ORDER FOR ADJOURNMENT

Mr. GRASSLEY. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that the Senate stand in adjournment under the previous order following the remarks of the Senator from Delaware, Mr. CARPER, for as much time as he may want to Use.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Delaware.

CLASS ACTION FAIRNESS ACT

Mr. CARPER. Mr. President, over the course of the next several days, a number of unkind things are likely to be said about class action lawsuits, usually by people who do not support this legislation which is before us.

I simply suggest that some of the criticism we are going to hear is merited, but, quite frankly, some of it is not. The legal process that we call class action can be traced back to the old English courts of chancery.

Despite the criticism leveled at class action lawsuits today, these lawsuits frequently have served a public good. They have proven a powerful weapon against unscrupulous or reckless businesses, discouraging those businesses from selling dangerous products or from cheating customers.

Class action lawsuits reduce the likelihood that rogue companies can harm thousands of innocent people, confident in the belief that none of those people could ever afford to hold those companies accountable in court for their misdeeds.

There are many examples over time where the bad guys were caught in the act, where they were taken to court and where they were ordered to pay up.

The film ''Erin Brockovich'' tells a story about one such time. Not long ago I picked up a video at Blockbuster of the film starring Julie Roberts in the title role that some of us may have seen. The film tells the story of how one woman convinced hundreds of people residing in a place called Hinkley, CA, to join in a lawsuit. Together, they sued a utility company that was making people sick by polluting their water supply. Erin Brockovich's leadership won damages of $333 million for the victims of that pollution. That true story is just one example of the good that class action litigation can accomplish.

While I will not take the time this evening to talk about those other examples, let me say there are plenty of them. Unfortunately, though, there are also a growing number of examples that are not as uplifting or not as inspiring as the tale told in ''Erin Brockovich.''

Let me mention several of those, too. Ironically, one of them also involves Blockbuster. That company was sued over its policy of charging customers for overdue rentals. The result was that plaintiffs, of which I may unknowingly have been one, will get two free movie rentals and a dollar-off coupon. Meanwhile, attorneys received more than $9 million in fees and expenses.

Let me also mention Poland Spring. Poland Spring, if you are not aware of it, is a bottled water company. They were sued a couple of years ago in a place called Kane County, IL. Allegedly, the company's water was not pure and did not come from a spring. During the course of litigation, Poland Spring settled. The consumers alleging that they had spent their money on a product they did not actually receive were not compensated. Instead, they were awarded coupons which they could apply toward the purchase of the same Poland Spring water of which they originally weren't happy. The attorneys who negotiated the settlement on their behalf meanwhile were awarded $1.35 million. Poland Spring itself admitted no wrongdoing and has no plans, at least to my knowledge, to change the way they bottle and market their water.

Here is another one: General Mills was sued because an unapproved food additive apparently was used in some oats that were used to make Cheerios. Although I am told there was no evidence of customer injury, a settlement was reached in the class action lawsuit. It provided for $1.75 million in fees for the plaintiffs' attorneys. The plaintiffs? They received a coupon for more Cheerios.

In another class action suit involving Chase Manhattan Bank, plaintiffs' attorneys collected, I am told, over $4 million. The plaintiffs? They could collect 33 cents apiece if they were willing to pony up the money for a postage stamp.

With the next one, I think it may actually get worse. In a different class action lawsuit against the Bank of Boston over escrow accounts, plaintiffs apparently didn't win a dime. In fact, their accounts were debited to help pay attorneys' fees of $8.5 million.

Let me mention just one more. A couple of years ago, Intel was taken into court in I believe Madison County, IL, for asserting that the company's Pentium IV chips were faster than the company's Pentium III chips.

Let me say that I have no idea which chip is faster. I do have a hunch, though, that the Madison County Courthouse probably isn't the best forum in which to make that determination. For that matter, neither were any of the other local courts in which the previous five cases that I have mentioned here were brought.

Don't get me wrong. Class action lawsuits are still being brought for noble purposes that none of us would question for a minute. Last month, in fact, a class of 1.6 million current and former female Wal-Mart employees alleging gender discrimination at that company were certified as a class. Ironically, I believe it was in a Federal court in California.

There is a growing phenomena, however, that is troubling, at least to me and I suspect to other fairminded people, including, I would be willing to bet, a number of plaintiffs' attorneys. We have witnessed the emergence in different parts of America of something called magnet courts. Oftentimes, they are county courts with locally elected judges and a reputation for verdicts that can put the fear of God in companies when cases are filed in one of them. Once a plaintiffs' class is certified in one of those courts, the companies generally realize that their goose is about to be cooked and the work of reaching a settlement begins in earnest.

The attorneys who in many cases assembled the plaintiff class of aggrieved consumers from across the country oftentimes make out pretty well in those settlements. As you might imagine from the examples I have cited above, the people those attorneys represent sometimes do not.

Those who are supporting the legislation before the Senate this evening do so in the belief somebody needs to do something about the growing trend toward forum shopping we are witnessing around the country.

In addition, somebody needs to do so while preserving access to the courts when people are harmed. My colleagues, that somebody is us.

The legislation before the Senate tonight, the Class Action Fairness Act, does not get rid of class action lawsuits. And it should not. For years, they have been an efficient way for small and large groups of consumers who have been harmed or shortchanged by some product or service to pursue legislation against the company, when those consumers lack the wherewithal to pursue justice on their own.

What the legislation now before the Senate seeks to do is ensure class action lawsuits that are national in scope are decided in Federal courts. When the bulk of plaintiffs comes from across America, a decision can have an impact on all or most of the 50 States. Federal judges, not State, not county judges, should hear those cases more often than not.

These issues are not new. They have been the subject of a number of congressional hearings over the years. These issues have been debated and voted on in the relevant committees in both the House and the Senate. These issues have been debated in the U.S. House of Representatives and last year the House approved and sent to the Senate a bill that sought to address the concerns we are raising this evening.

The Senate Judiciary Committee reported out a more balanced bill, I believe, than the one we received from the House last year. That Senate bill was further improved through bipartisan negotiations last fall after efforts to proceed to class action fell one vote short in the Senate.

It will come as no surprise that not everyone likes the measure before the Senate this evening. As is often the case with highly contentious issues,

some would say this bill goes too far. Frankly, there are others who say it does not go far enough. The latter contend, for example, this is not real tort reform. They are right. It is court reform. It attempts to close the gaping loophole in Federal law.

That loophole allows the plaintiffs from one State to be tried in a State or county court of another State on matters that have national implications. That loophole also allows those cases to be heard by judges who are locally elected and whose elections and reelections are supported at least in part by some of the very same plaintiffs' attorneys bringing cases before those judges against out-of-State defendants.

Let me take a moment or two to be clear about what this bill does and does not do. This legislation does not limit the damages that can be awarded in class action lawsuits. It does not eliminate punitive damages. It does not mention joint and several liability. In fact, even if this bill is adopted, a majority of class action lawsuits will still be heard in State courts. For example, cases with fewer than 100 plaintiffs will be heard in State courts. The same holds true for cases involving less than $5 million, as well as for cases where two-thirds or more of the plaintiffs are from the same State as the defendant.

Federal judges would also have the discretion to keep cases in State courts where as few as one-third of the plaintiffs are from the same State as the defendants.

That is not all. This bill includes what we call a local controversy exception. That local controversy exception will leave in State court class actions with multiple defendants as long as one of the primary defendants is local. That provision is intended to ensure State courts can continue to preside over local controversies even though plaintiffs may name an out-of-State defendant, such as a parent company.

This bill is an improvement, at least in my judgment, over the House bill in some other ways, too. The House bill is retroactive. The Senate bill is not. The House bill allows defendants to file appeals of class certifications that would unnecessarily delay a plaintiff's day in court. The Senate bill does not. The House bill allows defendants to have multiple bites out of the apple and continue to appeal decisions by judges to keep cases in State court. The Senate bill does not.

Unlike the House bill, the measure before the Senate allows lead plaintiffs, especially those in civil rights cases, to receive a greater payment that is reflective of the higher and riskier profile they have assumed.

Other provisions have been adopted as well. In settlements where coupons were awarded to plaintiffs, the fees to their attorneys are linked directly under this bill to the coupons that are actually redeemed, not just issued. In addition, Federal judges may direct that the value of unredeemed coupons be donated to charity.

These and other changes have caused several of our colleagues, especially on our side of the aisle, who had previously opposed class action legislation, to support the bill that is before the Senate tonight.

But Members of the legislative branch are not the only ones who apparently have had a change of heart. Back in 1999, the Federal judiciary registered its opposition to a previous version of the Class Action Fairness Act through a letter the judicial conference sent to HENRY HYDE who was then the chairman of the House Judiciary Committee. And why? Largely because Federal judges fear the bill could well flood Federal courts with class action cases that otherwise would be heard in State or in local courts. Today, that view has changed as the legislation has undergone some of the changes we have been talking about this evening.

The Federal judiciary no longer opposes class action reform. I invite my colleagues to read those views for themselves. They are contained in this letter from the Judicial Conference which I hold in my hand.

Mr. President, I ask unanimous consent this letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JUDICIAL CONFERENCE OF THE UNITED STATES

Washington, DC, April 25, 2003.

Hon. PATRICK J. LEAHY,

Ranking Member, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR LEAHY: Thank you for your letters of April 9, 2003, and April 11, 2003. In those letters, you requested that the Judicial Conference provide the Senate Judiciary Committee with legislative language implementing the Judicial Conference's March 2003 recommendations on class-action litigation and the views of the Conference on S. 274, the ''Class Action Fairness Act of 2003,'' as reported by the Senate Judiciary Committee on April 11, 2003.

As you know, at its March 18, 2003, session, the Judicial Conference adopted the following resolution:

That the Judicial Conference recognize that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that the federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions may appropriately include such factors as whether substantially all members of the class are citizens of a single state, the relationship of the defendants to the forum state, or whether the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference should continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that do not unduly intrude on state courts or burden federal courts.

S. 274, as reported by the Senate Judiciary Committee, generally provides for federal jurisdiction of a class action based on minimal diversity of citizenship if the matter in controversy exceeds the sum of $5 million, exclusive of interest and costs. (S. 274 as introduced established a $2 million minimum amount in controversy.) The bill also now permits a federal district court, in the interests of justice, to decline to exercise jurisdiction 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. The court would be required to consider five specified factors when exercising this discretion. (This discretionary provision was not included in the bill as introduced.)

In addition, S. 274 as reported provides that the federal district courts shall not have original jurisdiction over 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 one hundred. As introduced, the second and third exceptions were the same, but the first one originally precluded federal jurisdiction where ''the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed'' and ''the claims asserted therein will be governed primarily by the laws of'' that state. The replacement language in essence substitutes a numerical ratio for ''substantial majority'' and eliminates the choice-of-law requirement.

We are grateful that Congress is working to resolve the serious problems generated by overlapping and competing class actions. The Judicial Conference ''recognizes that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts.'' At the same time, the Judicial Conference does not support the removal of all state law class actions into federal court. Appropriate legislation should ''include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed.'' Finding the right balance between these objectives and articulating that balance in legislative language implicate important policy choices.

Any minimal-diversity bill will result in certain cases being litigated in federal court that would not previously have been subject to federal jurisdiction. The effects of this transfer should be assessed in determining the appropriateness of various limitations on the availability of minimal diversity jurisdiction.

Certain kinds of cases would seem to be inherently ''state-court'' cases—cases in which a particular state's interest in the litigation is so substantial that federal court jurisdiction ought not be available. At the same

time, significant multi-state class actions would seem to be appropriate candidates for removal to federal court.

The Judicial Conference's resolution deliberately avoided specific legislative language, out of deference to Congress's judgment and the political process. These issues implicate fundamental interests and relationships that are political in nature and are peculiarly within Congress's province. Notwithstanding this general view, we can, however, confirm that the conference has no objection to proposals: (1) to increase the threshold jurisdictional amount in controversy for federal minimal diversity jurisdiction: (2) to increase the number of all proposed plaintiff class members required for maintenance of a federal minimal-diversity class action; and (3) to confer upon the assigned district judge the discretion to decline to exercise jurisdiction over a minimal-diversity federal class action if whatever criteria imposed by the statute are satisfied. Finally, the Conference continues to encourage Congress to ensure that any legislation that is crafted does not ''unduly intrude on state courts or burden federal courts.''

We thank you for your efforts in this most complex area of jurisdiction and public policy.

Sincerely,

LEONIDAS RALPH MECHAM,
Secretary.

Mr. CARPER. The pages who are still here tonight would agree I may have talked at least long enough for one evening.

As I prepare to wrap up, let me acknowledge that the impact of class action lawsuits on our Nation's business climate may not be as harmful as some of our business interests contend. In some cases, they may actually overstate the harm class actions have done.

Having said that, a balance still needs to be found in today's system that is respectful on the one hand of the right to seek redress for wrongdoing by corporations while preserving a reasonable measure of fairness for business interests, too.

Patti Waldmeir, who writes on legal issues for the Financial Times, summed it up in her column last month with these words:

The class-action lawsuit was meant to be a vehicle for democracy in the U.S., a way to level the playing field between the powerless and powerful by allowing individuals to band together to sue big corporations.

I believe the bill before us does strike the balance that is needed. I am pleased to say that view is reflected on the editorial pages of scores of newspapers across America: from the Chicago Tribune, to the St. Louis Post Dispatch, the Des Moines Register, the Christian Science Monitor, the Buffalo News, the Baltimore Sun, the Hartford Courant, Newsday, the Omaha World-Herald, the Oregonian, the Orlando Sentinel, the Providence Journal, the Santa Fe New Mexican, and, yes, even the Washington Post.

Let me conclude my remarks this evening with these words from the editorial pages of the Washington Post in endorsing the Class Action Fairness Act. These are their words:

It would ensure that cases with implications for national policies get decided by a court system accountable to the whole country. This is not, as opponents have cast it, an attack on the right to sue or a liability shield for corporate wrongdoing. It is a modest step to rein in a system that too often simply taxes corporations—irrespective of whether they have done anything wrong—and uses that money to pay lawyers who provided no services to anyone. Such a system does not deserve the Senate's protection for yet another Congress.

Their words, not mine. But to those words let me simply add: Amen.

With that, Mr. President, I yield back my time.

ADJOURNMENT UNTIL 9:30 A.M. TOMORROW

The PRESIDING OFFICER. Under the previous order, the Senate stands adjourned until 9:30 a.m. tomorrow morning.

Thereupon, the Senate, at 7:38 p.m., adjourned until Wednesday, July 7, 2004, at 9:30 a.m.

NOMINATIONS

Executive nomination received by the Senate July 6, 2004:

THE JUDICIARY

KEITH STARRETT, OF MISSISSIPPI, TO BE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, VICE CHARLES W. PICKERING, SR., RESIGNED.

CONFIRMATION

Executive nomination confirmed by the Senate July 6, 2004:

THE JUDICIARY

J. LEON HOLMES, OF ARKANSAS, TO BE UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS.