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[127] See, e.g., *Jerome-Duncan, Inc.* v. *Auto-By-Tel, L.L.C.,* 176 F.3d 904 (6th Cir. 1999); *Gould* v. *Mutual Life Ins. Co. of New York*, 790 F.2d 769 (9th Cir. 1986).

[128] See Public Law 104–67, the "Private Securities Litigation Reform Act of 1995," and Public Law 105–353, the "Securities Litigation Uniform Standards Act of 1998."

pleading or thirty days after receipt of an amended pleading, motion, order or other paper from which it may be ascertained that the case is one which is or has become removable.

*Section 6.*—Section 6 directs the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, to prepare and transmit to the Committees on the Judiciary of the Senate and House of Representatives a report on class action settlements. The report shall contain recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that these settlements are supposed to benefit. In addition, the report shall contain recommendations on the best practices that courts can use to ensure that fees and expenses awarded to attorneys in connection with a class action settlement appropriately reflect the extent to which counsel obtained full redress for the injuries alleged in the complaint, and the time, expense and risk devoted to the litigation. Finally, the report shall identify the actions that the Judicial Conference has taken and intends to take toward having the federal judiciary implement the recommendations in the report.

Section 6 contains a provision stating that nothing in the Act shall be construed to alter the authority of the federal courts to supervise the award of attorneys' fees. It is the Committee's intent not to disrupt the federal courts' broad discretion to approve attorneys' fees based on fairness determinations, notwithstanding contractual arrangements between attorneys and their clients.

*Section 7.*—Section 7 provides that the amendments made by the Act shall apply to any civil action commenced on or after the date of enactment.

## VII. Critics Contentions and Rebuttals

*Critics' Contention No. 1:* S. 274 would transfer nearly every class action from state to federal court and would add to the overwhelming workload faced by our federal courts.

*Response*

During Committee debate on this and previous versions of this bill, the most frequently expressed concern was that its jurisdictional provisions would overload the federal judiciary. That argument, however, ignores the fact that class actions burden our entire national judicial system, which includes both federal courts and state courts. In fact, many state courts, where the critics apparently would like to confine all interstate class actions, are just as burdened—if not more so—than the federal courts, and are less equipped to deal with complex cases like class actions. Indeed, many state courts have comparatively crushing caseloads.

Civil filings in state trial courts of general jurisdiction have been increasing rapidly, up 21 percent since 1984, compared to only a four percent increase in the federal courts.[129] Most tellingly, in most jurisdictions, each state court judge is assigned (on average)

[129] B. Ostrom, et al., Examining the Work of State Courts 12 (Court Statistics Project 2001).

over 1,500 new cases each year.[130] The jurisdictions with these high case assignment levels include California (average of 1,545 cases assigned to each judge annually), District of Columbia (2,318 cases), Florida (2,054 cases), Indiana (2,079 cases), New Jersey (2,653 cases), North Carolina (2,823 cases), South Carolina (3,833 cases), South Dakota (2,641 cases), Utah (3,124 cases), and Vermont (2,081 cases). By contrast, each federal court judge was assigned an average of 518 new cases during the twelve-month period ending September 30, 2002.[131]

The median time for final disposition of a civil claim filed in federal court is 8.7 months, and the median time to trial in a civil matter in federal court is 21.8 months.[132] The record reflects no hard evidence that on average, state courts proceed more quickly.

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

Critics also overlook the fact that even if both court systems were similarly burdened, federal courts could still deal with class actions more efficiently for two reasons. First, federal courts can coordinate "copy cat" or overlapping class actions. The record before the Committee indicates that it is not uncommon to see twenty, thirty, or even 100 class actions filed on the same subject matter. Sometimes, competing lawyers file these cases; other times, they are filed by the same lawyers who are simply forum-shopping for the most receptive judge. When these similar, overlapping class actions are filed in state courts of different jurisdictions, there is no way to consolidate or coordinate the cases. The result is enormous waste, to say nothing of the unfairness to both defendants and plaintiffs. Defendants are forced to defend the same case in many different courts. Class members are harmed because the various different class counsel compete with each other to achieve the best settlement for the lawyers. By contrast, if overlapping or similar class actions are filed against the same defendant in two or more different federal courts, the multidistrict litigation process (established by 28 U.S.C. § 1407) permits the transfer to and consolidation of those cases with a single judge. The federal court multidistrict litigation system regularly consolidates multiple overlapping class actions in this manner, preventing the waste that occurs in state courts.

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[130] Id. at 12–13

[131] See Administrative Office of the U.S. Courts, 2002 Federal Court Management Statistics 167 (2003).

[132] See Administrative Office of the U.S. Courts, Judicial Business of the United States Courts 2002, at 159, 172 (2003).

Second, federal judges generally have greater resources for dealing with huge, complex cases, like class actions. As stated previously, federal court judges usually have two or three law clerks, while state court judges often have none. Federal court judges usually can delegate certain aspects of their cases to magistrate judges or special masters, while state court judges often lack such resources.

Finally, those expressing workload concerns also ignore the fact that S. 274 does not require that interstate class actions be heard in federal courts. It simply provides the option for either side to litigate in federal court if appropriate and it so desires. Just as defendants choose to leave many cases in state court that would be subject to proper removal, there is no reason to believe that all class actions will be moved to federal court. By the same token, under S. 274, plaintiffs' counsel would no longer have an incentive to file large numbers of class actions in a small number of "magnet" courts. Thus, any burden posed by class actions would be more evenly distributed among the different federal and state courts.

Class action filings in state courts have increased far more rapidly than they have in federal courts. According to recent studies, federal class action filings over the past ten years have increased by more than 300%, while class action filings in state courts have increased by more than 1,000%.[133] As the number of class action lawsuits continues to grow, state courts typically do not have the resources, procedural mechanisms or expertise to handle them effectively. Because the federal judiciary has more personnel and other resources, it is more likely that class actions will be resolved more quickly in federal court than in state court.

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

Critics who focus on the federal courts' workload are missing the point—class actions are precisely the kind of cases that should be heard in federal court. Class actions usually involve the most people, most money, and most interstate commerce issues. They also usually involve issues of nationwide implications. Interstate class actions are certainly no less deserving of a federal forum than the 5,212 cases to recover a few thousand dollars in defaulted student loans, the 41,135 product liability actions (typically one-person injury case), the 17,862 federal personal injury cases (e.g., single person medical malpractice cases), or 23,863 civil habeas corpus cases filed last year in federal court.[134] Indeed, it is noteworthy that there were almost twenty times as many product liability and fed-

[133] See Class Action Litigation—A Survey, Class Action Watch, at 5 (Vol. 1, No. 1 1998); Deborah Hensler, et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 19 (1999) (executive summary).

[134] See Judicial Business, at 130–31.

eral personal injury cases (normally one-person claims) filed in federal court last year (58,997) as there were class actions (2,916).[135] Ultimately, regardless of the impact on the federal court caseload, large interstate class actions belong in federal court.

*Critics' Contention No. 2:* Abuses of class actions exist in both federal and state courts, and therefore, allowing more interstate class actions to be heard in federal court will not solve any problems.

*Response*

At congressional hearings on the subject of class actions, witness after witness provided compelling evidence that serious abuses of the class device are primarily occurring in state courts.[136]

Moreover, several studies also indicate that the class action abuse problem, particularly with respect to class settlements, is primarily a state court issue. For example, a detailed Federal Judicial Center study concluded that "[i]n most [class actions handled by federal courts subject to the study], net monetary distributions to the class exceeded attorneys' fees by substantial margins." [137] In stark contrast, an Institute for Civil Justice/RAND study indicated that in state court consumer class action settlements not involving personal injuries, class counsel typically walk off with more money than all of the class members combined.[138] The ICJ/RAND study offered three compelling rationales for allowing more interstate class actions to be heard by federal courts:

(1) "federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly;"

(2) "state judges may not have adequate resources to oversee and manage class actions with a national scope;" and

(3) "if a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in federal court than in a state court." [139]

While some abuses do occur in federal court, the extent to which they take place in no way even approaches the level of abuse evidencing itself in state court. Indeed, it is interesting that while few state court systems have attempted to address class action abuses, the federal court system, which has far less of a problem in the first place, has invested considerable effort in developing new rules reflecting best practices that courts should follow in handling class litigation, particularly in the settlement context. Those revisions to Rule 23 have been approved by the U.S. Supreme Court and forwarded to Congress for consideration pursuant to the Rules Enabling Act.[140] Those rule changes will dovetail with the "consumer

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[135] Id. at 394.

[136] See generally 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); Hearings on Mass Torts and Class Actions Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 105th Cong. (1998); Hearing on H.R. 1875, The Class Action Jurisdiction Act of 1999 Before the House Committee on the Judiciary, 106th Cong. (1999).

[137] Federal Judicial Center, Empirical Study of Class Actions in Four Federal District Courts 68–69 (1996).

[138] Deborah R. Hensler, et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 19 (1999) (executive summary).

[139] Id. at 28.

[140] See Amendments to Federal Procedural Rules, 71 U.S.L.W. 4253, 4254–55 (U.S. Apr. 1, 2003) (Supreme Court order amending rules pursuant to Rules Enabling Act).

bill of rights" provisions in S. 274 to bolster federal court safeguards in the proper handling of class action cases.

*Critics' Contention No. 3:* To date, the only mechanism that has been successful in imposing liability on some industries, such as the tobacco or firearms industries, has been class action lawsuits. Allowing removal of state class actions to federal court will destroy the impact that class actions are having on these socially irresponsible businesses. Therefore, we should exempt certain industries from the diversity and removal provisions of S. 274.

*Response*

Opponents of S. 274 seek to prohibit federal courts from exercising jurisdiction over those class actions brought against certain industries, including HMOs, tobacco companies, nursing homes, and firearms manufacturers. In addition, opponents have suggested that claims arising from state consumer protection statutes or state environmental protection laws should be exempt from the bill as well.

However, industry-specific exemptions from federal jurisdiction make no sense. Like bills of attainder, such exemptions irrationally single out a specific industry and slam the federal courthouse door in its face. The proposal to carve out certain legitimate, yet presently unpopular, industries contradicts the constitutional purposes of federal diversity jurisdiction—to allow interstate businesses to have claims against them heard in federal court under diversity so as to avoid local biases and to promote and enhance, rather than hamper, interstate commerce. The notion that certain industries are less entitled to federal court protection is utterly inconsistent with the purpose and goals of diversity jurisdiction. Simply put, there should not be one set of rules for one category of defendants and another for another group of defendants.

Moreover, there is no evidence that plaintiffs will be less successful in litigating their class action claims in federal court.[141] Class

[141] Indeed, there is no evidence that plaintiffs' counsel believe that they must file in state court in order to succeed. Tobacco class actions prove this point. Of the purported class actions on tobacco issue, many were originally filed in federal courts. Moreover, there is no evidence that classes are more likely to be certified in state courts. The reality is that the vast majority of courts—both federal and state courts—that have considered the issue have denied certification of proposed tobacco classes. The state court certification denials include: *In re Tobacco Cases II,* No. JCCP–4042, slip op. (Md. Ct. App. May 16, 2000); *Reed* v. *Philip Morris, Inc.,* No. 96–5070, slip op. (D.C. Super. Ct. July 23, 1999); *Philip Morris, Inc.* v. *Angeletti,* No. 961450501 CE212596, slip op. (Md. Ct. App. May 16, 2000); *Taylor* v. *American Tobacco Co.,* No. 97715975, slip op. (Mich. Cir. Ct. Jan. 20, 2000); *Constentino* v. *Philip Morris, Inc.,* No. MID-L–5135–97, slip op. (N.J. Super. Ct. Oct. 26, 1998); *Small* v. *Lorilard Tobacco Co.,* 679 N.Y.S.2d 593 (App. Div. 1998), aff'd, 698 N.Y.S.2d 615 (1999); and *Geiger* v. *American Tobacco Co.,* 696 N.Y.S.2d 345 (1999). At least three federal courts have certified tobacco-related classes: *In re Simon II Litig.,* 211 F.R.D. 86 (E.D.N.Y. 2002) (certifying nationwide punitive damages class of smokers' claims against tobacco companies); *Iron Workers Local Union No. 17 Insurance Fund* v. *Philip Morris, Inc.,* 182 F.R.D. 523 (N.D. Ohio 1998); *Northwest Laborers-Employers Health & Security Trust Fund* v. *Philip Morris, Inc.,* 1997 U.S. Dist. LEXIS 21299 (W.D. Wash. Dec. 24, 1997). In addition, a U.S. Magistrate Judge recommended certification of a class in *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris, Inc.,* 188 F.R.D. 365 (D. Or. 1998), but that recommendation was never acted upon by the district court judge. Three state courts (two in Florida and one in Louisiana) have certified tobacco-related classes: *R.J. Reynolds Tobacco Co.* v. *Engle,* 672 So.2d 39 (Fla. Ct. App. 1996) (affirming the trial court's certification of tobacco class); *Broin* v. *Philip Morris Cos.,* 641 So.2d 888 (Fla. Ct. App. 1994) (ordering trial court to certify tobacco class); *Scott* v. *American Tobacco Co.,* 725 So.2d 10 (La. Ct. App. 1998) (affirming trial court certification of tobacco class). However, a Florida appeals court recently decertified the *Engle* class. See *Liggett Group, Inc.* v. *Engle,* 28 Fla. L. Weekly D1219 (Fla. Ct. App. May 21, 2003). Thus, the scorecard is basically even; there is no evidence that class members will be treated differently in state court.

Continued

actions against unpopular corporate defendants, such as the firearms and tobacco industry have successfully proceeded in Federal court, and have resulted in beneficial judgments and settlements for the plaintiff classes. For example, the class action that is touted as the only real success the class counsel have had against the firearms industry [142] turns out to be a federal court class action.[143] Assuming that a case is a meritorious class action asserting meritorious claims, there is no reason to believe such a case heard by a federal court would have an outcome different from a state court case, particularly given that the federal court normally would apply the same state substantive law as a state court considering the same case.

*Critics' Contention No. 4:* S. 274 should exclude civil rights cases, in order to ensure that civil rights plaintiffs have maximum access to our courts.

*Response*

First, critics who would exclude civil rights cases from the scope of S. 274 have it backwards. An amendment that would affirmatively exclude civil rights cases from federal jurisdiction would be contrary to a long tradition of encouraging the availability of our federal courts to address civil rights claims. Indeed, Congress has already enacted several statutes that are intended to ensure that civil rights cases can be heard in federal courts. For example, one statute permits removal to federal court of a broad range of civil rights actions.[144] More importantly, one general jurisdiction statute—28 U.S.C. §1343—provides broad federal jurisdiction over a whole host of civil rights claims (e.g., any action "for injury to person or property or because of the deprivation of any right or privilege of a citizen of the United States," any action "to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights"). Indeed, that section provides original federal jurisdiction over any action "to redress the deprivation, under color of any State law, statute, ordi-

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While critics have pointed to the two Florida tobacco class actions as evidence that state courts will somehow be tougher on the tobacco industry, there is no real support for this contention. In the first tobacco class action to reach conclusion after a class was certified and the matter was tried (*Broin,* a Florida state court case), the matter ultimately settled. But the class members received no money at all. Under the terms of the settlement, they obtained only a "right to sue" individually. Meanwhile, the class counsel were awarded $49 million (on the basis of a medical research contribution made by defendants). Counsel for one of the class members who protested the settlement reportedly commented: "Its mind-boggling that a court would permit this kind of settlement to go ahead. What is the class getting out of this? Nothing." The Legal Intelligencer, Sept. 22, 1999, at 4. The second case, *Engle* v. *T.J. Reynolds Tobacco Co.,* received a lot of publicity because the jury awarded a $145 billion verdict to the class of Florida smokers. However, the verdict was recently vacated, after an appeals court found that trying the plaintiffs' claims on a classwide basis was improper. *Engle,* 28 Fla. L. Weekly D1219 (Fla. Ct. App. May 21, 2003).

Moreover, there is no evidence that tobacco cases would be tried more quickly in state courts. It took six years to get the first tobacco class action to trial in state court; the second took more than four years. The average time to trial in federal court civil cases is shorter.

Finally, it is clear that certain opponents of the bill are trying to single-out certain unpopular industries, such as the firearms industry, because they are unpopular. But that is exactly what the Framers of the Constitution were trying to avoid. They were trying to ensure a fair, even-handed federal court forum for defendants that may otherwise be haled into a local court less concerned about protecting the rights of an out-of-state company.

[142] 145 Cong. Rec. H8577 (Sept. 23, 1999) (floor debate on H.R. 1789) (Rep. Nadler asserting that a "1995 class action against Remington Arms * * * settled for $31.5 million * * * [and] led to the implementation of greater safety protections for owners of shotguns").

[143] See *Garza* v. *Sporting Goods Properties, Inc.,* 1996 U.S. Dist. LEXIS 2009 (W.D. Tex. Feb. 6, 1996) (approving class settlement).

[144] 28 U.S.C. §1443.

nance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens."

Second, the assumption of the amendment that federal courts are clogged and unable to handle civil rights cases has no basis. Indeed, the federal court workload issue is overblown, and ignores the burdens that class actions place on ill-equipped state courts. Several of our federal judicial districts may need additional resources. Wherever that need has been confirmed, additional resources have been provided (as they were in 1999 and again last year, when new permanent and temporary federal district court judgeships were added). But those spot shortages are no excuse for continuing to deny both consumers and corporations their due process rights by keeping interstate class actions a state court monopoly.

Finally, contrary to the position of the amendment's proponents, the bill will not impose new, burdensome and unnecessary requirements on civil rights litigants and the federal courts. A major complaint about class actions is that the unnamed class members—the persons on whose behalf the actions are brought—are not adequately informed about how their rights are being affected by the class litigation. The notice provisions in the bill are simply an effort to make sure that the claimants are provided communications in "plain English." Moreover, providing notice to state attorneys general and other regulatory bodies only increases protections for class plaintiffs. The bill does not require that additional or more expensive communications be provided beyond what is already mandated by existing law.

*Critics' Contention No. 5:* S. 274 would unfairly tilt the playing field by providing an advantage to defendant corporations at the expense of consumers.

*Response*

This concern mischaracterizes the content and intent of the bill. S. 274 would simply allow federal courts to handle more interstate class actions. It makes no changes in substantive law whatsoever. Critics of S. 274 erroneously argue that the bill would reverse the ordinary presumption that a plaintiff chooses his or her own court. Yet, in this context, there is no such presumption. In fact, the whole purpose of diversity jurisdiction is to preclude any such presumption by allowing state-law based claims to be removed from local courts to federal courts, so as to ensure that all parties can litigate on a level playing field and thereby protect interstate commerce interests.[145]

Article III of the Constitution ensures that there will be a fair, uniform, and efficient forum—a federal court—for adjudicating interstate commercial disputes, so as to nurture interstate commerce. Some scholars have persuasively argued that diversity jurisdiction, of all the powers exercised under the Constitution, has had the greatest influence in melding the United States into a single nation, by fostering interstate commerce, communication and the uninterrupted flow of capital for investment into various parts of

[145] See, e.g., *Pease* v. *Peck,* 59 U.S. (18 How.) 595, 599 (1856).

the Union, and sustaining the public credit and the sanctity of private contracts.[146]

S. 274 promotes these important constitutional norms. The statutory "gatekeeper" for federal diversity jurisdiction—28 U.S.C. §1332—generally allows federal courts to hear cases that are large (cases with large "amounts in controversy") and that have interstate implications (cases involving citizens from multiple jurisdictions). These requirements were intended to ensure that diversity jurisdiction is preserved for those cases with significant interstate and economic impacts. Class actions would normally satisfy these requirements because they usually involve big dollar amounts and parties from multiple jurisdictions. Yet, because section 1332 was enacted prior to the existence of the modern-day class action, it does not take into account the unique circumstances presented by class actions. Consequently, section 1332, in current law, tends to exclude the overwhelming majority of class actions from federal courts, while inviting into federal courts much smaller single-plaintiff cases having few (if any) interstate ramifications. Such a result is inconsistent with the federal judiciary's proper jurisdictional role. S. 274 would correct this technical problem and thereby promote the underlying goals of diversity jurisdiction.

As former Clinton Administration Acting Solicitor General Walter Dellinger has testified in congressional hearings, if Congress were to now re-write the federal diversity jurisdiction statute, interstate class actions undoubtedly would be one of the first categories of cases to be included within the scope of the statute.[147] This makes plain sense insofar as class action lawsuits typically involve more people, more money, and more interstate commerce issues than any other type of case. S. 274 will simply fix the technical problem in section 1332 and judicial interpretation of the diversity requirements that keep most class actions in state court.

*Critics' Contention No. 6:* S. 274 will result in delays for injured consumers.

*Response*

This criticism stems from baseless concerns about the federal courts' caseload and the possible impact of this legislation on the ability of the federal courts to resolve these cases in a timely manner. For all of the reasons set forth previously, there is no basis for arguing that S. 274 would overwhelm the federal courts with class action cases and thereby adversely affect the ability of consumers to find timely redress for their injuries in federal court.

Opponents of the bill have presented no data whatsoever that judicial overload would occur. When Congress has expanded federal court jurisdiction in other respects, it normally has not (at least in recent years) had the benefit of any hard data indicating the likely impact on federal court workload. For example, the Y2K Act (P.L. 106–37) expanded federal jurisdiction over Y2K class actions in almost precisely the same manner as proposed in S. 274. Congress enacted that change without knowing its likely judicial workload impact. Likewise, the Securities Litigation Reform Act of 1998 (P.L.

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

[147] See Hearings on H.R. 1875, statement of Walter E. Dellinger.

105–353) contained provisions moving virtually all securities class actions from state courts into the federal courts. Once again, Congress enacted that expansion of federal jurisdiction without knowing the precise effects on federal court workload. In the past, when the case has been made that federal court jurisdiction should be expanded, Congress has simply enacted the expansion with the understanding that any resulting judicial workload problems could be addressed later.

In sum, there simply is no basis to the claims that consumers will be worse off in federal court, or that the resolution of class actions will be delayed because of the federal judiciary's workload.

*Critics' Contention No. 7:* S. 274 will trample on the rights of states to manage their legal systems, thus undermining the principles of federalism that our system of government is built upon.

*Response*

While some critics have alleged that this bill will somehow undermine federalism principles, exactly the opposite is true. S. 274 has been carefully crafted to correct a problem in the current system that does not promote traditional concepts of federalism. In fact, it is the current system and the wave of state court class actions that has trampled on the rights of states to manage their legal systems by allowing state court judges to interpret and apply the laws of multiple jurisdictions. When state courts preside over class actions involving claims of residents of more than one state, they frequently dictate the substantive laws of other states, sometimes over the protests of those other jurisdictions (as discussed previously). When that happens, there is little those other jurisdictions can do, since the judgment of a court in one state is not reviewable by the state court of another jurisdiction.

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

In short, contrary to critics' contentions, the real harm to federalism is the status quo—leaving the bulk of class action cases in state court. Federal courts are the appropriate forum to decide interstate class actions involving large amounts of money, many plaintiffs and interstate commerce disputes, and these matters of interstate comity are more appropriately handled by federal judges appointed by the President and confirmed by the Senate. S. 274 simply restores this proper balance by resolving an anomaly of diversity jurisdiction. True to the concept of federalism, S. 274 appropriately leaves certain "intrastate" class actions in state court: cases involving small amounts in controversy; cases with a class of 100 plaintiffs or less; cases involving plaintiffs, defendants and governing law all from the same state; cases against states and state officials; and certain securities and corporate governance cases. S.

274 also incorporates the concept of balanced diversity, leaving in state court cases in which more than ⅔ of the plaintiffs and the primary defendants are residents of the forum state, as well as certain cases in which between ⅓ and ⅔ of the plaintiffs are residents of the forum state as are the primary defendants, subject to a set of factors to be applied by the court. As such, S. 274 promotes the concept of federalism and protects the ability of states to determine their own laws and policies for their citizens.

*Critics' Contention No. 8:* S. 274 assumes that federal courts will not engage in the same "false federalism" that state courts are accused of fostering. There really is no evidence that in the class action context, federal courts will intrude less on the states' rights to interpret their own laws than have state courts.

*Response*

A principal purpose of the Class Action Fairness Act is to correct what former Acting Solicitor General Walter Dellinger has labeled a wave of "false federalism." As he testified before the Senate Judiciary Committee last July, the problem is that "many state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to * * * other states, resulting in a breach of federalism principles * * *."

As discussed previously, a prime example of this situation is the *Avery* case,[148] in which defendant State Farm allegedly breached auto insurance policies nationwide by requiring the use of less expensive non-original equipment manufacturer parts ("non-OEM parts") in repairing accident-damaged vehicles. The Illinois state court certified a nationwide class, and at trial, a jury rendered a $1.3 billion verdict against State Farm.

The case is noteworthy on the "false federalism" issue because the court applied Illinois consumer protection law to all class claims in the case. It did so even though Illinois law on this subject contravened the laws and policies of other states in which some class members lived—laws and policies encouraging (or even requiring) insurers to use less expensive, non-OEM parts in making accident repairs as a means of containing auto insurance costs. In affirming the verdict, an Illinois state appellate court acknowledged that it had disregarded "state insurance commissioners [who] testified that the laws in many of our sister states permit and in some cases * * * [even] encourage" usage of non-OEM parts.[149] The New York Times reported that the decision effectively "overturn[ed] insurance regulations * * * in New York, Massachusetts, and Hawaii, among other places" establishing "what amounts to a national rule on insurance."[150] As discussed previously, *Avery* is not an isolated occurrence. Numerous state courts have trampled on these federalism principles, all in an effort to certify classes that should not be certified.[151]

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[148] *Avery* v. *State Farm Auto Insurance Cos.,* 746 N.E.2d 1242, 1254 (Ill. Ct. App. 2001).

[149] Id. at 1254.

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

[151] See, e.g., *Ysbrand* v. *DaimlerChrysler Corp.,* 2003 Okla. LEXIS 17 (Okla. 2003) (affirming certification of nationwide product liability class, applying the law of one state to all claims); *Peterson* v. *BASF Corp.,* 2003 Minn. App. LEXIS 275 (Minn. Ct. App. March 11, 2003) (affirming nationwide consumer protection act case, applying the law of one state to all claims).

A premise of the Class Action Fairness Act is that this problem can be corrected by expanding federal jurisdiction over interstate class actions, the theory being that federal courts will not engage in "false federalism" games. But what proof is there that the federal courts will not similarly botch these critical choice-of-law issues?

In reality, there is ample evidence that the federal courts will not engage in the "false federalism" that is so rampant in state court class actions. To start, it should be noted that the lead federal court—the U.S. Supreme Court—has repeatedly warned that courts should not attempt to apply the laws of one state to behaviors that occurred in other jurisdictions:

- "Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of the other States." *Huntington* v. *Attrill,* 146 U.S. 657, 669 (1892).
- "[I]t would be impossible to permit the statutes of [one State] to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co.* v. *Head,* 234 U.S. 149, 161 (1914).
- "A state does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that state." *Bigelow* v. *Virginia,* 421 U.S. 809, 824 (1975).
- States should not apply their own laws to matters with which they have no significant contact. *Philips Petroleum Co.* v. *Shutts,* 472 U.S. 797, 821–22 (1985).

Most recently, on April 7, 2003, the U.S. Supreme Court again warned state courts on this issue, striking down one state's effort to apply its laws to conduct that occurred elsewhere: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." [152]

Unlike many state courts, federal courts have consistently heeded the Supreme Court's admonitions. The record shows that in the class action context, federal courts have been extremely respectful of the interests of each state in having its laws applied (as appropriate) to its own residents, particularly in recognizing the substantial variations of those laws in the class action context.

In recent years, numerous federal courts (applying the choice-of-law doctrines of various jurisdictions) have considered which laws should apply in proposed nationwide class actions asserting state law-based claims. Those courts have consistently concluded that in a nationwide or multi-state class action, the choice-of-law rules of the state in which the action was originally filed must be applied. [153] Further, they have consistently concluded that those

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[152] *State Farm Mut. Auto. Ins. Co.* v. *Campbell,* 2003 WL 1791206 (U.S. Apr. 7, 2003).

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

choice-of-law rules must be applied to "each plaintiff's claims." [154] Based on those principles, federal courts have consistently concluded that the laws of all states where purported class members were defrauded, injured, or purchased the challenged product or service must come into play. [155] And in those very few instances in which a federal district court has toyed with the idea of engaging in "false federalism" (i.e., applying a single state's law to all asserted claims), that notion has been reversed on appeal almost immediately. [156]

The bottom line is that over the past ten years, the federal court system has not produced any final decisions applying the law of a single state to all claims in a nationwide or multi-state class action. And there are hundreds of federal court decisions (examples of which are set forth above) which flatly reject arguments using such a "false federalism" choice-of-law approach and applying the laws of a single state to all claims in a multi-state case. That is the record that confirms that the passage of the Class Action Fairness Act will end the "false federalism" game that is occurring in the state court class action arena.

*Critics' Contention No. 9:* S. 274 could deny plaintiff class members any meaningful ability to recover damages for their injuries.

*Response*

In arguing that this bill would hurt consumers, some opponents have gone so far as to list several state court class actions which supposedly have served consumers well, inferring that removal of such cases to federal court is tantamount to a denial of justice. This argument assumes that the federal courts are inferior to state courts—that a federal court cannot arrive at a just outcome. If the cases cited by S. 274's opponents would not have had the same outcome in federal court as they did in state court, it is because the federal courts may have been more careful to avoid the abuses of the system that occur in state courts. The only thing that would be denied when an interstate class action is removed to federal court is the plaintiffs' lawyers' ability to strike it rich on class actions that should not be certified by any court because they do not meet the requirements of a proper class.

Moreover, the claim that federal courts never certify class actions is unfounded. While opponents of the bill cite cases that allegedly achieved greater justice in state court than they would have re-

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

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

[156] See, e.g., *In re Bridgestone/Firestone, Inc.,* 288 F.3d at 1024; *Szabo* v. *Bridgeport Machines, Inc.,* 249 F.3d 672, 674–75 (7th Cir. 2001); *Spence* v. *Glock, GES.m.b.H,* 227 F.3d 308, 313–15 (5th Cir. 2000); *In re Am. Med. Sys.,* 75 F.3d 1069, 1085 (6th Cir. 1996); *Castano* v. *American Tobacco Co.,* 84 F.3d 734, 741–43, 749–50 (5th Cir. 1995); *In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293, 1302 (7th Cir. 1995); *Walsh* v. *Ford Motor Co.,* 807 F.2d 1000, 1017–19 (D.C. Cir. 1990).

ceived if they had been removed to federal court, it is clear that this is pure speculation. In fact, federal courts have certified hundreds of cases for class treatment in recent years,[157] and the rules governing the decision of whether cases may proceed as class actions are basically the same in federal and state courts. Further, under the *Erie* doctrine, federal courts apply state substantive law in diversity cases. Consequently, a removed class action should have the same substantive law applied to it, regardless of whether it is in federal or state court.

Additionally, strict analysis by courts in deciding whether a group of plaintiffs can proceed on a class basis should be encouraged, rather than discouraged. The purpose of the current requirements in Rule 23 and similar state court class action rules is to protect the due process rights of both plaintiffs and defendants. When judges indiscriminately certify class actions, unnamed plaintiffs lose important legal rights and can be denied appropriate awards for their injuries, and defendants become more vulnerable to frivolous and unjustifiably magnified class actions.

Allowing individual states to certify classes for their own citizens on particular issues could result in a denial of relief for the citizens of other states, particularly given the limited resources available to some defendants to satisfy all pending claims. For example, some hailed the now reversed punitive damages verdict in the *Engle* tobacco class action that continues to proceed in Florida state court. There, a Florida jury awarded $135 billion in punitive damages to a class of Florida residents. But if that verdict had been upheld, citizens of other states might have been denied any relief whatsoever on their claims against tobacco companies because the Florida residents (through their single state class action) would have taken all available money to pay their punitive damages claims. In short, Florida residents would have received billions of dollars in excess of what they claim for their real personal injury damages, while residents of all other states would not have even received what they claim to be owed for the basic personal injuries that they allege. As one commentator has noted,

> This is what fuels the [state court class action] litigation lottery. If you are the first in line to demand punitive damages, you may receive awards in the billions. Injured parties in later [class actions] are likely to receive less. * * * They may receive nothing if the first award killed the company or the industry. None of this makes much sense. There is no reason why one group of litigants should, solely on the basis of residency in a particular state, receive the lion's share of damages to the deprivation of hundreds of thousands of other injured parties. Moreover, there is no reason why one state should be able to impose this result on other states when a problem and its victims are shared by the nation as a whole. [158]

Of course, this situation would not arise if S. 274 were passed, since all qualifying interstate class actions on a particular subject

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[157] See Responses To Written Questions From Senators Orrin G. Hatch and Charles E. Grassley to Walter Dellinger, Attachment A (list of exemplar cases in which federal courts have certified classes since 2001).

[158] Jonathan Turley, A Crisis of Faith: Tobacco and the Madisonian Democracy, 37 Harv. J. on Legis. 433, 475 (2000).

could be removed to federal court and consolidated before a single federal court judge under the multidistrict litigation mechanism described previously. That judge would be able to manage the proceeding to ensure that no group of litigants gained advantage over the others by virtue of their residency (or any other irrelevant factor).

Finally, a large quantity of class actions in state court, like the *Broin* tobacco case in Florida, results in millions of dollars for plaintiffs' counsel but nothing of any value for plaintiffs. An Institute for Civil Justice/RAND study has confirmed this pattern, finding that class counsel in state court consumer class action settlements typically walk off with more money than all of the class members combined.[159] The ICJ/RAND study provides three compelling rationales for allowing more interstate class actions to be heard by federal courts: (1) "federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly;" (2) "state judges may not have adequate resources to oversee and manage class actions with a national scope;" and (3) "if a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in federal court than in a state court."[160] S. 274 would help assure fairer settlements by allowing the federal courts to review more class action lawsuits, as well as by providing notice to state Attorneys General so they can better protect their citizens against unfair settlement agreements.

*Critics' Contention No. 10:* S. 274 provides that if a federal district court determines that a class action lawsuit removed to that court does not satisfy applicable prerequisites for certifying a class action, the court shall dismiss the case. The case may be altered and refiled in state court, but if that amended case still meets federal jurisdictional prerequisites, it may be removed again to federal court. This results in a "merry-go-round," whereby defendants can endlessly remove the class action to federal court.

*Response*

Critics of S. 274's remand provisions would alter the bill so that any time a case brought in or removed to a federal court is dismissed for failing to meet the requirements of Rule 23, a state court could then certify the case and allow it to proceed as a class action under the state's class action law. In short, these critics would guarantee that even though a federal court has determined that a case cannot be certified as a class action, a state court could essentially consider all class issues anew.

Altering S. 274 in this manner would defeat a primary purpose of the bill—to allow the removal of more interstate class actions to federal courts, where they are more appropriately heard. The revision suggested by critics would effectively write that change out of the statute. Under the proposed revision, if a federal district court determines that a removed case should not be afforded class treatment, a state court (upon remand of the case) would be free to "overrule" the federal court's ruling that class treatment would be

[159] See Class Action Dilemmas, at 23.
[160] Id. at 28.

inappropriate. Thus, in interstate class actions, state courts—not federal courts—would become the final arbiters of what should proceed as a class action in our judicial system. This would essentially be a declaration that in interstate class actions, the federal courts are inferior to state courts. This result runs counter to generally accepted concepts of federalism.

Furthermore, altering S. 274 in this manner would only aggravate the class action abuse already occurring in state courts. When a federal district court denies class certification in a case, it is typically because litigating the case on a class basis would likely result in a denial of the purported class members' or the defendants' due process rights or run counter to basic fairness principles. This revision to the bill would invite state courts to overrule such federal court determinations and, instead, advance class actions which have already been determined to deny due process rights or to be unfair to unnamed class members and/or defendants.

In short, this proposed change to the bill would cause S. 274 to preserve the status quo instead of improving it. In fact, the revision would create even more inefficiencies; even if a defendant were to defeat class certification and win in federal court, the defendant could turn around and mount the fight all over again in state court.

Indeed, the proposed fix to the so-called "merry-go-round" problem would specifically authorize an activity that even Public Citizen (which has expressed opposition to the bill) believes to be unethical. In correspondence with the House Judiciary Committee discussing an amendment to the parallel House class action bill, Public Citizen stated that "if a federal judge were to deny class certification in a case that had been properly removed to federal court, it is clear that the same class allegations could not be reasserted in state court."[161] Public Citizen went on to say that "a plaintiff's lawyer who attempted that type of circumvention of the federal court certification process would likely be subject to significant sanctions, which would include payment of defendants' attorneys' fees."[162] In short, the proposed change would expressly bless activity that a court would—and should—find sanctionable.

Ultimately, concerns that a "merry-go-round" situation will arise because of the way S. 274 is drafted are simply an exaggeration. The Committee strongly believes that no judge—federal or state—would allow such a situation to take place, and that a court would stop such bad faith tactics. If this were to actually occur, it is more conceivable that a court would dismiss the complaint with prejudice and sanction the offending attorney.

*Critics' Contention No. 11:* S. 274 will cause delay and mass confusion because of (a) the difficulty of assessing compliance with jurisdictional requirements at the outset and (b) the potential that class membership and definitions will change over time.

*Response*

The contention that S. 274 (particularly its differing treatment of categories of cases when a suit is filed in the defendant's home

[161] Letter to House Judiciary Committee Members from Messrs. Clemente and Vladeck of Public Citizen Litigation Group (dated Aug. 3, 1998), at 1.
[162] Id.

state) would complicate and delay the final resolution of jurisdictional inquiries is absolutely groundless. In reality, the jurisdictional standards in S. 274 will simplify—not complicate—a court's jurisdictional inquiries. Under the current standards, many (and possibly most) newly-filed state court class actions are removed to federal court to test whether the class counsel's efforts to evade federal jurisdiction have been successful (even though those removal attempts normally fail and the cases are remanded to state court). Those inquiries are often quite complicated and can create significant delays.

For example, as noted previously, counsel often include in their complaint extraneous parties in order to prevent the complaint from complying with the current "complete diversity" requirement. The federal courts have ruled that those arguably extraneous parties can be ignored in the jurisdictional analysis if their claims are meritless,[163] and quite frequently, the claims of those parties are challenged in class actions as part of the jurisdictional analysis, requiring the court to take time to engage in the complicated process of assessing the merits of their claims. Under current law, this time-consuming "fraudulent joinder" issue arises in many purported class actions that are removed to federal court.[164]

Similarly, the process of assessing whether a class action complies with the current jurisdictional amount requirement is also often "an expensive and time consuming process,"[165] requiring discovery on the nature and value of the named plaintiffs' claims. As noted previously, in some federal Circuits, the jurisdictional amount requirement in a class action is satisfied by showing that any member of the proposed class is asserting damages in excess of $75,000, and in other Circuits, the question is whether each and every member of the putative class has individually an amount in controversy exceeding $75,000.[166] Again, this time-consuming issue, often requiring significant amounts of record review and fact-

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[163] See, e.g., *Whitaker* v. *American Telecasting, Inc.,* 261 F.3d 196, 207 (2d Cir. 2001) ("'In order to show that naming a non-diverse defendant is a 'fraudulent joinder' effected to defeat diversity [jurisdiction], the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court.'") (citations omitted); *Morris* v. *Princess Cruises, Inc.,* 236 F.3d 1061, 1067 (9th Cir. 2001) ("Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of determining diversity, '[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.'") (citations omitted); *Tillman* v. *R.J. Reynolds Tobacco,* 253 F.3d 1302, 1305 (11th Cir. 2001) ("it is appropriate for a federal court to dismiss * * * a [non-diverse] defendant and retain diversity jurisdiction if the complaint shows that there is no possibility that the plaintiff can establish any cause of action against [the] defendant"); *Heritage Bank* v. *Redcom Laboratories, Inc.,* 250 F.3d 319 (5th Cir. 2001) (to similar effect).

[164] In just the past year, many federal courts have been required to address fraudulent joinder issues in the context of class actions removed to federal court. See, e.g., *Jamison* v. *The Purdue Pharma Co.,* 2003 U.S. Dist. LEXIS 4439 (S.D. Miss. Feb. 5, 2003) (mass action matter); *Hardy* v. *Ducote,* 2003 U.S. Dist. LEXIS 2940 (E.D. La. Jan. 20, 2003); *Burns* v. *Friedli,* 241 F. Supp. 2d 519 (D. Md. 2003); *Moore* v. *Wyeth-Ayerst Labs.,* 236 F. Supp. 2d 509 (D. Md. 2002); *Shields* v. *Bridgestone/Firestone, Inc.,* 232 F. Supp. 2d 715 (E.D. Tex. 2002); *Little* v. *Purdue Pharma, L.P.,* 227 F. Supp. 2d 838 (S.D. Ohio 2002); *In re: Diet Drugs Prods. Liab. Litig.,* 220 F. Supp. 2d 414 (E.D. Pa. 2002); *Doherty* v. *Aventis Pasteur, Inc.,* 2002 U.S. Dist. LEXIS 9596 (N.D. Cal. May 15, 2002); *Garcia* v. *Aventis Pasteur, Inc.,* 2002 U.S. Dist. LEXIS 15122 (W.D. Wash. Apr. 22, 2002); *Ohler* v. *Purdue Pharma, L.P.,* 2002 U.S. Dist. LEXIS 2368 (E.D. La. Jan. 22, 2002); *Mead* v. *Aventis Pasteur, Inc.,* 2002 U.S. Dist. LEXIS 25645 (D. Ore. Jan. 7, 2002).

[165] See C.A. Wright, A.R. Miller, et al., Federal Practice and Procedure § 3707, at 225 (1998).

[166] Id. § 3705, at 65 (2003 Supp.).

finding, is litigated very frequently in the many class actions that are removed to federal court under current law.[167]

In sum, S. 274 will make the resolution of class action jurisdictional issues easier—not harder. The need to deal with the bona fides of counsel's efforts to use dubious parties to avoid diversity will evaporate. In short, it will be much easier to figure out whether any class member is diverse as to any defendant (the "minimal diversity" inquiry established by S. 274) than resolving the fraudulent joinder issues regularly presented under the current rule ("complete diversity"). Likewise, it will be much easier to determine whether the amount in controversy presented by a purported class as a whole (that is, in the aggregate) exceeds $5 million than it is to assess the value of the claim presented by each and every individual class member, as is required by the current diversity jurisdictional statute.

The critics' concerns that events might occur after a complaint is filed or removed that would either create federal jurisdiction in a way never intended or would remove federal jurisdiction in an arbitrary manner are similarly unfounded. While questions regarding events occurring after a complaint is filed or removed to federal court will, of course, arise under S. 274, those same (or, at least, very similar) questions arise in current practice on jurisdictional issues. Well-established law exists to resolve these questions, and S. 274 does not change—or even complicate—the answers to these questions. In short, the "rules of the road" on such issues are already established, and S. 274 does not change them.

Under existing law (which S. 274 would not change), "diversity" of citizenship between the parties must exist both at the time a complaint is filed and at the time a complaint is removed to federal court.[168] For this reason, the federal court would generally only need to measure the diversity of the parties at the outset of the litigation. For example, in a case filed on behalf of a class of California citizens against a California company, there would be no minimal diversity when the case was filed—and thus the case could not be removed simply because one named plaintiff or class member later moved to Nevada. Similarly, if a class action against a California company were filed in California and more than 66% of the class members were California citizens at the time the case was filed, changes in those class members' residences would not alter the jurisdictional analysis. In other words, no court would be required to engage in a residency play-by-play after the time the complaint was filed.

If, however, the plaintiff in the above example of his or her own volition filed an amended complaint in state court that added Nevada plaintiffs (or that brought the percentage of Nevada plaintiffs above 33% in a suit in the defendant's home state), jurisdiction

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[167] In the past year alone, many federal courts have had to resolve jurisdictional amount issues in resolving motions to remand class actions. See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.,* 2003 U.S. Dist. LEXIS 6225 (S.D. Ind. Apr. 11, 2003); *Adams* v. *Nationwide Mutual Ins. Co.,* 2003 U.S. Dist. LEXIS 4973 (N.D. Tex. Mar. 31, 2003); *Carrick* v. *Sears, Roebuck and Co.,* 2003 U.S. Dist. LEXIS 4167 (M.D. Pa. Mar. 17, 2003); *Dash* v. *Firstplus Home Loan Trust,* 2003 U.S. Dist. LEXIS 3706 (M.D.N.C. Mar. 6, 2003); *Harris* v. *Physicians Mut. Ins. Co.,* 240 F. Supp. 3d 715 (N.D. Ohio 2003); *Radlo* v. *Rhone-Poulenc, S.A.,* 241 F. Supp. 2d 61 (D. Mass. 2002); *Mentzel* v. *Comcast Cable Communications,* 222 F. Supp. 2d 923 (E.D. Mich. 2002); *Tremblay* v. *Philip Morris, Inc.,* 231 F. Supp. 2d 411 (D.N.H. 2002).

[168] *Coury* v. *Prot,* 85 F.3d 244, 249 (5th Cir. 1996); *Kanzelberger* v. *Kanzelberger,* 782 F.2d 774, 776 (7th Cir. 1986).

would exist at the time that complaint was filed. Accordingly, as dictated by current law, the defendant could remove the case to federal court.[169]

Current law (that S. 274 does not alter) is also clear that, once a complaint is properly removed to federal court, the federal court's jurisdiction cannot be "ousted" by later events. Thus, for example, changes in the amount in controversy after the complaint has been removed would not subject a lawsuit to be remanded to state court. The Supreme Court established this principle in *St. Paul Mercury Indem. Co.* v. *Red Cab Co.,*[170] stating that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached." The same would be true if a case was removed to federal court because minimal diversity existed at the time and, because of a later event, minimal diversity was eliminated. This would occur if, for example, the federal court dismissed the claims of out-of-state plaintiffs, leaving only the claims of in-state plaintiffs against an in-state defendant intact. "It uniformly has been held that in a suit properly begun in federal court the change of citizenship does not oust the jurisdiction. The same rule governs a suit brought in a state court and removed to federal court." [171]

Sound policy reasons support this rule. If a federal court's jurisdiction could be ousted by events occurring after a case was removed, plaintiffs who believed the tide was turning against them could simply always amend their complaint months (or even years) into the litigation to require remand to state court. "If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election." [172] Similarly, a defendant prevailing on the merits always shows that the amount in controversy, at the end of the day, is zero. Thus, if subsequent events could unravel a federal court's jurisdiction, a defendant could prevail on the merits, only to have the federal court conclude that it lacks jurisdiction to enter a judgment.[173]

It is also clear under existing law that even if a case is not originally removable, it can become removable because of subsequent events (other than changes in the citizenship of the original parties, which, as noted above, do not effect jurisdiction). Thus, as applied under S. 274, if a plaintiff, through amendment or otherwise, increased the amount in controversy, created minimal diversity, or changed the class definition in a case filed in the defendant's home

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[169] See *Caterpillar, Inc.* v. *Lewis,* 519 U.S. 61, 69 (1996) ("In a case not originally removable, a defendant who receives a pleading or other paper indicating the postcommencement satisfaction of federal jurisdictional requirements—for example, by reason of the dismissal of a nondiverse party—may remove the case from federal court within 30 days of receiving such information").

[170] 303 U.S. 283, 293 (1938).

[171] Id.at 294–95.

[172] Id. at 294.

[173] *Herremans* v. *Carrera Designs, Inc.,* 157 F.3d 1118, 1121 (7th Cir. 1998) (holding that the jurisdictional test is "not whether the plaintiff is actually entitled" to $75,000, "[o]therwise every diversity case that a plaintiff lost on the merits would be dismissed for lack of federal jurisdiction").

state to include more than 33% of out-of-state plaintiffs, a complaint filed in state court—and previously not subject to federal jurisdiction—could properly be removed.[174] Otherwise, the plaintiff could simply file a complaint not subject to removal and then later amend it, thereby circumventing federal jurisdiction. Similarly, if a plaintiff defines a class so as to allow diverse parties to become members of a class as the case proceeds, removal may be appropriate if diverse parties actually enter the class. For example, if a class action is filed in state court against an Indiana company on behalf of all persons affected by a chemical spill and it is initially thought that all class members are Indiana citizens, the case may become removable later in the litigation if it emerges that citizens of other states fall within the class definition or have become members of the class as the effects of the chemical spill spread. If this were not the rule, major interstate controversies could evade federal jurisdiction because counsel filed a class action before the parameters of the controversy were fully developed. Any alternative rule would allow class counsel to urge rejection of federal jurisdiction on the grounds that only non-diverse Indiana citizens were in the class and then turn around months later and purport to represent thousands of persons residing outside of Indiana. It should be noted that class counsel can limit the potential for removal as the case proceeds by defining the class to encompass only parties that were injured as of the date on which the action was filed or only parties who are citizens of a certain state.

*Critics' Contention No. 12:* S. 274's provisions expanding federal jurisdiction over class actions are invalid because they exceed the jurisdictional authorization of Article III of the Constitution.

*Response*

This concern lacks merit. As viewed by many Circuits, a federal court may exercise diversity jurisdiction over a purported class action only if none of the plaintiffs named in the complaint share state citizenship with any defendant. In other words, no named plaintiff may be a citizen of the same state as any defendant. This so-called "complete diversity" prerequisite for federal jurisdiction is wholly a policy creation of Congress, establishing a scope of federal diversity jurisdiction narrower than what is authorized by Article III.[175] Broader definitions of diversity jurisdiction would be wholly consistent with Article III. "[I]n a variety of contexts, [federal courts] have concluded that Article III poses no obstacle to the legislative extension of federal [diversity] jurisdiction * * * so long as any two adverse parties are not co-citizens."[176]

Critics suggest that S. 274 is constitutionally suspect because it would authorize federal jurisdiction over purported class actions in which there is "minimal (but not complete) diversity"—that is, cases in which any member of the purported class (whether or not explicitly named in the caption of the complaint) has state citizenship that differs from any defendant (using the definitions already

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[174] See *Caterpillar, Inc.,* 519 U.S. at 69.

[175] See *Strawbridge* v. *Curtis,* 3 Cranch 267 (1806) (complete diversity requirement derives from "[t]he words of the act of Congress," not the Constitution).

[176] *State Farm Fire & Cas. Co.* v. *Tashire,* 386 U.S. 523, 530–31 (1967) (citing *Am. Fire & Cas. Ca.* v. *Finn,* 341 U.S. 6, 10 n.3 (1951); *Wichita R.R. & Light Co.* v. *Pub. Util. Comm'n,* 260 U.S. 48 (1922); *Barney* v. *Latham,* 103 U.S. 205, 213 (1881)).

in 28 U.S.C. § 1332). Citing no precedents whatsoever, the critics allege that there is an absolute bar on considering unnamed class members to be "parties" to a purported class action. They contend that those unnamed persons must be ignored completely in determining whether the two sides meet the applicable diversity requirement.

But the premise of this challenge—that unnamed class members cannot be deemed parties to an action—is flatly inconsistent with the fact that in a variety of contexts over the years, federal courts have treated unnamed class members as parties to class actions. For example:

• In *Zahn* v. *International Paper Co,*[177] the U.S. Supreme Court considered whether federal diversity jurisdiction existed over a purported Rule 23(b)(3) class that had not been certified. The district court declined to exercise federal jurisdiction (or to allow the matter to proceed as a class action) because even though "[t]he claim of each of the named plaintiffs was found to satisfy the * * * jurisdictional amount," "not every individual owner in the class has suffered * * * damages in excess of" the amount-in-controversy threshold.[178] The Supreme Court concurred, holding that in determining whether the amount-in-controversy prerequisite for diversity jurisdiction is satisfied, a trial court is obliged to look at whether each purported claimant, even if unnamed, meets the $75,000 jurisdictional amount requirement.[179] Thus, in this respect, the federal courts have for many years treated unnamed class members as "parties."

• Similarly, in *Devlin* v. *Scardelletti,*[180] the Supreme Court recently held that unnamed class members are considered "parties" for purposes of mounting an appeal. Thus, *Devlin* rejects the contention that unnamed class members cannot be considered "parties" to the litigation.

• Earlier, the Supreme Court ruled that normally, the filing of a class action immediately tolls the statute of limitations as to all unnamed class members.[181] In short, all unnamed class members are treated as parties—treated as if they had filed the litigation themselves. Significantly, the *American Pipe* Court declared that "the claimed members of the class *stood as parties to the suit until and unless they received notice thereof and chose not to continue.*")[182]

• Along these same lines, many courts have held that under Fed. R. Civ. P. 23(e), a court must ensure that unnamed class members' interests are protected if class claims are dismissed.[183] In other words, the court is obliged (at least at some level) to treat the unnamed class members as parties to the litigation.

S. 274 proposes that Congress declare unnamed class members to be "parties" to the litigation for purposes of the "minimal diversity" jurisdictional requirement. As evidenced by the foregoing ex-

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[177] 414 U.S. 291 (1973),

[178] *Zahn* v. *International Paper Co.,* 53 F.R.D. 430 (D. Vt. 1971).

[179] *Zahn* v. *International Paper Co.,* 414 U.S. at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'").

[180] 536 U.S. 1 (2002).

[181] See, e.g., *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974).

[182] Id. at 550 (emphasis added).

[183] See *Diaz* v. *Trust Territory of the Pacific Islands,* 876 F.2d 1401, 1408 (9th Cir. 1989); *Glidden* v. *Chromalloy American Corp.,* 808 F.2d 621, 626–28 (7th Cir. 1986).

amples, such a congressional determination about who is a class action "party" would be wholly consistent with long-standing practice. For years, Congress and the courts have made practical determinations about how various categories of parties should be treated in assessing compliance with diversity jurisdiction prerequisites and specifically about the circumstances in which unnamed class members should be treated as parties to a lawsuit. The enactment of the "minimal diversity" provisions of S. 274 would be merely another such practical determination—a determination that for purposes of the "minimal diversity" jurisdictional inquiry established by the legislation, unnamed class members (as well as any named class members) shall be considered "parties." Congress is certainly empowered to establish such a definition in this instance.

The Committee also notes that the exercise of this expanded jurisdiction can be grounded on a Commerce Clause rationale as well. In that regard, the Committee notes that the legislation contains findings that the state court class action abuses identified in the record before the Committee are having a serious adverse effect on interstate commerce and that the legislation (particularly its jurisdictional provisions) is intended to ameliorate those adverse effects.

## VIII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

*S. 274—Class Action Fairness Act of 2003*

S. 274 would expand the types of class-action lawsuits that would be initially heard in federal district courts. CBO estimates that implementing the bill would cost the federal district courts about $6 million a year, subject to appropriation of the necessary funds. The bill would not affect direct spending or revenues. S. 274 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. S. 274 would impose private-sector mandates, as defined in UMRA, but CBO estimates that the direct cost of the mandates would fall below the annual threshold established by UMRA ($117 million in 2003, adjusted annually for inflation).

Under S. 274, most class-action lawsuits would be heard in a federal district court rather than a state court. Therefore, CBO estimates that the bill would impose additional costs on the federal district court system. While the number of cases that would be filed in federal court under this bill is uncertain, CBO expects that a few hundred additional cases would be heard in federal court each year. According to the Administrative Office of the United States Court, class-action lawsuits tried in federal court cost the government, on average, about $21,000. That figure includes salaries and benefits for clerks, rent, utilities, and associated overhead expenses, but excludes the costs of the salaries and benefits of judges. CBO estimates that implementing S. 274 would cost about $6 million annually.

CBO also estimates that enacting this bill could increase the need for additional district judges. Because the salaries and benefits of district court judges are considered mandatory, adding more judges would increase direct spending. However, S. 274 would not—by itself—affect direct spending because separate legislation would be necessary to authorize an increase in the number of dis-

trict judges. In any event, CBO expects that enacting the bill would not require a significant increase in the number of federal judges, so that any potential increase in direct spending from subsequent legislation would probably be less than $500,000 a year.

S. 274 would require the Judicial Conference of the United States to transmit a report on class action settlements to the Congress no later than one year after the bill's enactment. CBO estimates that this provision would cost less than $500,000 in 2004.

S. 274 would impose a private-sector mandate by requiring any notice concerning a proposed settlement of a class action provided to the class members through the mail or in printed media contain specific information in plain, easily understood language and in a specific format. The bill also would require any notice to inform class members of their right to be excluded from a class action or from a proposed settlement provided through television or radio contain information in plain, easily understood language. According to the Association of Trial Lawyers of America, such notices are currently provided, but are not always in plain English language and tabular format as required by the bill. Therefore, CBO estimates that the direct cost, if any, to comply with those mandates would be minimal.

In addition, S. 274 would impose a private-sector mandate on defendants participating in a proposed class action settlement. The bill would require defendants to make certain notifications and disclosures to the appropriate state official of each state in which a classmember resides and the appropriate federal official within 10 days after a proposed settlement is filed in court. The bill defines a proposed settlement as an agreement regarding a class action that is subject to court approval and would be binding on the class. The required notices and disclosures would include a copy of the suit, a copy of the proposed settlement, a statement of class-members' rights, and certain other materials. In effect, the defendants would have to provide copies of documents and materials related to information that they usually already possess about the case. Further, the provision would allow for the use of the Internet in making such disclosures. Thus, CBO estimates that the costs of complying with this mandate would be small.

The CBO staff contacts for this estimate are Lanette J. Walker (for federal costs) and Paige Piper/Bach (for the private-sector impact). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

## IX. Regulatory Impact Statement

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 274 will not have a significant regulatory impact.

# X. MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, BIDEN, FEINGOLD, SCHUMER, DURBIN, AND EDWARDS

## I. INTRODUCTION

We strongly oppose S. 274, the "Class Action Fairness Act of 2003." Although the legislation is described by some of its proponents as a simple procedural fix, it represents a radical revision of the class action rules and diversity jurisdiction requirements. In fact, we believe it would bar most state class actions from being heard in state courts. S. 274 is opposed by the Federal [1] and state [2] judiciaries, and by a multitude of civil justice, consumer, environmental and public interest advocates.[3]

By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation. This legislation will undercut that important principle by making it far more burdensome, expensive, and time-consuming for groups of injured persons to obtain access to justice. Thus, it would be more difficult for citizens to seek redress for violations of civil rights, employment discrimination, and consumer health, safety and environmental laws, to name but a few important laws. The legislation goes so far as to prevent state courts from considering class action cases which involve solely violations of state laws, such as state consumer protection laws.

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[1] See Letter from Leonias Ralph Mecham, Secretary, Judicial Conference of the United States (March 26, 2003) [hereinafter Judicial Conference letter] (stating that on March 18, 2003, the Conference voted to express its opposition to the jurisdictional provisions in S. 274, as it had in the earlier version of this legislation, because the provisions "would add substantially to the work of the Federal courts and are inconsistent with principles of Federalism"); Letter from Anthony J. Scirica, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (May 12, 2003) [hereinafter Scirica letter] (requesting that the Judiciary Committee withdraw the notice provisions of the bill because they conflict with Rule 23 of the Federal Rules of Civil Procedures and are inconsistent with the Rules Enabling Act ).

[2] See Letter from Annice M. Wagner, President, Conference of Chief Justices (March 28, 2002). The Conference of Chief Justices wrote to Congress regarding an earlier version of this legislation: "Absent hard evidence of the inability of the state judicial systems to hear and decide fairly class actions brought in state courts, we do not believe that such a procedure is warranted."

[3] See Letters to Committee Members in opposition to S. 274 from the AARP, Alliance for Justice, Alliance for Retired Americans, American Association of People with Disabilities, American Cancer Society, American Heart Association, American Lung Association, Campaign For Tobacco-Free Kids, Center for Disability and Health, Clean Water Action, Coalition to Stop Gun Violence, Consumer Federation of America, Consumers for Auto Reliability and Safety, Consumers Union, Disability Rights Education Fund, Earthjustice, Environmental Working Group, Families USA, Friends of the Earth, Gray Panthers, Greenpeace, Homeowners Against Deficient Dwellings, Lawyers Committee For Civil Rights Under Law, Leadership Conference on Civil Rights, Mexican American Legal Defense and Educational Fund, Mineral Policy Center, National Asian Pacific Legal Consortium, National Consumers League, National Council of La Raza, National Employment Lawyers Association, National Partnership for Women and Families, National Resources Defense Council, National Workrights Institute, National Women's Health Network, National Women's Law Center, NOW Legal Defense Fund, People for the American Way, Public Citizen, Service Employees Union International, Sierra Club, Tobacco Control Resource Center, Tobacco Products Liability Project, United Policyholders, U.S. Action, U.S. Public Interest Research Group, Women Employed, and Violence Policy Center.

"The Class Action Fairness Act of 2003" will force most state class action cases into Federal courts. It will provide automatically for both original jurisdiction and the removal of state class action claims to Federal court at the request of either party in cases involving violations of state law if any member of the plaintiff class and at least one primary defendant are citizens of different states.[4]

As part of the expanded diversity jurisdiction, the bill also provides for the removal of state class actions to Federal court at the request of either party if fewer than one-third of the plaintiff class members are citizens of a different state than any primary defendant, even if the primary defendant conducts substantial business in that state.[5] The legislation would allow removal of a class action to Federal court in cases where between one-third and two-thirds of the plaintiffs are citizens of the same state as the primary defendants.[6]

Under the legislation, Federal courts are directed to abstain from hearing a class action only where (1) more than two-thirds of the plaintiffs are citizens of the same state as the primary defendant; (2) the matters in controversy are less than $5,000,000 or the membership of the proposed class is less than 100; or (3) the primary defendants are states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief.[7]

This bill also contains a "Consumer Class Action Bill of Rights." This "bill of rights" includes some safeguards that we agree will improve class action litigation for all parties, such as protection against a proposed settlement that would result in a net loss to a class member and protection against discrimination based on geographic location. But this "bill of rights" also fails to address the greatest consumer abuses in class action cases such as worthless coupon settlements[8] and "sweetheart" deals which pay off one class in order to eradicate future claims which had not even been before the court.[9]

Furthermore, in the event that a district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Procedure 23, under S. 274, the court

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[4] S. 274, §§ 4–5. Current law requires complete diversity before a state law case is eligible for removal to Federal court, meaning all of the defendants must be citizens residing in different states than the plaintiffs. See *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Snyder* v. *Harris*, 394 U.S. 332 (1969), the Supreme Court held that the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.

[5] S. 274, §§ 4–5.

[6] S. 274, § 4. The bill is silent as to when the percentage of the class members is to be measured during the litigation for removal purposes. Typically, the membership of a class will change during different stages of the litigation depending on the discovery and settlement process. As a result, parties in a given class action might spend years litigating the proper venue for the case rather than arguing the merits of their case if S. 274 becomes law.

[7] S. 274, § 4. The legislation also excludes securities-related and corporate governance class actions from coverage and makes a number of other procedural changes, such as easing the procedural requirements for removing a class action to Federal court (i.e., permitting removal to be sought by any plaintiff or defendant and eliminating the one-year deadline for filing removal actions) and tolling the statute of limitation periods for dismissed class actions.

[8] Indeed, S. 274 merely requires the judge to scrutinize coupon settlements as "fair, reasonable and adequate"—an action that the judge is already obligated to do under existing law. See Part III of these views for more details about coupon settlements.

[9] These include collusive settlements, in which the parties agree to a far broader settlement than was originally sought in order to insulate defendants from other liability. See Part III of these views for more details about collusive settlements.

must dismiss the action.[10] This would have the effect of ending the class action claim. And while the action may be refiled in state court, it will likely be removed again to the Federal court, and dismissed again, resulting in a fruitless "merry-go-round" effect.[11]

We object to the fact that the bill is written in a one-sided manner favoring defendants at the expense of harmed victims. As Senator Biden eloquently stated during Committee consideration of the bill, S. 274 will make it "far less likely that class actions will be brought, far less likely that corporations will be deterred from taking action contrary to the public interest, and far less likely that businesses will redress injuries their products have inflicted. Consumers will suffer the consequences." [12]

Before even considering S. 274, the Committee and the full Senate should insist on receiving objective and comprehensive data justifying such a dramatic intrusion into state court prerogatives. Nothing in the way of such information now exists. Before the Committee considered this bill, six Members of the Committee wrote to Chairman Hatch, respectfully requesting a hearing on class action litigation to help the Committee develop consensus reforms to better serve both defendants and plaintiffs before the Committee proceeded to a markup on S. 274.[13] Unfortunately, that request was ignored and the letter went unanswered.

We had hoped that the Committee would undertake a deliberate and careful review of information from parties actually involved in class action litigation to provide a realistic picture of the benefits and problems with class actions. But, instead, the Committee has proceeded with one-sided legislation that has repeatedly failed to pass the Senate in recent years.

We recognize that class action litigation has genuine problems that should be addressed by Federal legislation for the benefit of both defendants and plaintiffs. This legislation, however, is heavily biased in favor of defendants. Rather than address the system's real failings, S. 274 will make it more difficult for the vast majority of legitimate, well-intentioned class actions to move forward, by placing cumbersome restrictions on citizens' rights to seek redress for their injuries.

In short, we agree with the position of the National Conference of State Legislatures: "Anecdotal evidence of abuse might highlight a need for reform in a particular jurisdiction, reform that can and has been addressed outside the nation's capitol. Such anecdotes, however, are grossly insufficient reasons for a wholesale Federal takeover of class action litigation. Lawsuits based on questions of state law should be decided in state courts by the judges who are best qualified to interpret and apply the laws of that state." [14]

For these and other reasons set forth herein, we strongly oppose S. 274.

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[10] S. 274, § 4. Under current law, the case would be remanded to state court, not dismissed.

[11] While the class action may be refiled again, any such refiled action may also be removed again if the district court has jurisdiction under S. 274.

[12] Written statement of Senator Biden, executive business meeting of the Committee, April 3, 2003.

[13] See March 25, 2003 letter from Senators Leahy, Kennedy, Biden, Feingold, Durbin, and Edwards to Chairman Hatch.

[14] Letter from Representative Kip Holden, Louisiana House of Representatives, Chair, National Conference of State Legislatures, AFI Law and Justice Committee, dated June 21, 2000, to Senator Leahy.

II. S. 274 WILL DAMAGE THE FEDERAL AND STATE COURT SYSTEMS

By expanding Federal class action jurisdiction to include most state class actions, S. 274 will inevitably result in a significant increase in the Federal courts' workload. In its letter to the Judiciary Committee concerning a prior version of this bill, the Judicial Conference warned that:

> [T]he effect of the class action provisions of [S. 353] would be to move virtually all class action litigation into the Federal courts, thereby offending well-established principles of Federalism [and] * * * hold[ing] the potential for increasing significantly the number of [class action] cases currently being litigated in the Federal system.[15]

The Judicial Conference reaffirmed its opposition to this effect of S. 274 in its recent letter, stating that the Conference's position on S. 274 "makes clear that such opposition continues to apply to similar jurisdictional provisions." [16]

In addition to overwhelming the Federal courts with new time-intensive class actions, S. 274 will undermine state courts' independent authority. Recently, several state Attorneys General wrote to Senate leaders objecting to this "federalizing" of most class actions under this legislation:

> The fundamental flaw in S. 274 is that all class actions brought against a defendant who is not a "citizen" of the state will be removed to federal court, no matter how substantial a presence the defendant has in the state or how much harm the defendant has caused in the state. Most class actions will be transferred to federal court, even where the majority of class members are from a single state.[17]

In cases that are removed to the Federal courts but not certified, S. 274 will prevent the state courts from hearing cases as class actions, even though the claims are based in state law. It is important to recall the context in which this legislation arises—a class action has been filed in state court involving state law claims, which if filed by individuals would not be subject to Federal jurisdiction (either because the parties do not meet the current Federal diversity requirements or the amount in controversy for each claim does not exceed $75,000). When these class actions are dismissed by the Federal courts, thousands of individual actions may be unleashed on the state courts.[18]

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[15] See Judicial Conference letters of July 26, 1999 and August 23, 1999.

[16] See Judicial Conference Letter, supra note 1.

[17] June 11, 2003, letter from Eliot Spitzer, Attorney General of the State of New York, and W.A. Drew Edmondson, Attorney General of the State of Oklahoma, on behalf of the Attorneys General of the States of Ilinois, Maryland, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, and West Virginia to Majority Leader Frist and Minority Leader Daschle.

[18] To counter this problem, Senator Feingold offered an amendment at the Judiciary Committee markup of S. 274 which provided that if after removal, the Federal court determines that no aspect of an action that is subject to its jurisdiction may be maintained as a Federal class action, the court shall remand the action to the state court without prejudice. This amendment would respond to the most serious complaint leveled by class action defendants by allowing the Federal court the first opportunity to certify the class action but it would not deny the state court jurisdiction over the class action if it did not meet the Federal requirements. The amendment was defeated by a vote of 7–11.

Even more troublesome than these potential workload problems, S. 274 raises serious constitutional issues by challenging the vision of our founders and the intent of the Constitution. This legislation undermines James Madison's vision of a Federal government "limited to certain enumerated objects, which concern all the members of the republic." [19]

This bill does not merely operate to preempt state laws; rather, it unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes. As the Lawyers' Committee for Civil Rights Under Law observes, citing *Bank of the United States* v. *Deveaux:*

> For over 200 years, Federal diversity jurisdiction has been exercised with care and hesitation, demonstrating that Congress believed, with few exceptions "tribunals of the state * * * administer justice as impartially as those of the nation, to parties of every description." [20]

The courts have previously found that efforts by Congress to dictate such state court procedures implicate important Tenth Amendment Federalism concerns and should be avoided. For example, in *Fielder* v. *Casey* [21] the Supreme Court observed that it is an "unassailable proposition * * * that States may establish the rules of procedure governing litigation in their own courts." Similarly, in *Johnson* v. *Fankell* [22] the Court reiterated what it termed "the general rule 'bottomed deeply in belief in the importance of State control of State judicial procedure * * * that Federal law takes State courts as it finds them'" [23] and observed that judicial respect for the principal of Federalism "is at its apex when we confront a claim that Federal law requires a State to undertake something as fundamental as restructuring the operation of its courts" and "it is a matter for each State to decide how to structure its judicial system." [24]

These same constitutional concerns were highlighted by Professor Laurence Tribe in his testimony regarding the constitutionality of a proposed Federal class action rule applicable to state courts included in tobacco legislation proposed during the 105th Congress. Professor Tribe observed: "[f]or Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco

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[19] Federalist No. 14.

[20] See April 9, 2003, letter from Lawyers' Committee for Civil Rights Under Law, quoting *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 87 (U.S. 1809); see also *City of Indianapolis* v. *Chase Nat'l Bank,* 314 U.S. 63, 76 (1941).

[21] 487 U.S. 131, 138 (1988) (finding Wisconsin notice-of-claim statute to be preempted by 42 U.S.C. § 1983, which holds anyone acting under color of law liable for violating constitutional rights of others).

[22] 520 U.S. 911 (1997) (holding that Idaho procedural rules concerning appealability of orders are not preempted by 42 U.S.C. § 1983).

[23] Id. at 919 (quoting Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954).

[24] Id. at 922. See also *Howlett* v. *Rose*, 296 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev 489, 508 (1954) for the proposition that Federal law should not alter the operation of the state courts); *New York* v. *United States*, 505 U.S. 144, 161 (1992) (stating that a law may be struck down on Federalism grounds if it "commandeer[s] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program").

suits—would raise serious questions under the Tenth Amendment and principles of Federalism." [25]

The Supreme Court's most recent decisions further indicate that S. 274 is an unacceptable infringement upon state sovereignty. In *United States* v. *Morrison,*[26] the Court invalidated parts of the Violence Against Women Act, claiming that Congress overstepped its specific constitutional power to regulate interstate commerce. Despite vast quantities of data illustrating the effects that violence against women has on interstate commerce, the Court essentially warned Congress not to extend its constitutional authority to "completely obliterate the Constitution's distinction between national and local authority." S. 274, introduced without a hearing and without any convincing data, ignores the Court's admonitions and subverts the Federal system by hindering the states' ability to adjudicate class actions involving important and evolving questions of state law. S. 274 not only obliterates the distinction between national and local authority, it effectively annihilates local authority over state class actions.

Responding to these significant constitutional concerns, proponents of this legislation argue that state courts will not give fair hearings to out-of-state defendants, but support for their assertion is bereft of evidence. First, the Supreme Court has already made clear that the state courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co.* v. *Shutts,*[27] the Supreme Court held that in class action cases, state courts must ensure that: (1) the defendant receives notice plus an opportunity to be heard and participate in the litigation;[28] (2) an absent plaintiff must be provided with an opportunity to remove himself or herself from the class; (3) the named plaintiff must at all times adequately represent the interests of the absent class members; and (4) the forum state must have a significant relationship to the claims asserted by each member of the plaintiff class.[29]

Secondly, as fears of local court prejudice have subsided and concerns about diverting Federal courts from their core responsibilities have increased, the policy trend in recent years has been towards limiting Federal diversity jurisdiction.[30] For example, Congress enacted the Federal Courts Improvement Act of 1996,[31] which in-

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[25] The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary, 105th Cong., (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School). Indeed, Chairman Hatch recently praised Professor Tribe at the Committee's June 4, 2003, hearing on asbestos litigation as "known here and throughout the country as one of the most respected constitutional scholars and practitioners."

[26] 120 S. Ct. 1740 (2000).

[27] 472 U.S. 797 (1985).

[28] See id at 812 (stating that the notice must be the "best practicable, reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.") (quoting *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314–315 (1950)).

[29] See id. at 806–810. These findings were reiterated by the Supreme Court in 1995 in *Matshusita Elec. Indust. Co.* v. *Epstein,* 516 U.S. 367 (1995) (holding that state class actions are entitled to full faith and credit so long as, inter alia: the settlement was fair, reasonable, adequate and in the best interests of the settlement class; notice to the class was in full compliance with due process; and the class representatives fairly and adequately represented class interests).

[30] Ironically, during the 104th Congress, the Republican Party was extolling the virtues of state courts in the context of their efforts to limit habeas corpus rights, which permit individuals to challenge unconstitutional state law convictions in Federal court.

[31] 28 U.S.C §1332(a) (West Supp. 1998).

creased the amount in controversy requirement needed to remove a diversity case to Federal court from $50,000 to $75,000. This statutory change was based on the Judicial Conference's determination that fear of local prejudice by state courts was no longer relevant[32] and that it was important to keep the Federal judiciary's efforts focused on Federal issues.[33]

One encouraging note was struck in the mark-up of S. 274, when Senators Feinstein and Specter joined together to craft an amendment to strike the provisions in S. 274 which treated suits by private attorneys general, and mass tort suits, as if they were class actions. As introduced, S. 274 would have created Federal jurisdiction not only for true class actions, but also for private attorney general actions brought by any organization or citizen, as well as for groups of cases in which 100 or more individuals seeking monetary relief seek to try any common legal or factual issue together (i.e., "mass torts").[34] As Senator Feinstein explained, that provision was "a direct strike against State law in a way that puts a whole category of actions that are not now class actions into the class action arena."[35] Senator Specter echoed that understanding, pointing out that, "This is a class action bill * * * but these provisions do not relate to class actions."[36] As Chairman Hatch conceded, "these are representative actions that are a little different from class actions,"[37] and the Committee accepted the Specter-Feinstein amendment without objection.

## III. S. 274 WILL HURT CONSUMERS, VICTIMS, AND THE ENVIRONMENT

Proponents of this legislation claim that S. 274 will protect consumers while remedying the worst abuses of the class action system, yet consumer advocates overwhelmingly oppose these alleged "reforms."[38] There can be little doubt that S. 274 will have a serious adverse impact on the ability of consumers and victims to obtain compensation in cases involving widespread harm. At a minimum, the legislation will force most state class action claims into Federal courts where it is generally more expensive for plaintiffs to litigate cases and where defendants could force plaintiffs to travel long distances to attend proceedings.

It is also typically more difficult and time consuming to certify a class action in Federal court. Fourteen states, representing nearly one-third of the nation's population,[39] have adopted different cri-

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[32] See Judicial Conference of the United States, Long Range Plan for the Federal Courts, Recommendation 7 at 30 (1995).

[33] See id.

[34] Transcript of executive business meeting of the Senate Judiciary Committee, April 11, 2003, p. 24–31.

[35] Statement of Senator Feinstein, executive business meeting of the Senate Judiciary Committee, April 11, 2003, p. 26.

[36] Statement of Senator Specter, executive business meeting of the Senate Judiciary Committee, April 11, 2003, p. 28.

[37] Statement of Senator Hatch, executive business meeting of the Senate Judiciary Committee, April 11, 2003, p. 26.

[38] See Letter in Opposition to S. 274, February 5, 2003, from the Consumer Federation of America, Consumers Union, and U.S. Public Interest Research Group.

[39] Three states still use their common law rules, rather than statutes, to permit class actions (Mississippi, New Hampshire, and Virginia); four states use Field Code-based rules based on the "community of interest" test (California, Nebraska, South Carolina, and Wisconsin); and seven states use class action rules modeled on the original Federal Rule 23 (1938) which creates a distinction among class members which depends on the substantive character of the right asserted (Alaska, Georgia, Louisiana, New Mexico, North Carolina, Rhode Island, and West Vir-

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teria for class action rules than Rule 23 of the Federal Rules of Civil Procedure.[40] In addition, with respect to those states which have enacted an analog to Rule 23, the Federal courts are likely to represent a more difficult forum for class certification to occur. This ratcheting up of the standard is the result of a series of adverse Federal precedents, such as *Castano* v. *American Tobacco Co.,*[41] *In re Rhone-Poulenc Rorer, Inc.,*[42] *In re American Medical Systems, Inc.,*[43] *Georgine* v. *Amchem Products, Inc.,*[44] *Broussard* v. *Meineke Discount Mufflers,*[45] and *Ortiz* v. *Fibreboard,*[46] which have made it more difficult to establish the "predominance requirement" necessary to establish a class action under the Federal rules.

*A. Removal abuses and the effects of the judicial "merry-go-round"*

"The Class Action Fairness Act of 2003" also creates unique risks and obstacles to plaintiffs not present in the current system. A particularly troubling aspect of S. 274 is that it allows removal of a case at any time. The possibilities for abusing this provision are obvious, and worth noting. As more than a hundred law professors noted in a letter to Senators Frist and Daschle:

> This would give a defendant the power to yank a case away from a state-court judge who has properly issued pretrial rulings the defendant does not like, and would encourage a level of forum-shopping never before seen in this country. Moreover, this provision would allow an unscrupulous defendant, anxious to put off the day of judgment so that more assets can be hidden, to remove a case on the eve of a state-court trial, resulting in an automatic delay of months or even years before the case can be tried in Federal courts.[47]

Equally worrisome is the fact that, under S. 274, if the Federal district court determines that an action does not satisfy the re-

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ginia). See 3 Herbert B. Newberg and Alba Conte, Newberg on Class Actions § 13.04 (3d ed.1992 & Supp. 1997).

[40] Rule 23(a) states four factual prerequisites that must be met before a court will certify the lawsuit as a class action: (1) size—the class must be so large that joinder of all of its members is not feasible; (2) common questions—there must be questions of law or fact common to the class; (3) typical claims—the claims or defenses of the representatives must be "typical" of those of the class; and (4) representation—the representatives must fairly and adequately represent the interests of the class.

[41] 84 F.3d 734 (5th Cir. 1996) (preventing the certification of a nationwide class action brought by cigarette smokers and their families for nicotine addiction where there was found to be too wide a disparity between the various state tort and fraud laws for the class action vehicle to be superior to individual case adjudication).

[42] 51 F. 3d 1293 (7th Cir. 1995) (decertifying, under the Erie doctrine, a nationwide negligence class action brought on behalf of hemophiliacs infected with the AIDS virus through use of defendants' blood clotting products because of diversity of state laws).

[43] 75 F.3d 1069 (6th Cir. 1996) (decertifying a proposed plaintiff settlement class comprising all U.S. residents implanted with defective or malfunctioning inflatable penile prostheses that were manufactured, developed, or sold by defendant company because common questions of law or fact did not predominate the action to such an extent that warranted class certification).

[44] 521 U.S. 591 (1997) (overturning consensual settlement between a class of workers injured by asbestos and a coalition of former asbestos manufacturers because of disparate levels of the class members' knowledge of their injuries and class members' large amount at stake in the litigation).

[45] 155 F.3d 331 (4th Cir. 1998) (rejecting class certification brought by Meineke franchisees alleging violations of franchise, tort, unfair trade, and other laws).

[46] 119 S.Ct. 2295 (1999). The Court found that mandatory limited fund class treatment under Rule 23(b)(1)(B) is not appropriate unless the maximum funds available are clearly inadequate to pay all claims.

[47] Letter from 106 professors of constitutional law and civil procedure to Senators Frist and Daschle, June 3, 2003, p. 2.

quirements of Federal Rule of Civil Procedure 23, the court must dismiss the action. This has the effect of striking the class action claim, and may have the long term result of federalizing all state class action standards. While the class action may be refiled in state court, any such refiled action may be removed again to Federal court. Therefore, even if a state court subsequently certifies the class, it could be removed again and again, creating a revolving door between Federal and state court—hardly a just outcome for all parties.

Added to the "merry-go-round" provision of the legislation are the hurdles established by Senator Feinstein's amendment to S. 274. While undoubtedly well-intentioned, the amendment sets up cumbersome requirements for determining whether an action will be heard in state or Federal court.[48] The result is a bill that will cause unnecessary and expensive litigation that favors corporate defendants at the expense of harmed victims. As Senator Feingold stated during the April 10, 2003, mark-up of this legislation:

> The two-thirds requirement is a hard and fast rule that will allow defendants to argue the case should be removed as long as the class composition doesn't exceed the magic 66.67 percent * * * The [resultant] procedural hurdles in [this legislation] make it more difficult for plaintiffs to proceed in either state or Federal court due to the legal maneuvering over which forum is appropriate * * * Justice delayed is justice denied.[49]

Moreover, given that membership in class actions frequently change, the two-thirds requirement, and the "middle-third" provision (subject to judicial discretion) would open up the process to legal gamesmanship. Considering the vast resources of defendants in many class actions, as compared to the plaintiffs, this will only make it more difficult for class members to ever have a final ruling on the merits of their case.

Attempting to address this misgiving constructively, Senator Feingold introduced a modest amendment to S. 274 that would have prevented "endless rounds of removals, dismissals, and remands."[50] The Feingold amendment would have required that class actions that were removed to Federal court and unable to satisfy the Rule 23 class certification requirements be remanded to state court, as is the case under current law. If the claims before the state court were substantially identical to the original action, the case could not be removed again under the amendment. This amendment would have alleviated some of the unacceptable delays

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[48] The Feinstein amendment provides that a Federal judge may use five factors in deciding jurisdiction of a class action where between one-third and two-thirds of the plaintiffs are from the same state as the primary defendants: (1) whether the claims involve matters of national or interstate interest; (2) whether the claims will be governed by laws other than those of the forum state; (3) whether the case has been pleaded in a manner that seeks to avoid Federal jurisdiction; (4) whether the number of citizens from the forum state is substantially larger than the number of citizens from any other state and the citizenship of the members is dispersed among a substantial number of states; and (5) whether one or more class actions asserting the same or similar claims on behalf of the same or other person have been or may be filed. These five factors are not defined in S. 274.

[49] Statement of Senator Russell Feingold in opposition to Senator Feinstein's amendment to S. 274, executive business meeting of the Senate Judiciary Committee, April 11, 2003.

[50] See Transcript of April 11, 2003, Executive Business Meeting at 52–53.

S. 274 would create for class action litigation. Unfortunately, the majority voted down this amendment to improve the bill.[51]

*B. Barriers to justice for consumers*

This legislation will also severely limit the ability of consumers to pursue class actions in state court, even when state consumer protection laws are implicated. Consumers pay the price when Federal courts dismiss a case rather than remanding the suit to state court where a state might certify the action. When this occurs, consumers are left with two equally unattractive options: "A consumer could bring the claim in state court as an individual action. However, individual cases would be impractical to litigate, would not have the same deterrent effect, and would have the potential to overwhelm state courts. In the alternative, consumers could re-file an amended class certification in state court. This re-filing again opens the door created by S. 274 for the defendant to remove the case to Federal court." [52]

Even if consumers get their day in Federal court under this legislation, consumer advocates argue that just outcomes are unlikely. Federal court decisions will likely be narrowly tailored, without establishing legal precedent for future state court cases of the particular law in question. Because of this, S. 274 "will slow—and in some cases thwart—the continual interpretation of state law." [53]

Once again, S. 274 raises serious concerns about Federalism. Senator Feingold, in introducing an amendment that would keep consumer protection class actions in state courts, made the point: "* * * Federal courts interpret State law on a regular basis, but I do not believe that we should be setting up a system where the State courts will virtually never interpret and apply their own laws to significant cases of first impression * * * That just seems to be a result as far removed from any reasonable interpretation of our Federal system as I can imagine." [54] And Senator Feingold is not alone in criticism of S. 274 in this regard. Indeed, the American Bar Association Task Force on Class Action Legislation's recent report noted that "any expansion [of Federal court jurisdiction] should preserve a balance between legitimate state-court interests and Federal-court jurisdictional benefits." [55] The current legislation clearly fails this test.

Senator Feingold's amendment would have ensured that state consumer protection cases are kept where they belong—in state courts. If his amendment had been approved, citizens would have been able to seek remedies in their own states in cases relating to "consumer fraud, consumer loans, consumer credit sales, deceptive trade practices, unlawful trade practices, or unfair and deceptive practices." The only exception to this would be in class actions where there is a complete diversity among the parties (the current

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[51] At the April 11, 2003, executive business meeting of the Committee, Senators Leahy, Kennedy, Biden, Feingold, Schumer, Durbin, and Edwards voted for the amendment. All other members voted in oppositon, with Senator Specter passing.

[52] See Letter from the Consumer Federation of America, Consumers Union, and U.S. PIRG, February 5, 2003.

[53] Ibid.

[54] April 11, 2003, executive business meeting, at 61.

[55] See April 2, 2003 letter in opposition to S. 274, "Opposition to S. 274, 'The Class Action Fairness Act of 2003,'" from the Consumers Union.

standard).[56] The Committee failed to approve this important amendment by a vote of 7 yeas to 11 nays.[57]

Nor does S. 274's provision for "notice requirements" to class members improve current law. In fact, S. 274 contains a long, detailed notice provision that would actually confuse consumers—not help them. According to the Judicial Conference Rules Committee, these notice requirements would have "undermine[d] the bill's stated objectives by requiring notices so elaborate that most class members [would] not even attempt to read them."[58] Indeed, members of the House Judiciary Committee, when considering similar legislation, unanimously accepted an amendment conforming the notice requirements to the Federal Rules of Civil Procedure.

This legislation as originally introduced went so far as to federalize nearly all consumer protection actions, regardless of whether or not they involve large classes of nationwide plaintiffs, or even a class of plaintiffs at all. For instance, some states have laws that protect consumers by prohibiting deceptive business practices.[59] These laws may be enforced by the State Attorney General or, if the State Attorney General does not act, the state citizens may act as private attorneys general. This legislation, as introduced, would have forced these cases into Federal court because these private citizens also represent the interests of the "general public," which the bill explicitly grouped with class actions. Fortunately, Senator Specter and Senator Feinstein offered an amendment to strike this subsection of S. 274, which was accepted by a voice vote.

The net result of these various changes is that under the proposed legislation, it will be far more difficult for consumers and other injured individuals to obtain justice in class action cases at the state or Federal level.

*C. Special protections for the tobacco and gun industries*

"The Class Action Fairness Act of 2003" will have the effect of giving special protections to two industries undeserving of special treatment—the tobacco industry and the gun industry. Because of the special legal protections in S. 274, the tobacco and firearms industries may be able to avoid accountability for their products. For example, the reported bill's "⅓–⅓–⅓" requirement virtually guarantees that tobacco-related cases will end up in Federal court since the major tobacco companies are all headquartered in only one or two states while tobacco victims are nationwide. In effect, cigarette makers will be able to "forum shop" to the Federal courts where they prefer to litigate, since the rules for certifying class actions are often stricter.[60]

Such special protection is particularly inappropriate for an industry that has "lied to Congress and the American people" for dec-

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[56] See Feingold Amendment to S. 274, April 11, 2003, executive business meeting, at 63–64.

[57] April 11, 2003 executive business meeting at 75. The amendment was defeated by 7 yeas to 11 nays. Senators Leahy, Kennedy, Biden, Feingold, Schumer, Durbin, and Edwards voted in favor of the amendment. All of the other Committee members voted against, with Senator Specter passing.

[58] Scirica letter, p. 3.

[59] Michigan and California are two states that allow "private attorney general" suits.

[60] See Letter in Opposition to S. 274, March 10, 2003, from Campaign for Tobacco Free Kids, the American Heart Association, and the American Lung Association.

ades.[61] Citing a recent class action victory in the state of Illinois, Senator Durbin notes that "if the class action fairness law were law today, this case would not have come to trial in Illinois courts and most likely would not have come to trial at all. This bill could insulate Philip Morris and other tobacco companies from class action suits which are finally bringing to the public eye the deception which they have practiced on America for over half a century."[62]

Proposing an amendment to S. 274, Senator Durbin sought to ensure that companies like Philip Morris cannot violate the rights of citizens as guaranteed by their states, and then choose Federal court as a friendlier venue merely because they are not incorporated in the state where they committed their misdeeds. The amendment would have carved out tobacco suits as inappropriate for class action reform legislation, but this amendment failed a Committee vote.[63]

Similarly, Senator Kennedy sought an amendment that would exempt from S. 274 lawsuits dealing with firearms. As Senator Kennedy said:

> [It] is wrong to oppose needed gun safety legislation such as the closing of the gun show loophole. It is wrong to have fought to keep guns exempt from Federal safety regulation, and it is wrong to have failed to use technology to make guns safer * * * it would be wrong for Congress to impose yet another obstacle in [the way of Americans]. S. 274 should not apply to gun lawsuits.[64]

Class actions are often the only method to force manufacturers of defective firearms to make guns safer because firearms are exempt from consumer safety laws. For example, in the 1990s, firearms consumers filed a class action lawsuit in Texas against Remington Arms. Facing allegations that their gun barrels were prone to explode, Remington settled the dispute for $31 million and agreed to upgrade the steel used in shotguns.[65] Unfortunately, Senator Kennedy's amendment was defeated by the majority as well.[66]

*D. Special punishment for the environment and civil rights*

While this legislation offers special protections to gun manufacturers and cigarette makers, S. 274 offers no such beneficial provisions to protect the environment and Americans' civil rights. By removing many important environmental class actions from state to Federal court, S. 274 not only denies to state courts the opportunity to interpret their own state's environmental protection laws, it hampers and deters plaintiffs from pursuing important environmental litigation. The well-documented backlog in the Federal courts and the need for attorneys to engage in choice of law debates

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[61] Statement of Senator Durbin, April 11, 2003, Executive Business Meeting at 19.

[62] Ibid. at 22.

[63] At the April 11, 2003, Executive Business Meeting, the amendment failed by a vote of 8–11, with Senators Leahy, Kennedy, Biden, Feingold, Schumer, Durbin, Edwards and DeWine in Favor of the amendment, and Senator Specter passing.

[64] Transcript of April 11, 2003 executive business meeting of the Senate Judiciary Committee at 46.

[65] "Remington Settles Class-Action Suit over Shotgun Barrels," The Austin American-Statesman, October 1, 1995, page B7.

[66] At the April 11, 2003, executive business meeting of the Committee, the amendment failed by a vote of 7–11, with Senators Leahy, Kennedy, Biden, Feingold, Schumer, Durbin, and Edwards in favor of the amendment, and Senator Specter passing.

will significantly increase the time and cost of environmental litigation. Ultimately, environmental class actions may not get litigated and the incentive polluters have to keep our environment clean will be reduced.

At the April 11, 2003, executive business meeting of the Committee, Senator Leahy offered an amendment to S. 274 that would carve out claims arising under state environmental protection laws, given the evolving nature of State law and the importance of maintaining efficient litigation to protect our environment. Unfortunately, the majority defeated this amendment.[67]

Moreover, by failing to carve out an exception in S. 274 to protect the environment, the majority ignores the advice of the Judicial Conference of the United States, chaired by Chief Justice Rehnquist. In its March 26, 2003, letter, the Judicial Conference noted that even if the Congress adopts class action removal legislation, there should be certain exceptions such as "a class action in which plaintiff class members suffered personal injury or physical property damage within the state, as in the case of a serious environmental disaster." [68]

Just as S. 274 turns a blind eye toward the environment and a cold shoulder to the advice of Chief Justice Rehnquist, the proposed legislation will make it much more difficult to use class actions as a means of protecting civil rights. Several civil rights organizations have argued that S. 274 and its "additional, substantial and costly noticing requirements and built-in delays are not a matter of due process, but are overly burdensome and improperly assume that Federal and state officials have proper interest in, and a capacity to respond to, each and every class action." [69]

Indeed, class action litigation has been essential to vindicating basic civil rights through our courts. For example, the landmark Supreme Court decision in *Brown* v. *Board of Education* was the culmination of appeals from four class action cases, three from Federal court decisions in Kansas, South Carolina and Virginia and one from a decision by the Supreme Court of Delaware. Only the Supreme Court of Delaware, the state court, got the case right by deciding for the African-American plaintiffs. The state court justices understood that they were constrained by the existing Supreme Court law, but nonetheless held that the segregated schools of Delaware violated the Fourteenth Amendment. Before any Federal court did so, a state court rejected separate and unequal schools.

S. 274 sets up several new hurdles for plaintiffs who file class actions. These requirements would be especially burdensome on many civil rights claimants.

The bill's requirement to provide "notice" to state officials, such as a state attorney general, would certainly lead to delays in the proceedings. As a result, some of the critical evidence of malice or

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[67] At the April 11, 2003, executive business meeting of the Committee, Senators Leahy, Kennedy, Biden, Feingold, Schumer, Durbin, and Edwards voted for the amendment. All other members of the Committee voted against the amendment, with Senator Specter passing.

[68] See Judicial Conference Letter, supra note 1.

[69] See Letter in Opposition to S. 274, March 20, 2003, from the Leadership Conference on Civil Rights, Alliance for Justice, Lawyers' Committee for Civil Rights Under Law, Mexican American Legal Defense and Educational Fund, National Asian Pacific Legal Consortium, National Partnership for Women and Families, National Workrights Institute, National Women's Law Center, People for the American Way, and Women Employed.

discriminatory intent required to prevail in civil rights and discrimination cases could be lost while this additional step is taken. In addition, this added hurdle will likely be redundant because many of these plaintiffs will have already gone through an administrative proceeding before being allowed to file a discrimination claim in Federal court.

Moreover, the requirement prohibiting named plaintiffs from receiving additional benefits—even when they were often the ones who already lost their jobs or homes due to discriminatory practices—is patently unfair. These lead plaintiffs deserve the "additional benefits" of being reinstated in their jobs or homes if they prevail at trial. Clearly, the defendants are seeking to deter plaintiffs from taking the lead in class actions by denying them any additional remedies.

A particularly worrisome provision of S. 274 prohibits "the payment of bounties," which is harmful to civil rights cases. In an employment discrimination case, there may be fewer employment slots denied than there are qualified applicants. A plaintiff filing an individual action may obtain an order placing him or her in the job denied and receives back pay. Such a remedy would, of course, be appropriate under current law for a named plaintiff in a class action. However, S. 274 would bar such a remedy for named plaintiffs unless each and every other class member also receives the same. This may well be impossibility and will certainly act as a deterrent to civil rights class actions in general, and becoming a class representative in particular.

Thomas Henderson, Chief Counsel of the Lawyers Committee for Civil Rights, testified before the House of Representatives as to the damage this bounty provision would do to civil rights cases:

> The prohibition on approving settlements that involve named plaintiffs receiving amounts different from other members of the class is not a reasonable or practical limitation in all instances. In many employment discrimination cases there are fewer employment opportunities denied because of discrimination than there are qualified potential claimants. In those situations, a person who sues as an individual can receive a full award of back pay and in a proper case can obtain an order placing him or her in the job denied because of discrimination. A class member in such a situation must share in the total back pay award, and has only an opportunity to be one of the persons selected for hire or promotion because not all can be selected. If the price of trying to protect others is that he or she must also lose the full measure of individual relief and take only the same percentage share as those who never took any action to challenge the employer, individuals would be deterred from becoming a class representative. Thus, rather than a reform, this provision would hinder civil rights class actions.[70]

[70] Class Action Fairness Act of 2003: Hearings on H.R. 1115 before the House Comm. on the Judiciary, 108th Cong. (2003) (written testimony of Thomas Henderson, Chief Counsel, Lawyers' Committee for Civil Rights Under Law).

As a result of the assault that S. 274 would launch on the defense of civil liberties, many civil rights advocates—including the Lawyers' Committee for Civil Rights Under Law, the Leadership Conference on Civil Rights, the Mexican American Legal Defense and Education Fund, and the National Asian Pacific Legal Consortium—have concluded that this legislation "would discourage civil rights class actions, impose substantial barriers to settling class actions and render Federal courts unable to provide swift and effective administration of justice."[71]

For these reasons, Senator Kennedy introduced an amendment that would create a carve-out in S. 274 relating to civil rights class actions. Senator Kennedy emphasized that such a provision is particularly important for the many "good actor" states, such as Wisconsin, North Carolina, California, and Massachusetts, which have civil rights laws that provide protections and remedies distinct from the Federal laws. The majority, however, voted against this amendment.[72]

### III. S. 274 FAILS TO ACHIEVE MEANINGFUL REFORM

Not only does the legislation limit the rights of Americans to pursue class action litigation in their own states, "The Class Action Fairness Act of 2003" fails to provide meaningful reform. The minority recommend several steps for those lawmakers who earnestly desire real change for the better.

First and foremost, we believe the Committee should have held a hearing on this important legislation. Given the scope of the proposed changes and the impact that they will have on our state and Federal courts, we believe that at least one fair and balanced hearing would have been essential for the Committee to develop consensus reforms to better serve defendants and plaintiffs.

Similarly, the Committee should have taken the opportunity to consider other approaches to the problems of class action litigation, most particularly and obviously the suggestions outlined by the Judicial Conference in its March 26, 2003, letter. The Judicial Conference offered a coherent and sensible distinction between "significant multi-state class action litigation" and those suits that properly belong in state courts. Highlighting the need to respect the basic principles of Federalism that assign different responsibilities to the state and Federal courts, the Judicial Conference recommended reserving Federal court jurisdiction for only those cases that truly implicate regional or national interests—cases in which a single state might well not be the appropriate venue for decision. The Judicial Conference is also uniquely well-situated to address the concerns that will arise from overburdening the already busy Federal judiciary, and the Committee failed to heed those cautions as well. It is most unfortunate that in the rush to legislate, the

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[71] See Letter in Opposition to S. 274, March 20, 2003, from the Leadership Conference on Civil Rights, Alliance for Justice, Lawyers' Committee for Civil Rights Under Law, Mexican American Legal Defense and Educational Fund, National Asian Pacific Legal Consortium, National Partnership for Women and Families, National Workrights Institute, National Women's Law People for the American Way, and Women Employed.

[72] At the April 11, 2003, executive business meeting this amendment failed by a vote of 7–11. Senators Leahy, Kennedy, Biden, Feingold, Schumer, Durbin, and Edwards voted in favor of the amendment. All the other members of the Committee voted against, with Senator Specter passing.

Committee has failed not only to consider seriously the alternative proposal to class action litigation reform presented by the Judicial Conference, but even to take advantage of the experience of the members of the Conference to comment upon and improve S. 274.

Second, S. 274 does nothing to deal with the problems of collusive settlements which protect defendants from future liability. Serious concerns have been raised about these abusive settlements where counsels for both parties agree to a far broader settlement than was originally sought in order to insulate defendants from future liability.[73] This practice is far too common in class action cases, but S. 274 completely ignores this class action abuse.

Third, S. 274 fails to adequately address the class action practice of worthless coupon settlements, which provide little or no tangible benefits to plaintiffs. Typically, these collusive settlements involve an agreement by plaintiffs' and defendants' counsel that fully pay for the attorney fees and expenses of the plaintiffs' counsel while class members are left holding coupons to buy the defendants' products. For example, in a Federal class action case alleging a price-fixing conspiracy between major airlines, class members were awarded $400 million in flight coupons. However, the coupons were restricted to certain dates and small increments of travel making them virtually unusable to consumers.[74]

In another Federal class action, distributors of Amway products sought relief after being taken for thousands of dollars by the company. It was alleged that Amway had "misrepresented the nature and characteristics of Amway distributorships and of motivational materials or training materials they published, produced, distributed or sold." A Federal district court judge approved a settlement where Amway agreed to coupons for class members for exactly the same products that they had allegedly misrepresented in the first place.[75]

But S. 274 merely requires the judge to make a finding that these coupon settlements as "fair, reasonable and adequate"—an action that the judge is already obligated to do under existing law. Instead, reforms with real teeth are needed to end worthless coupon settlements in class action cases.[76]

## IV. CONCLUSION

Contrary to the supporters' assertions, S. 274's provisions are much broader than merely prohibiting nationwide class actions from being pursued in state court. In fact, this bill seeks to override the current state laws governing class actions in the fifty states. And, in practice, it would bar many, if not most, state class actions filed solely on behalf of residents of a single state, solely in-

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[73] See *Nat'l Super Spuds* v. *New York Mercantile Exchange,* 660 F.2d 9, 17–18 (2d Cir. 1981) (rejecting potato futures class action settlement in which parties sought to release claims for which they were not authorized to represent class members).

[74] See *In re Domestic Air Transportation Antitrust Litigation,* 137 F.R.D. 677 (N.D. Ga. 1991).

[75] See *Hanrahan* v. *Britt,* 174 F.R.D. 356 (E.D. Pa. 1997).

[76] See also In re General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation, 55 F. 3d 768 (3d Cir. 1995) (overturning a lower Federal court's approval of a settlement awarding class members a $1,000 coupon toward future purchases of the defendant's cars); *In re Ford Motor Co. Bronco II Products Liability Litigation,* 1995 U.S. Dist. Lexis 3507 (E.D. La. 1995) (awarding plaintiffs only a package of videos, stickers, and flashlights); and *Hanlon* v. *Chrysler Corp.,* 1998 WL 296890 (9th Cir. June 9, 1998) (awarding plaintiffs no monetary compensation and essentially no more than Chrysler's promise to conform with its obligation to the Federal regulators).

volving matters of that state's law from being heard in that state court, so long as one plaintiff or one defendant is a citizen of a different state. This is clearly an extreme and distorted change to the diversity standards and would not apply in any other legal proceeding.

As a result, these drastic changes to longstanding Federal procedural rules would make it harder for citizens to protect themselves against violations of state civil rights, consumer, health, and environmental protection laws by forcing these class action cases out of convenient state courts into Federal courts, with significant new barriers and burdens on plaintiffs.

In conclusion, we agree with Senator Kennedy's comments at the Committee markup of this legislation:

> The bill before us reflects a one-sided approach of a difficult problem, and ignores the pleas of the Judicial Conference * * * If we could genuinely work together, we could probably reach a consensus; make needed improvements in class action cases * * * in a matter of days.[77]

Until we reach consensus on improvements to class action litigation for the benefit of defendants and plaintiffs, we remain strongly opposed to S. 274.

PATRICK J. LEAHY.
EDWARD KENNEDY.
JOE BIDEN.
RUSS FEINGOLD.
CHARLES E. SCHUMER.
DICK DURBIN.
JOHN EDWARDS.

[77] Transcript of executive business meeting, April 10, 2003, at 77–78.

## XI. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 274, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

# UNITED STATES CODE

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# TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE



PART I—ORGANIZATION OF COURTS



PART IV—JURISDICTION AND VENUE



CHAPTER 85—DISTRICT COURTS; JURISDICTION



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

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

* * * * * * *

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct ac-

tion against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured in a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

*(d)(1) In this subsection—*

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

*(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;*

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

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

*(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—*

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

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

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

*(3) A district court may, in the interests of justice, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of the following factors:*

*(A) Whether the claims asserted involve matters of national or interstate interest.*

*(B) Whether the claims asserted will be governed by laws other than those of the State in which the action was originally filed.*

*(C) In the case of a class action originally filed in a State court, whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction.*

*(D) Whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens*

*from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States.*

*(E) Whether 1 or more class actions asserting the same or similar claims on behalf of the same or other persons have been or may be filed.*

*(4) Paragraph (2) shall not apply to any class action in which—*

*(A) two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed;*

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

*(C) the number of members of all proposed plaintiff classes in the aggregate is less than 100.*

*(5) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.*

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

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

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

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

(8) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 and section 28(f)(4)(E) of the Securities Exchange Act of 1934;

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

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to

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

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

~~(9)~~*(10)*~~(A) For purposes of this action and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) shall nevertheless be deemed a class action if—~~

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

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

*(B)(i) In any civil action described under paragraph (A)(i), the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims of individual class members.*

*(ii) Paragraph (7) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to any civil action described under subparagraph (A)(i).*

*(ii) Paragraph (7) of this subsection, and subsections (b)(2) and (d) of section 1453 shall not apply to any civil action described under subparagraph (A)(ii).*

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

* * * * * * *

**§ 1335. Interpleader**

(a) The district courts shall * * *

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

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



### § 1446. Procedure for removal

(a) A defendant or defendants * * *

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

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

* * * * * * *

### § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remaining a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

### *§ 1453. Removal of class actions*

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

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

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

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

*(c) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of a class certification order in the action.*

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

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

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

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

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

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

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CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES



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### § 1603. Definitions

For purposes of this chapter—(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

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

(1) which is a separate legal person, corporate or otherwise, and

* * * * * * *

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

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PART V—PROCEDURE



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*CHAPTER 114—CLASS ACTIONS*



### *§ 1711. Definitions*

*In this chapter:*

*(1) CLASS.—The term "class" means all of the class members in a class action.*

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

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

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

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

*(6) PROPOSED SETTLEMENT.—The term "proposed settlement" means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.*

### *§ 1712. Judicial scrutiny of coupon and other noncash settlements*

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

### *§ 1713. Protection against loss by class members*

*The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a*

*written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.*

### *§ 1714. Protection against discrimination based on geographic location*

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

### *§ 1715. Prohibition on the payment of bounties*

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

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

### *§ 1716. Clearer and simpler settlement information*

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

*(1) at the beginning of such notice, a statement in 18-point or greater bold type, stating "LEGAL NOTICE: YOU ARE A PLAINTIFF IN A CLASS ACTION LAWSUIT AND YOUR LEGAL RIGHTS ARE AFFECTED BY THE SETTLEMENT DESCRIBED IN THIS NOTICE."; AND*

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

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

*(B) the members of the class;*

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

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

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

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

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

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

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

*(E) any other material matter.*

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

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

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

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

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

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

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

### *§ 1717. Notifications to appropriate Federal and State officials*

*(a) DEFINITIONS.—*

*(1) APPROPRIATE FEDERAL OFFICIAL.—In this section, the term "appropriate Federal official" means—*

*(A) the Attorney General of the United States; or*

*(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.*

*(2) APPROPRIATE STATE OFFICIAL.—In this section, the term "appropriate State official" means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.*

*(b) IN GENERAL.—No later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—*

*(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);*

*(2) notice of any scheduled judicial hearing in the class action;*

*(3) any proposed or final notification to class members of—*

*(A)(i) the members' rights to request exclusion from the class action; or*

*(ii) if no right to request exclusion exists, a statement that no such right exists; and*

*(B) a proposed settlement of a class action;*

*(4) any proposed or final class action settlement;*

*(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;*

*(6) any final judgment or notice of dismissal;*

*(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or*

*(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and*

*(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).*

*(c) DEPOSITORY INSTITUTIONS NOTIFICATION.—*

*(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.*

*(2) STATE DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.*

*(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the*

*appropriate State official are served with the notice required under subsection (b).*

*(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.—*

*(1) IN GENERAL.—A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.*

*(2) LIMITATION.—A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.*

*(3) APPLICATION OF RIGHTS.—The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.*

*(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.*

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