107TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
107–370

CLASS ACTION FAIRNESS ACT OF 2002

MARCH 12, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 2341]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2341) to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

99–006

The amendment is as follows:
Strike all after the enacting clause and insert the following:

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

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2002".

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

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

SEC. 2. FINDINGS AND PURPOSES.

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

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

(2) Over the past decade, there have been abuses of the class action device that have harmed class members with legitimate claims and defendants that have acted responsibly, and that have thereby undermined public respect for our judicial system.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"CHAPTER 114—CLASS ACTIONS

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

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

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

"§ 1712. Protection against loss by class members

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

"§ 1713. Protection against discrimination based on geographic location

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

"§ 1714. Prohibition on the payment of bounties

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

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

"§ 1715. Clearer and simpler settlement information

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

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

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

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

"(B) the members of the class;

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

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

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

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

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

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

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

"(E) any other material matter.

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

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

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

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

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

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

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

"§ 1716. Definitions

"In this chapter—

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

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

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

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

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

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

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

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

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

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

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

"(d)(1) In this subsection—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) CONFORMING AMENDMENTS.—

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

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

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

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

"§ 1453. Removal of class actions

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

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

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

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

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

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

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

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

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

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

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

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

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

"1453. Removal of class actions.".

SEC. 6. APPEALS OF CLASS ACTION CERTIFICATION ORDERS.

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

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

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

SEC. 7. EFFECTIVE DATE.

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

PURPOSE AND SUMMARY

H.R. 2341 is intended to provide meaningful improvements in litigation management by allowing Federal courts to hear large

interstate class actions and by establishing new protections for consumers against abusive class action settlements. In making these improvements, H.R. 2341 does not limit access to the courthouse or alter any existing State or Federal substantive law. Furthermore, it will help prevent a handful of State courts from usurping the authority of other States and the rights of their citizens.

H.R. 2341 has two core purposes. First, it amends the current Federal diversity-of-citizenship jurisdiction statute (28 U.S.C. § 1332)—to allow large interstate class actions to be adjudicated in Federal courts. Currently, Federal courts have jurisdiction over (a) lawsuits dealing with a Federal question and (b) cases meeting current diversity jurisdiction requirements—matters in which all plaintiffs are citizens of jurisdictions different than all defendants, and each claimant has an amount in controversy in excess of $75,000. H.R. 2341 would change the diversity jurisdiction requirement for class actions, generally permitting access to Federal courts in class actions where there is "minimal diversity" (that is, any member of the proposed class is a citizen of a State different from any defendant) and the aggregate amount in controversy among all class members exceeds $2 million. In that way, H.R. 2341 recognizes that large interstate class actions deserve Federal court access because they typically effect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit.

Second, it implements long needed protections for consumers against abusive settlements. These protections are established in the "Consumer Class Action Bill of Rights" (Bill of Rights), which is located in Section 3 of the bill. The Bill of Rights would: (1) establish new "Plain English" requirements (non-legal jargon) so that class members can better understand class action settlement notices and how these notices effect their rights; (2) enhance judicial scrutiny of coupon settlements; (3) provide judicial scrutiny over settlements that would result in a net monetary loss to plaintiffs; (4) prohibit unjustified payments, also known as bounties, to class representatives; and (5) protect out-of-state class members against settlements that favor class members based upon geographic proximity to the courthouse.

BACKGROUND AND NEED FOR THE LEGISLATION

Class actions are an important part of our legal system. They can promote efficiency by allowing plaintiffs with similar claims to adjudicate their cases in one proceeding. They may lead to the adjudication of homogeneous groups of smaller claims alleging harms to a large number of people, which would otherwise go unaddressed because the cost to individuals of suing would far exceed any possible benefit to the individual. However, because class actions empower one individual to represent the interests of thousands (and sometimes millions) of other people without their permission or supervision, there is substantial risk of serious abuse. Unfortunately, that abuse has become pervasive in certain county courts. Even more unfortunately, because interstate class actions often have nationwide ramifications, those abuses are impacting persons (both class members and defendants) having little or no relationship to the jurisdictions in which these abuses are occurring. In short,

even though these abuses are occurring primarily in our State court system, the impact is national in scope.

Concerns for the Rights of Class Members

Recent developments in class action practice have created concern about the rights of class members in some of these lawsuits.[1] For instance, a class action filed against an airline resulted in coupon rewards for class members for $25 when they purchased another airline ticket for more than $250.[2] In Boston, a class action against a Boston bank resulted in an award of $8.76 to each class member; however, each class member was also deducted $90 from their bank account to pay their attorney fees.[3] In Mississippi, an infamous class action settlement resulted in extreme disparate rewards for class members from different States with identical injuries.[4] In other class actions, named representatives of the class have received disparate awards, which diverges the interest of the class representatives and other members of the lawsuit.[5] While class actions require that class members affirmatively opt-out of the lawsuit, recent studies have indicated that most adults are unable to understand notices explaining this requirement.[6] While these abuses have been commonplace under the current system, the Bill of Rights in Section 3 of H.R. 2341 establishes important rules to prevent these abuses.

Class Action Certification Standards

Class actions were initially created in State courts of law and equity, and in 1849 became statutory with the advent of the Field Code, which several States adopted. In 1938, a Federal class action rule was first enacted in the form of Federal Rule of Civil Procedure 23.[7] Rule 23 was substantially amended in 1966, and granted courts more flexibility in certifying class actions.[8]

Today, the vast majority of Federal and State courts have adopted (sometimes with minor modifications) the 1966 version of Federal Rule 23. Indeed, only six States (Georgia, North Carolina, Nebraska, South Carolina, and Wisconsin) follow rules substantially different from Federal Rule 23, and even the courts of most of

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

[2] Harry Levins, *Airlines Send Coupons To Customers Certificates Are Part of Settlement of Suit Alleging Price-Fixing,* ST. LOUIS POST DISPATCH, Dec. 23, 1994, at B3.

[3] *Hearings on Class Action Lawsuits: Examining Victim Compensation and Attorney's fees Before the Senate Comm. on the Judiciary Subcomm. on Administrative Oversight and the Courts*, 105th Cong., 2nd Sess., Hrg. 105–504 (Oct. 30, 1997) (opening statement of the Hon. Herb Kohl).

[4] Stephen Labaton, *Top Asbestos Makers Agree to Settle 2 Large Lawsuits*, THE NEW YORK TIMES, JAN. 23, 2000, AT SEC. 1 P. 22.

[5] C. Krislov, *Scrutiny of the Bounty: Incentive Awards for Plaintiffs in Class Litigation,* 78 Ill.B.J. 286 (1990) ("[m]any commentators have said that awarding representatives any more than the proportionate amount of the class recovery creates an unacceptable conflict between the class and representatives. "). *See also:* Warren & Stuckey, *Recent Developments in Class Actions: Attorneys' Fees, Partial Settlements, and Awards to Named Plaintiffs*, 430 PLI/Lit 625, 663 (1992).

[6] J. Willging, L. Hooper, and R. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U.L.Rev. 74, at 134 ("[m]any, perhaps most, of the notices present technical information in legal jargon . . . and most notices [were] not comprehensible to the lay reader.").

[7] The original rule 23 recognized three types of class actions: the "true" class action involving joint rights in which a class decision was res judicata; the hybrid category involving several rights relating to specific property; and the "spurious" class action involving several rights affected by common questions, as to which the result was res judicata only as to the parties actually joined.

[8] *See* Fed. R. Civ. Proc. 23.

those States tend to look to the Federal rule and Federal court precedents for guidance on the circumstances in which cases should be certified for class treatment. (Two States—Mississippi and Virginia—have never adopted rules authorizing class actions.)

Rule 23 Class Action Requirements (Federal Rules of Civil Procedure)

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

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

Rule 23(c) outlines the notice requirement for actions brought under rule 23(b)(3). Members of any class must be provided with the "best notice [of the action] practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." After notice has been made class members are automatically included in the action unless they affirmatively opt-out of the class. Information on how to opt-out is also supposed to be clearly communicated by this notice.

Class Certification Dilemmas of Interstate Class Actions

Large interstate class actions create the potential for considerable abuse, particularly when the case involves parties from multiple States and/or requires the application of the laws of many

States.[9] For example, some State courts routinely certify classes before the defendant is even served with a complaint and given a chance to defend itself.[10] Other State courts employ very lax class certification criteria, rendering virtually any controversy subject to class action treatment.[11] There are instances where a State court, in order to certify a class, has determined that the law of that State applies to all claims, including those of purported class members who live in other jurisdictions.[12] This has the effect of making the law of that State applicable nationwide.

Certain county courts that do not rigorously enforce class action certification rules have encouraged plaintiffs to forum shop for the court which is most likely to certify a purported class. In many instances, the fact that a class is certified will determine the outcome of the case.[13] Because the cases are brought on behalf of thousands (and sometimes millions) of claimants, the potential exposure for a defendant is enormous. Plaintiffs' counsel can use this potential exposure to coerce settlements that offer minimal benefits to the class members. These settlements also result in hefty attorneys' fees.[14]

The inability of our Federal and State judicial systems to draw together all class actions that are filed on a particular subject for coordinated adjudication is injuring the rights of both plaintiffs (that is, the unnamed class members) and defendants in such cases.[15] In the Federal court system, class actions asserting the same claims on behalf of the same or overlapping classes may be transferred to one district for coordinated or consolidated pretrial proceedings.[16] When these class actions are pending in State courts, however, there is no corresponding mechanism for cogently adjudicating the competing suits. Instead, a settlement or judgment in any of the cases makes the other class actions moot.[17] This creates an incentive for each class counsel to obtain a quick settlement of the case, and an opportunity for the defendant to play the various class counsel against each other and drive the settlement value down.[18] Again, the loser is the putative class member whose claim is extinguished by the settlement, benefitting the lawyer seeking large fees.[19] This has led to phenomena commonly referred to as "copycat" class actions, where identical actions are filed in

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[9] *Hearings on H.R. 1875: The "Interstate Class Action Jurisdiction Act of 1999" Before the House Comm. on the Judiciary,* 106th Cong., 1st Sess. (July 21, 1999) (prepared statement of Hon. Walter Dellinger, III, Esq.).

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

[11] *Id.*

[12] *Avery v. State Farm Mut. Auto Ins. Cos.,* 746 N.E. 2d 1242 (Ill 5th Dis. Court of Appeals); *See also:* Matthew L. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers,* THE NEW YORK TIMES, Sep. 27, 1998, at sec. 1 p. 29.

[13] H.R. Report No. 106–320, 106th Cong., 1st Sess., at 8 (1999).

[14] Stuart Eskenazi, *Consumer activists: Bell deal a 'ripoff' / / Phone company defends offer of services to settle class action suit,* AUSTIN AMERICAN-STATESMAN, April 17, 1998, at A1.

[15] Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 3, at 32 (May 1, 1997) (hereinafter "Advisory Committee Working Papers") (statement of Prof. Samuel Isaacaroff, University of Texas Law School) (noting that "rival State court proceedings" in class actions are "emerging as real problem spots"); *Id.*, Vol. 4, at 88 (comments of consumer advocate Stephen Gardner) (describing the duplication of rival State class action proceedings in State and Federal courts).

[16] *See* 28 U.S.C. 1407.

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

[18] *Id.*

[19] *Id.*

multiple jurisdictions by the same pool of plaintiffs.[20] H.R. 2341 is intended to prevent these abuses by allowing large interstate class action cases to be heard in Federal court.

Federal Diversity Jurisdiction

While Federal courts have jurisdiction over questions or disputes concerning Federal law, article III of the Constitution empowers Congress to establish Federal jurisdiction over any law when there is diversity—disputes "between citizens of different States." Diversity jurisdiction is premised on concerns that State courts might discriminate against out of State defendants. Since 1806, with some exceptions, the Federal courts have followed the rule of *Strawbridge* v. *Curtiss*, which states that Federal jurisdiction lies only where all plaintiffs are citizens of States different than all defendants.[21] This is known as the "complete diversity" rule.[22] In a class action, only the citizenship of the named plaintiffs is considered for determining diversity, which means that Federal diversity jurisdiction will not exist if the named plaintiff is a citizen of the same State as the defendant, regardless of the citizenship of the rest of the class.[23] Since the early days of the country, Congress has imposed a monetary threshold—now $75,000—for Federal diversity claims.[24] However, the amount in controversy requirement is satisfied in a class action only if all of the class members are seeking damages in excess of the statutory minimum.[25]

These jurisdictional statutes were originally enacted years ago, well before the modern class action arose. As a result, State courts typically resolve most class actions—the largest, most diverse lawsuits in our civil justice system. Attorneys often name irrelevant parties to their class actions in an effort to "destroy diversity"—that is, to keep the case from qualifying for Federal diversity jurisdiction. In fact, plaintiff's counsel have made statements about a case to prevent a defendant from removing the case to Federal court (*e.g.,* "plaintiffs seek only a very small amount of money in this case ").[26] After 1 year, however, the same counsel will recant those statements, since at that point, current statutes bar removal of the case to Federal court.[27]

Standards for Removal of Interstate Class Actions to Federal District Court

The general Federal removal statute provides, *inter alia*, that any civil action brought in a State court of which U.S. district courts have original jurisdiction, may be removed by the defend-

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[20] H.R. REP. NO. 106–30, 106th Cong., 1st Sess, at 9 (1999).
[21] *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806).
[22] The Supreme Court has regularly recognized that the decision to require complete diversity, and to set a minimum amount in controversy, are political decisions not mandated by the Constitution. *See, e.g., Newman-Green, Inc.* v. *Alfonzo-Larrian*, 490 U.S. 826, 829 n.1 (1989). It is therefore the prerogative of the Congress to broaden the scope of diversity jurisdiction to any extent it sees fit, as long as any two adverse parties to a lawsuit are citizens of different States. *See State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530–31 (1967).
[23] *See Snyder* v. *Harris*, 394 U.S. 332 (1969).
[24] *See* 28 U.S.C. § 1332(a).
[25] *See Zahn v. International Paper Co.*, 414 U.S. 291 (1973).
[26] *Hearings on H.R. 1875 and 2005: the "Interstate Class Action Jurisdiction Act of 1999" and "Workplace Goods Job Growth and Competitiveness Act of 1999" Before the House Comm. on the Judiciary,* 106th Cong., 1st Sess. 57 (July 21, 1999) (prepared statement of John Beisner).
[27] *Id.*

ant(s) to the appropriate Federal court.[28] Removal is based on the same general assumption as diversity jurisdiction, that an out-of-state defendant may become a victim of local prejudice in State court.[29]

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

Jurisdictional Dilemmas of Interstate Class Actions

These jurisdictional statutes were originally enacted years ago, well before the modern class action arose. For example, under current law a citizen of one State may bring in Federal court a simple $75,001 slip-and-fall claim against a party from another State. But if a class of $25 million consumers living in all 50 States brings claims collectively worth $15 billion against a manufacturer, the lawsuit usually must be heard in State court. As former Attorney General Walter Dellinger articulated in 1999 before the Committee on the Judiciary, if Congress were to enact an entirely new Federal diversity jurisdiction statute and consider anew which kinds of cases most warrant access to Federal courts, there would be little legitimate debate that interstate class actions would be at or near the top of the list.[31] Those cases typically have the most money in controversy, involve the most people, and have the most interstate commerce ramifications. In short, they are the types of cases that most clearly fit the historic rationale for Federal diversity jurisdiction. Thus, it is an extreme anomaly that current law essentially excludes these cases from our Federal courts while allowing access to others.

As a result of this exclusion, the number of class actions filed in State courts has been mushrooming in recent years. Although data is difficult to gather, several studies provide a clear picture of the growing problem concentrated in certain State courts. For example:

- A major empirical research project by RAND's Institute for Civil Justice ("ICJ") observed that over a several year period, there was a "doubling or tripling of the number of putative class actions" that was "concentrated in the State courts."[32]
- Another survey revealed that while Federal court class actions had increased by 340 percent over the past decade, State court class action filings had increased 1,315 percent.

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[28] *See* 28 U.S.C. § 1441(a).
[29] *See* David P. Currie, Federal Jurisdiction at 140 (3rd ed. 1990).
[30] *See* 28 U.S.C. § 1446(b).
[31] *Hearings on H.R. 1875 and H.R. 2005: the "Interstate Class Action Jurisdiction Act of 1999" and "Workplace Goods Job Growth and Competitiveness Act of 1999" Before the House of Comm. on the Judiciary,* 106th Cong., 1st Sess. 57 (July 21, 1999) (prepared statement of Hon. Walter Dellinger, III, Esq.).
[32] *Hearings on H.R. 2341: the "Class Action Fairness Act of 2001" Before the House Committee on the Judiciary,* 107th Cong., 2nd Sess. (Feb. 6, 2002) (prepared statement of John Beisner).

Typically, the new State court filings were on behalf of proposed nationwide or multi-state classes.[33]

- A study submitted to the House Judiciary Committee in 1999 indicated that the local courts of six small, rural Alabama counties were experiencing a tidal wave of class action filings, many seeking relief on behalf of purported nationwide classes concerning matters of national significance.[34]
- The final report on the RAND/ICJ study on class actions concluded that class actions "were more prevalent" in certain States "than one would expect on the basis of population."[35]
- A new study (the "HARVARD JOURNAL study") examined data from the dockets of three State courts widely viewed as class action magnets—Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida—confirms that the filing of State court class actions is increasing rapidly in numbers wildly disproportionate with their populations. The most dramatic increase occurred in Madison County, a southwest Illinois county with a population of 250,000, where the number of class actions increased by 1,850% between 1998 and 2000. The majority of class actions in all three counties were brought on behalf of nationwide classes. In Madison County, for example, 81% of the cases filed during the survey period sought to certify nationwide classes. In Jefferson County, the number was 57%.[36]
- That same study confirms the theory that a select group of State courts had become national magnets for interstate class actions. For example, the study found that the three county courts examined were monopolized by a small cadre of plaintiffs' counsel who did not reside or practice in those counties. Further, the study determined that the vast majority of the class actions filed in those counties had no real nexus to the jurisdiction.[37]

The nature of the problem is illustrated by the lengths to which counsel will go in order to keep their cases in their favorite local courts—and out of the Federal courts. The current jurisdictional rules can be used to game the system and keep interstate class actions out of Federal court. During a February 6, 2002, hearing, the Committee received detailed testimony about how attorneys often name irrelevant parties to class actions filed in State court in an effort to "destroy diversity" and keep the case from qualifying for Federal diversity jurisdiction.[38] One witness, testifying on her experiences of owning a small drugstore in Jefferson County Mississippi, which was repeatedly dragged into national class actions against pharmaceutical manufacturers.[39] According to Mrs. Bankston, her drugstore was a target because if filled FDA ap-

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[33] *Id.*

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

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

[36] *Id.*

[37] *Id.*

[38] *Hearings on H.R. 2341: the "Class Action Fairness Act of 2001" Before the House Committee on the Judiciary,* 107th Cong., 2nd Sess. (Feb. 6, 2002) (prepared statement of Hilda Bankston).

[39] *Id.*

proved prescriptions, was located in Jefferson County Mississippi, and kept accurate records.[40]

The consequence of these jurisdictional limitations is not merely to eliminate the Federal forum for adjudication of interstate class actions. Because the alternative Federal forum is not available, considerable class action abuse is occurring in many State courts.[41] Some State courts are not properly supervising class settlements.[42] The result is that class counsel become the primary beneficiaries of those settlements; the class members (the persons on whose behalf the actions were brought) get little or nothing—or in some cases, even worse.[43]

According to the Institute for Civil Justice/RAND study, class counsel in State court consumer class action settlements (i.e., non-personal injury monetary relief cases) frequently walk off with more money than all of the class members combined.[44] Last year, an editorial in the *Tampa Tribune* referred to this phenomenon as "jackpot justice"—settlements that provide little, if any relief, to the class members, make their lawyers rich, and ultimately result in higher prices for consumers.[45] (In contrast, a Federal Judicial Center study found that "[i]n most [class actions handled by Federal courts], net monetary distributions to the class exceeded attorneys' fees by substantial margins.")[46]

In the now infamous *Bank of Boston* settlement, an Alabama State court judge approved a settlement that awarded up to $8.76 to individual class members, while the class counsel received more than $8.5 million in fees.[47] One class member testified before the Senate Subcommittee on Administrative Oversight and the Courts that she was charged a mysterious $80 miscellaneous deduction that she later learned was an expense used to pay the class lawyers' fee.[48] In her testimony, that witness expressed disbelief at the notion that "people who were supposed to be my lawyers, representing my interests, took my money and got away with it."[49]

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

- In a case in Madison County, Illinois, involving cable late fees, the customers received no compensation for billing problems; the cable operator was required to change its late fee policies prospectively; and plaintiffs' counsel received $5.6 million for their efforts.[50]

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[40] *Id.*

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

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Patrick Slevin, *Class-action lawsuit abuse threatens quality of life for all Floridians,* THE TAMPA BAY TRIBUNE, Sep. 16, 2000 at 15.

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

[47] *Hearings on Class Action Lawsuits: Examining Victim Compensation and Attorney's fees Before the Senate Comm. on the Judiciary Subcomm. on Administrative Oversight and the Courts,* 105th Cong., 2nd Sess., Hrg. 105–504 (Oct. 30, 1997).

[48] *Id.*

[49] *Id.*

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

- In a California State court case regarding the size of computer monitor screens, the court approved a settlement that offered $13 rebates to consumers who purchased new monitors. Their lawyers received approximately $6 million in fees.[51]
- The settlement of a suit involving souvenirs and merchandise sold at NASCAR Winston Cup stock car races gave consumers coupons toward the purchase of more merchandise; their lawyers were eligible to receive more than $2 million.[52]
- Customers in a suit against a telephone company in Texas State court received three optional phone services for 3 months or a $15 credit if they already subscribed to those services. The lawyers pocketed $4.5 million in fees.[53]
- A very recent class settlement that has received considerable attention arose in a case alleging that a video rental company improperly assessed late fees. Under the proposed settlement (which has reportedly received preliminary approval from the Jefferson County, Texas court), customers would receive varying benefits. For example, a customer who claimed payment of $30 in late fees would get two free movie rentals and five $1 coupons good toward the purchase of non-food items. Initially, the video rental company announced that the various coupons to be issued would have a face value of $460 million, but the company has now acknowledged that fewer than 10 percent of the coupons will be used and that it will not be changing its late fee policy. Plaintiffs' class counsel proposed that they be paid $9.25 million in fees and expenses. One commentator observed that "the real winners in the settlement are the lawyers who sued the company," who will be paid "in cash, not coupons." [54]

Although class action certification standards do not differ radically throughout America's Federal and State courts, certain county courts in the State systems have shown very lax attitudes toward class certification.[55] The record indicates that some State court judges have certified classes before the defendant was even served with the complaint and given an opportunity to defend itself.[56] Other State court judges simply do not rigorously apply the appropriate class certification prerequisites, such that they will afford class treatment to virtually any kind of case, even though doing so will trample the due process rights of the unnamed class members and/or defendants.[57] Indeed, the record contains examples of cases in which Federal courts denied class certification based on due

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[51] Jerry Heaster, *Enough Already With Lawsuits*, KANSAS CITY STAR, July 10, 1999 at C1.

[52] Robert D. Mauk, *Lawyers Win Big In Class Action Suits: Is It Justice Or Greed?,* CHARLESTON DAILY MAIL, June 19, 2001.

[53] Editorial, *We All Pay Dearly For Costly Class Actions,* CORPUS CHRISTI CALLER-TIMES, January 8, 2001.

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

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

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

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

process concerns, but State courts subsequently certified classes anyway.[58]

The power of the class device often corners defendants into settling any class action rather than contest its merits.[59] One witness at the Committee's February 6, 2002, hearing detailed his experiences of copy-cat class actions being filed by the same lawyers in the same State courts at the same time.[60] The witness indicated that these cases were routinely settled without regard to their merit.[61] While the witness represented one of the largest technology corporations in the world, it is evident that the costs associated with class actions that are routinely settled without regard to their merit pose no purpose to the American consumer other than passing off an additional cost and possibly preventing innovation and access to new markets.[62]

Some State courts have effectively made themselves the arbiters of the laws of other States, raising serious federalism concerns.[63] To facilitate the certification of nationwide or multi-state classes, some State courts have declared the laws of their forum to apply to all claims in the action, even where that home State law is inconsistent with the laws of other jurisdictions that should be applied.[64] Some years ago, the U.S. Supreme Court declared this practice to constitute a denial of due process, but it continues. In other nationwide or multi-state class actions, a single State court decides the law of many other jurisdictions, effectively telling other States what their laws are with no input from the judiciaries of those other jurisdictions.[65] Again, this practice means that a State court, which has no accountability to the residents of any other State, is dictating applicable laws to out-of-state residents.[66]

Perhaps the best-known example of this phenomenon is *Avery* v. *State Farm Mut. Auto Ins. Cos.*, a case involving allegations that an automobile insurance company breached its policyholder contracts nationwide by requiring the use of less expensive non-original equipment manufacturer parts in making accident repairs—a standard industry practice.[67] In that case, an Illinois county court certified a nationwide class, and at trial, a jury awarded a verdict of $1.18 billion against defendant State Farm. The Avery case received broad media attention because the judge granted class certification and allowed the jury verdict to stand, even though several insurance commissioners testified that a ruling in favor of the

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[58] *Hearings on H.R. 1875 and H.R. 2005: the "Interstate Class Action Jurisdiction Act of 1999" and "Workplace Goods Job Growth and Competitiveness Act of 1999" Before the House of Comm. on the Judiciary,* 106th Cong., 1st Sess. 57 (July 21, 1999); *Hearings on "Mass Torts and Class Action Law-suits" Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property,* 105th Cong., 2nd Sess. (March 5, 1998).

[59] *Hearings on H.R. 2341: the "Class Action Fairness Act of 2001" Before the House Committee on the Judiciary,* 107th Cong., 2nd Sess. (Feb. 6, 2002) (prepared statement of Peter Detkin)

[60] *Id.*

[61] *Id.*

[62] *Hearings on H.R. 2341: the "Class Action Fairness Act of 2001" Before the House Committee on the Judiciary,* 107th Cong., 2nd Sess. (Feb. 6, 2002); *Hearings on H.R. 1875 and H.R. 2005: the "Interstate Class Action Jurisdiction Act of 1999" and "Workplace Goods Job Growth and Competitiveness Act of 1999" Before the House of Comm. on the Judiciary,* 106th Cong., 1st Sess. 57 (July 21, 1999); *Hearings on "Mass Torts and Class Action Law-suits" Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property,* 105th Cong., 2nd Sess. (March 5, 1998).

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

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] 746 N.E.2d 1242 (Ill. Ct. App. 2001).

nationwide proposed class by an Illinois court would actually contravene the laws and policies of other States. Some of those States have enacted laws encouraging (or even requiring) insurers to use less expensive, non-OEM parts in making covered accident repairs to motor vehicles as a means of containing the cost of auto insurance coverage. In upholding the *Avery* jury's award last year, an Illinois court of appeals discounted testimony from "[f]ormer and current representatives of State insurance commissioners [who] testified that the laws in many of our sister States permit and in some cases . . . [even] encourage competitive price control."[68] According to the appellate court, this testimony was irrelevant because of the trial court's finding that the parts were inferior.[69] According to *The New York Times*, the import of the Illinois decision was to "overturn insurance regulations or State laws in New York, Massachusetts, and Hawaii, among other places" and "to make what amounts to a national rule on insurance."[70]

The HARVARD JOURNAL study found that in the three county courts examined, the class actions sought to have locally elected judges in county courts set policies in areas as diverse as warranties, land use rights, plumbing licenses, environmental protection, advertising campaigns, bank billing practices, employee investment plans, and numerous other broad-ranging issues for 49 other States—and 3,065 counties—in addition to their own.[71] While some of these cases may seem trivial (*e.g.,* movie rental late fees, the price of Barbie dolls), even those cases (particularly if decided wrongly) could dramatically affect commerce by limiting how companies can market and charge for their products.

An important question thus emerges: who should have responsibility for handling such large-scale, interstate class actions involving issues with significant national commerce implications—(a) Federal judges selected by the President and confirmed by the U.S. Senate or (b) State court judges often elected by a few thousand voters in a rural county? As the Senate Judiciary Committee has noted, "[c]learly, a system that allows State court judges to dictate national policy from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism."[72]

In addition to federalizing substantive law, State courts are also federalizing procedural class action law. A study produced at the Committee's February 6, 2002, hearing, provided specific details of county courts where the most questionable class actions are frequently filed and resolved.[73] Essentially, there is a race to the bottom—class action lawyers find the State courts with the most lax attitude toward class actions and file their cases there.[74] As a result, certain State courts hear a highly disproportionate amount of nationwide or multi-state class actions and thereby effectively dic-

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[68] *Id.* at 1254.
[69] *Id.*
[70] Mathew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers,* N.Y. TIMES, Sept. 27, 1998 § 1, at 29.
[71] S. REP. NO. 106–420, 106th Cong., 2nd Sess., at 20 (2000).
[72] *Id.*
[73] *Id.*
[74] *Id.*

tate Federal class action policy (even though they have no charter to do so).[75]

A dramatic example of this phenomenon was provided in the testimony of Dr. John B. Hendricks at the March 1998 House Subcommittee hearing.[76] He offered a docket study of State court class actions in one jurisdiction showing (a) that class actions had become disproportionately large elements of the dockets of some county courts, (b) that many of the class actions were against major out-of-state corporations lacking any connection with the forum county, and (c) that the proposed classes in those cases typically were not limited to in-state residents and often encompassed residents of all 50 States. Dr. Hendricks identified one State court judge who had granted class certification in 35 cases over the preceding 2 years. As Dr. Hendricks stated, "[t]hat's a huge number of cases when one considers that during 1997, all 900 Federal district court judges in the United States combined certified a total of only 38 cases for class treatment."[77] The study did not identify any instance in which that judge had ever denied class certification. Standing alone, that court clearly was playing a radically disproportionate role in setting national class action policy.

The current concentration of class actions in State courts is resulting in enormous waste and is putting class members' interests at risk. For example, with increasing frequency, counsel are filing overlapping or "copycat" class actions—cases that assert basically the same claims on behalf of basically the same class members.[78] Sometimes these class actions are brought by attorneys vying to wrest the potentially lucrative lead role away from the lawyers who filed the original class actions. In other instances, the "copy cat" class actions are an exercise in forum-shopping. The lawyers file duplicative actions before multiple courts in an effort to find a receptive judge who will rapidly certify a class. When such "copycat" cases are filed in various Federal courts, they may be consolidated before a single Federal judge through the multidistrict litigation provisions of 28 U.S.C. § 1407, thereby assuring consistent treatment of legal issues and uniform management of the cases.[79] But when "copycat" class actions are filed in multiple State courts in multiple jurisdictions, they must be litigated separately—there is no consolidation mechanism.[80] As a result, State courts and the counsel involved "compete" to control the cases, often to the detriment of the unnamed class members and defendants.[81] Counsel also use these "copycat" cases to "forum shop," presenting the same class certification and other issues to different courts, always try-

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[75] *Id.*

[76] *Hearings on "Mass Torts and Class Action Law-suits" Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property,* 105th Cong., 2nd Sess. (March 5, 1998) (prepared statement of John B. Hendrichs). The Alabama has since issued rulings which the Alabama legislature have enacted to curb such abuses.

[77] *Id.*

[78] *Hearings on H.R. 2341: the "Class Action Fairness Act of 2001" Before the House Committee on the Judiciary,* 107th Cong., 2nd Sess. (Feb. 6, 2002) (prepared statements of John Beisner and Peter Detkin).

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

[80] *Hearings on H.R. 2341: the "Class Action Fairness Act of 2001" Before the House Committee on the Judiciary,* 107th Cong., 2nd Sess. (Feb. 6, 2002) (prepared statements of John Beisner and Peter Detkin).

[81] *Id.*

ing to obtain better results than they achieved in another "copycat" case.[82]

The lax attitudes of some county courts and those courts' ineffectiveness in managing class litigation has, not surprisingly, resulted in dramatic increases in the number of purported class actions being filed in State courts.[83] And also not surprisingly, the record suggests that many of those numerous new cases are of questionable merit.[84] In interviews conducted for a study on class actions by the RAND Corporation's Institute for Civil Justice, many attorneys (including some plaintiffs' counsel) observed that "too many non-meritorious [class action lawsuits] are [being] filed and certified" for class treatment.[85]

Certification of interstate class actions under these circumstances is inconsistent with the constitutional theory of providing Federal diversity jurisdiction where there is the potential for discrimination against an out-of-state defendant. Yet, without the ability to remove these cases to Federal court, a defendant has no realistic opportunity to challenge the propriety of class certification. In many instances, the mere fact that a class is certified will determine the outcome of the case.[86] Because the cases are brought on behalf of thousands (and sometimes millions) of claimants, the potential exposure for a defendant is enormous. As noted above, plaintiffs' counsel can use this potential exposure to coerce settlements that offer minimal benefits to the class members, but which result in hefty attorneys' fees. When a class action is heard in Federal court, an interlocutory appeal may be taken to challenge an order granting or denying class certification.[87] This is not the case in many State courts; in those jurisdictions, a defendant who believes that class certification was improper in a case may not challenge the certification until having fully litigated the class action on its merits. When faced with the option of settling a case soon after certification or litigating a case to its conclusion, many times the economics of the situation leads defendants no logical choice but to settle non-meritorious claims.

There is now an increasing recognition that the jurisdictional laws that are keeping most class actions out of Federal court should be corrected:

- The leading Federal civil procedure treatise has declared that current principles governing Federal diversity jurisdiction over class actions make no sense: "The traditional principles in this area have evolved haphazardly and with little reasoning. They serve no apparent policy. . . ."[88]
- In a 1999 decision, the U.S. Court of Appeals for the Eleventh Circuit *"apologi[zed]"* for its "seemingly arbitrary" and "anomal[ous]" ruling sending a large interstate class action back to State court, noting that "an important historical jus-

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[82] *Id.*

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

[84] *Id.*

[85] *Id.*

[86] *Hearings on H.R. 2341: the "Class Action Fairness Act of 2001" Before the House Committee on the Judiciary,* 107th Cong., 2nd Sess. (Feb. 6, 2002) (prepared statement of Peter Detkin).

[87] *See* Fed. R. Civ. Proc. 23(f).

[88] 14B Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE, § 3704, at 127 (3d ed. 1998)(emphasis added).

tification 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."[89] Observing that the out-of-state defendant in that case was confronting "a State court system [prone to] produce[] gigantic awards against out-of-state corporate defendants," the court stated that "[o]ne would think that this case is exactly what those who espouse the historical justification for section 1332 would have had in mind."[90]

- In that same case, Judge John Nangle, formerly the chair of the Federal Judicial Panel on Multidistrict Litigation, concurred: "Plaintiffs' attorneys are increasingly filing nationwide class actions in various State courts, carefully crafting language . . . to avoid . . . the Federal courts. Existing Federal precedent . . . [permits] this practice . . . , although most of these cases . . . will be disposed of through "coupon" or "paper" settlements. . . . virtually always accompanied by munificent grants of or requests for attorneys' fees for class counsel. . . . [T]he present [jurisdictional] case law does not—accommodate the reality of modern class action litigation and settlements."[91]
- Similarly, in an opinion by Judge Anthony Scirica (who currently chairs the Federal Judicial Conference's Standing Committee on Rules and Procedure), the U.S. Court of Appeals for the Third Circuit observed that "national (interstate) class actions are the paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local State, and tend to guard against any bias against interstate enterprises," but that "at least under the current jurisdictional statutes, such class actions may be beyond the reach of the Federal courts."[92]
- Even attorneys and scholars associated with the plaintiffs' bar have acknowledged a need to expand Federal court jurisdiction over class actions. For example, at the March 1998 House hearing, Prof. Susan Koniak of the Boston University School of Law stated that such a move would be "a good idea. . . . Often these [state] courts are picked, and they are in the middle of nowhere. You can't have access to the documents, and I don't think it's a full answer, but I think it should be done."[93] Similarly, Elizabeth Cabraser, one of the foremost members of the plaintiffs' class action bar, testified that "much of the confusion and lack of consistency that is currently troubling practitioners and judges and the public in the class action area could be addressed through the exploration, the very thoughtful exploration, of legislation that would increase Federal diversity jurisdiction, so that more

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[89] *Davis* v. *Cannon Chevrolet-Olds, Inc.*, 192 F.3d 792, 797 (11th Cir. 1999) (emphasis added).
[90] *Id.*
[91] *Id.* at 798–99.
[92] *In re Prudential Ins. Co. America Sales Practice Litig.*, 148 F.3d 283, (3d Cir. 1998) (emphasis added).
[93] Federal News Service Transcript, *Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts, House Comm. on the Judiciary* (March 9, 1998), at 19 ("FNS Transcript").

class action litigation could be brought in the Federal court."[94]

- Increasingly, the media has joined the chorus as well. Several months ago, the *Washington Post* editorialized that "no portion of the American civil justice system is more of a mess than the world of class actions . . . [n]one is in more desperate need of policymakers' attention."[95] And within the past few days, the *Washington Post* endorsed H.R. 2341, noting that "nowhere is the need for civil justice reform greater than in the high-stakes arena of class actions, where irrational rules have allowed trial lawyers to enrich themselves at the expense of businesses—many guilty of no misconduct—and without benefit to the lawyers' supposed clients."[96]

In general, Federal courts are better equipped to deal with the complex proceedings often triggered by the filing of an interstate class action. While our Federal judicial system is facing substantial burdens, State courts are as well. The civil caseload in State courts has grown much more rapidly than the Federal court civil caseload. Federal courts have more resources to meet this challenge. Virtually all Federal court judges have two or three law clerks on staff; State court judges often have none. Federal court judges are usually able to delegate some aspects of their class action cases (*e.g.,* discovery issues) to magistrate judges or special masters; such personnel are usually not available to State court judges. And as noted above, while Federal courts can transfer and consolidate similar class actions from various States before a single judge in the interest of efficiency; State courts lack such consolidation authority and therefore must engage in the wasteful exercise of separately handling such overlapping cases.

Effect of H.R. 2341 on Existing Law

H.R. 2341 would amend the diversity jurisdiction and removal statutes applicable to class actions where there is a substantial risk of discrimination against out-of-state defendants. It amends 28 U.S.C. § 1332 to grant original jurisdiction in the Federal courts to hear interstate class actions where any member of the proposed class is a citizen of a State different from any defendant. (A change from "complete diversity" to "minimal diversity.") However, to ensure that cases that are truly local in nature are not swept into the Federal courts, the bill would exempt from its reach: (1) cases in which a "substantial majority" of the class members and the "primary defendants" are citizens of the same State and the claims will be governed primarily by that State's law; (2) cases involving fewer than 100 class members or where the aggregate amount in controversy is less than $2 million; and (3) cases where the primary defendants are States or State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

H.R. 2341 would also establish new rules governing the removal of class actions filed in State court. Existing removal procedures

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[94] *Id.*
[95] Editorial, *Actions Without Class,* THE WASHINGTON POST, Aug. 27, 2001, at A14.
[96] *Id.*

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

Under H.R. 2341, if a removed class action is found not to meet the requirements for proceeding on a class basis, the Federal court would dismiss the action without prejudice. Plaintiffs would then be permitted to re-file their claims in State court, presumably in a form amended either to fall within one of the types of class actions over which the district court is not to exercise jurisdiction, one which could be maintained as a class action under Federal Rule 23, or as an individual action. The re-filed case would once again be eligible for removal if original Federal jurisdiction exists. The statute of limitations on individual class members' claims in such a dismissed class action would not run during the period the action was pending in Federal court, nor would that of claims in new class actions filed by the same named plaintiffs in the same State venue.

HEARINGS

The full Committee conducted a full day of hearings on H.R. 2341 on February 6, 2002. Testimony was received from four witnesses: Peter Detkin, Esq.; John Beisner, Esq.; Mrs. Hilda Bankston; and Andrew Friedman, Esq..

COMMITTEE CONSIDERATION

On March 6 and March 7, 2002, the Committee met in open session and ordered favorably reported the bill H.R. 2341, as amended, by a recorded vote of 16–10, a quorum being present.

VOTE OF THE COMMITTEE

The following votes occurred during Committee deliberation on H.R. 2341:

1. An amendment offered by Mr. Boucher and Mr. Goodlatte to strike the pleading requirements in Section 3 and change the date of the short title to 2002. ADOPTED: voice vote.

2. An amendment offered by Mr. Conyers to make foreign corporations citizens of States where American corporations purchased by a foreign corporation are incorporated. DEFEATED: voice vote.

3. An amendment offered by Mr. Watt to prohibit unnamed plaintiffs from removing class actions from State court to Federal court until the State class action is certified. ADOPTED: voice vote.

4. An amendment offered by Mr. Frank to require Federal district courts to remand any removed class action that is dismissed for failure to satisfy the requirements of Federal Rule 23 to the

State court from which the class action was removed and permit the State court to certify the class action pursuant to the rules of that State. DEFEATED: rollcall vote of 9 ayes to 14 nays.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas			
Mr. Coble		X	
Mr. Smith (Texas)			
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Bryant		X	
Mr. Chabot			
Mr. Barr			
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Graham			
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Ms. Hart		X	
Mr. Flake			
Mr. Pence		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman		X	
Total	9	14	

5. An amendment offered by Mr. Watt to strike the removal provision. DEFEATED: rollcall vote of 9 ayes to 15 nays.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Bryant		X	
Mr. Chabot			
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Cannon			
Mr. Graham			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Bachus			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence			
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler			
Ms. Baldwin			
Mr. Weiner			
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman		X	
Total	9	15	

6. An amendment offered by Mr. Schiff to exclude private attorney general actions from the provisions of the bill. DEFEATED: rollcall vote of 11 ayes to 17 nays.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Bryant		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Cannon			
Mr. Graham		X	
Mr. Bachus			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence			
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman		X	
Total	11	17	

7. An amendment offered by Mr. Nadler to prohibit the court from sealing class action court records relevant to public health or safety. DEFEATED: rollcall vote of 9 ayes and 16 nays.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Bryant		X	
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Graham		X	
Mr. Bachus			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa			
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Conyers			
Mr. Frank			
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman		X	
Total	9	16	

8. A motion by Chairman Sensenbrenner to favorably report H.R. 2341 as amended. ADOPTED: rollcall vote of 16 ayes to 10 nays.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas			
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Bryant	X		
Mr. Chabot	X		
Mr. Barr			
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Graham	X		
Mr. Bachus			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Mr. Issa			
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Conyers			
Mr. Frank		X	
Mr. Berman		X	
Mr. Boucher	X		
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Mr. Sensenbrenner, Chairman	X		
Total	16	10	

COMMITTEE OVERSIGHT FINDINGS

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

PERFORMANCE GOALS AND OBJECTIVES

H.R. 2341 does not authorize funding. Therefore, clause 3(c) of rule XIII of the Rules of the House of Representatives is inapplicable.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

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

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2341, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 11, 2002.

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

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2341, the Class Action Fairness Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, and Page Piper/Bach (for the private-sector impact), who can be reached at 226–2940.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 2341—Class Action Fairness Act of 2002.

H.R. 2341 would expand the types of class-action lawsuits that would be heard initially 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 receipts, so pay-as-you-go procedures would not apply. H.R. 2341 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

H.R. 2341 would impose a private-sector mandate by requiring that any notice concerning a proposed settlement of a class action provided to the class members through the mail or in printed media contain certain information in plain, easily understood language and in a specific format. The bill also would require certain notices provided through television or radio to explain specific 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 the mandates would be minimal and would fall well below the annual threshold established by UMRA ($115 million in 2002, adjusted annually for inflation).

Under H.R. 2341, 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 highly uncertain, CBO expects that at least a few hundred additional cases would be heard in Federal court each year. According to the Administrative Office of the United States Courts, class-action lawsuits tried in Federal court cost the government, on average, about $20,000. This estimate includes discretionary costs for salaries and benefits for clerks, rent, utilities, and associated overhead expenses, but excludes the costs of the salaries and benefits of judges. CBO estimates that implementing H.R. 2341 would increase the courts' workload and result in additional costs of about $6 million annually.

CBO also estimates that enacting this bill could increase the need for additional judges. Because the salaries and benefits of district court judges are considered mandatory, adding more judges would increase direct spending. However, H.R. 2341 would not—by itself—affect direct spending because separate legislation would be necessary to authorize an increase in the number of 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.

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

CONSTITUTIONAL AUTHORITY STATEMENT

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

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1—Section 1 sets forth the short title of the bill—the "Class Action Fairness Act of 2002"—and specifies that any reference to an amendment or repeal of existing law shall be to a section of title 28, of the United States Code.

Section 2—Section 2 contains the findings of the Congress in support of the bill.

Section 3—Section 3 establishes a "Consumer Class Action Bill of Rights" as part of a new chapter 114 in title 28 of the United States Code. These provisions are as follows:

§ 1711. Judicial scrutiny of coupon and other noncash settlements—requires the court to conduct a hearing to determine whether a coupon or noncash settlement is fair, reasonable, and adequate for class members.

§ 1712. Protection against loss by class members—requires the court to make a written finding that non-monetary benefits to class members outweigh the monetary loss in any proposed settlement where a class member is obligated to pay sums to class counsel that would result in a net loss to the class member.

§ 1713. Protection against discrimination based on geographic location—prohibits settlements providing greater awards to class

members on the basis that they are in closer geographic proximity to the court.

§ 1714. Prohibition on the payment of bounties—prohibits settlements providing additional awards to certain class representatives other than awards approved by the court for reasonable time or costs associated with the class member's obligation as a class representative.

§ 1715. Clearer and simpler settlement information—establishes a new "Plain English" requirement for any written and broadcast notices concerning a proposed class action settlement. The new sections of 28 U.S.C. § 1713(c)(A)-(D) mandates that each notice to the class explain in "plain, easily understood language," the subject matter of the class action and the legal consequences of being ia member of the class. If the notice concerns a proposed settlement, according to new 28 U.S.C. § 1713(c)(1)(C), then the notice must also explain in "plain easily understood language," 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 the 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 mater" would include any other information a reasonable person would want to know before deciding whether the 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 bears 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."

§ 1716. Definitions—establishes definitions for class action, class counsel, class members, plaintiff class action, proposed settlement, and contains a technical and conforming amendment.

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

Pursuant to section 1332(d)(3), the Federal district courts are directed not to exercise diversity jurisdiction over class actions where (A) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed and the claims asserted will be governed primarily by the law of that same State ("intrastate" case); (B) the primary defendants are States, State officials, or

other governmental entities against whom the district court may be foreclosed from ordering relief ("state action" case); or (C) the number of members of all proposed plaintiff classes in the aggregate is fewer than 100 ("limited scope" case).

Pursuant to new section 1332(d)(4), the claims of the individual class members in any class action shall be aggregated to determine whether the amount in controversy exceeds the sum of value of $2 million (exclusive of interest and costs). The Committee intends this section to be interpreted expansively. If a purported class action is removed, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied). If a Federal court is uncertain as to whether the matter in controversy in a purported class action exceed the sum or value of $2 million, the court should err in favor of exercising jurisdiction over the case.

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

Consistent with this overriding intent, the provisions of the new section 1332(d)(3)(A) should be read narrowly. A purported class action should be deemed a case that falls outside Federal jurisdiction only if virtually all members of all proposed classes are residents of a single State of which all "primary defendants" are also citizens. For example, a case in which a proposed class of 1000 persons sues a North Carolina citizen corporation presumably would fit this exception if 997 of those persons were North Carolina citizens.

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

Similarly, the language in section 1332(d)(2) should also be interpreted narrowly. For example, if a court is uncertain as to whether "all matters in controversy" in a purported class action do not in the aggregate exceed the sum or value of $2 million, the court should err in favor of exercising jurisdiction over the matter. Pur-

suant to section 1332(d)(3)(C), the same is true in cases in which it is unclear whether the number of a proposed plaintiff class members is less than 100. Further, Federal courts should be cautious to decline Federal jurisdiction under section 1332(d)(3)(B) only where it is relatively clear that States, State officials, or other governmental entities are primary defendants against whom the court may be foreclosed from ordering relief. In assessing that issue, courts should apply the same guidance regarding the term "primary defendants" discussed above with regard to intrastate actions.

It is the Committee's intention with regard to each of these exceptions that the party opposing Federal jurisdiction shall have the burden of demonstrating the applicability of an exemption. For example, if a plaintiff seeks to have a purported class action remanded for lack of Federal diversity jurisdiction under section 1332(d)(3)(C), that plaintiff should have the burden of demonstrating that "the number of proposed class members is less than 100."

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

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

In addition, new section 1332 (d)(6)(C) provides that, if a dismissed case is re-filed by any of the original named plaintiffs in the same State court venue in which it was originally filed, the statute of limitations on the claims therein will be deemed tolled during the pendency of the dismissed case. This applies to both Federal and State statutes of limitations. A new class action filed either in

a different venue or by different named plaintiffs would not enjoy the benefits of this provision.

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

In the new section 1332(d)(7), the act provides two exceptions to the grant of original jurisdiction over cases described in new section 1332(d)(2). The first excepts from its reach any claims concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 or section 28(f)(5)(E) of the Securities Exchange Act of 1934. These claims are essentially claims against the officers of a corporation for a precipitous drop in the value of its stock, based on fraud. The Committee recognizes that Congress has previously enacted legislation governing the adjudication of these claims.[97] So as not to disturb the existing legal framework for litigating in this context, claims involving covered securities are not included in the new section 1332(d)(2) jurisdiction.

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

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

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

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[97] *See P.L. 104–67, the Private Securities Litigation Reform Act of 1995, and P.L. 105–353, the Securities Litigation Uniform Standards Act of 1998.*

For purposes of this exception, the phrase "the internal affairs or governance of a corporation or other form of business enterprise" is intended to refer to the internal affairs doctrine which the United States Supreme Court has defined as "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders. . . ."[98] The phrase "other form of business enterprise" in intended to include forms of business entities other than corporations, including, but not limited to, limited liability companies, limited liability partnerships, business trusts, partnerships and limited partnerships.

The exception to section 1332(d)(2) jurisdiction created by the act is also intended to cover disputes over the meaning of the terms of a security, which is generally spelled out in some formative document of the business enterprise, such as a certificate of incorporation or a certificate of designations. The reference to the Securities Act of 1933 contained in new section 1332(d)(7)(A) is for definitional purposes only. Since the law contains an already well-defined concept of a security, this provision simply imports the definition contained in the Securities Act.

New section 1332(d)(8) provides that for purposes of this new section and section 1453 of title 28, an unincorporated association shall be deemed to be a citizen of a State where it has its principal place of business and the State under whose laws it is organized. This provision is added to ensure that unincorporated associations receive the same treatment as corporations for purposes of diversity jurisdiction. The U.S. Supreme Court has held that "[f]or purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association."[99] This rule "has been frequently criticized because often * * * an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business."[100] Some insurance companies, for example, are "inter-insurance exchanges" or "reciprocal insurance association." They therefore, have been viewed by Federal courts as unincorporated associations for purposes of diversity jurisdiction purposes. Since such companies are nationwide companies, they are deemed to be citizens of any State in which they have insured customers.[101] Consequently, these companies can never be completely or even minimally diverse in any case. It makes no sense to treat an unincorporated insurance company differently from, for example, an incorporated manufacturer for purposes of diversity jurisdiction. New section 1332 (d)(8) corrects this anomaly.

Section 5—Section 5 of the act governs the procedures for removal from State court of interstate class actions over which the Federal court is granted original jurisdiction in the new section 1332(d). The general removal provisions currently contained in

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

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

[100] See. e.g., 3A J. Moore & J. Lucas, "Moore's Federal Practice," para. 17–25, 17–209 (1987 rev.) ("Congress should remove the one remaining anomaly and provide that where unincorporated have entity status under State law, they should be treated as analogous to corporations for purposes of diversity jurisdiction.")

[101] *Tuck* v. *United Services Automobile Ass'n.,* 859 F. 2d 842 (10th Cir. 1988).

chapter 89 of title 28 would continue to apply to such class actions, except where inconsistent with the provisions of the act. For example, under new section 1453(b), the general requirement contained in section 1441(b) that an action be removable only if none of the defendants is a citizen of the State in which the action is brought would not apply to the removal of class actions. Imposing such a restriction on removal jurisdiction would subvert the intent of the act by allowing a plaintiff to defeat removal jurisdiction by suing both in-state and out-of-state defendants. This would essentially perpetuate the current "complete diversity" rule in class actions that the new section 1332(b) rejects. The act does not, however, disturb the general rule that a case may only be removed to the district court of the United States for the district and division embracing the place where the action is pending.[102] 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

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

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

New section 1453(d) provides that a plaintiff class member who wishes to remove a purported class action to Federal court must do so within 30 days after receiving the initial written notice of the class action. The provision also indicates that a class member who is not a named plaintiff in a class action may not remove the case until the State court has certified a class in the action.

New section 1453(e) confirms that 28 U.S.C. § 1447 generally applies to the removal of a purported class action. However, the pro-

[102] *See 28 U.S.C. 1441(a).*

visions of section 1447(d) shall not apply. That section states that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." The Committee wishes to ensure that the appellate courts have an opportunity to supervise the expansion of Federal jurisdiction over class action established by this legislation and to contribute to the precedents interpreting the provisions of this act. Therefore, the nonreviewability provisions of section 1447(d) will not apply in the event of a removal of a class action to Federal court.

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

Section 5(b) amends current section 1446(b) to clarify that the 1-year limit otherwise imposed on removal of suits filed pursuant to section 1332 has no application to class actions; that is, the bill permits a defendant to remove to Federal court more than 1 year after commencement of a suit in State court. This change to present law is intended to prevent gaming of the current class action system by a plaintiffs' attorney. In the most extreme example, under current law a plaintiffs' attorney could file suit against a friendly defendant, and the 1-year limit after which no removal may be sought under any condition would commence. On the 366th day from filing suit, the plaintiff's attorney serves an additional defendant. It is now too late for the new defendant to remove, regardless of whether diversity jurisdiction exists, and irrespective of the practical merits of the case. Similarly, after the expiration of the current 1-year period, amendments could be made to dismiss diverse parties, increase the amount of the damages pled, or otherwise change the case so that it would then fall within the jurisdiction of the Federal courts. Under new section 1446(b) these cases could be removed when changes to the pleadings are made which bring the case within Federal court jurisdiction.

Section 6—Several years ago Federal Rule 23 was amended to add a provision, section (f) which authorized for the first time discretionary review of orders granting or denying class certification. In the Committee's view, that change has been very successful, allowing appellate courts to be a full participant in the development of the governing principles of class certification. The Committee is concerned, however, that the various Federal Circuit Courts of Appeal have been inconsistent in the extent to which they have exercised their discretion to review class certification orders. The Committee believes that both fairness to the parties and the need to develop stronger, clearer class certification precedents strongly favors the more frequent appellate review of class certification rulings. Section 6 of the bill therefore establishes that the parties to a class action may take an immediate appeal as of right from any district court ruling granting or denying a motion for class certification. While the matter is pending on appeal, the presumption shall be that other activity in the litigation shall be stayed. However, upon a finding that specific discovery must be taken to preserve evidence or to prevent undue prejudice to a party, the district court may order that such discovery may proceed.

Section 7—Section 5 provides that the amendments made by the act shall apply to actions commenced on or after the date of its enactment.

AGENCY VIEWS

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

March 1, 2002

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2341, the "Class Action Fairness Act of 2001" (counterpart to S. 1712 in the Senate). We appreciate your timely consideration of this important measure. The Department and the Administration support both of these bills.

Class action abuses have taken a toll on our legal system. All too often, class actions represent a lawyer's rush to the courthouse in order to select the most favorable State forum before other, duplicative actions purporting to represent the same class with the same claims are filed in other States. In essence, it becomes a race for the attorneys to see who among them can settle his or her case the fastest, thereby getting any attorneys' fees and binding all class members in perpetuity. In addition, this race to the preferred State courthouse results in class action filings in jurisdictions known for generous awards (and thus settlements). The resolution of these class actions in State court results in the first State to adjudicate a claim imposing its laws on class members from other States and on those other States themselves, which may have similar actions pending. Such interstate litigation is exactly that for which diversity jurisdiction sought to provide a Federal forum, preventing bias against out-of-State defendants and out-of-State plaintiff class members.

H.R. 2341 would close the gap in diversity jurisdiction that has resulted from the interpretation and application of diversity requirements in the unique class action world. The bill would prevent attorneys from avoiding removal through artful pleading that eliminates full diversity or minimizes the claimed damages of the individual class members, actions that fail to serve the plaintiff class members and actions that prejudice the defendants.

Sections 4 and 5 of the bill provide much needed amendments to Federal diversity jurisdiction and removal procedures that would permit, but not require, removal by any class member and any defendant in actions where minimal diversity existed and the total amount in controversy totaled at least $2 million. The Department fully supports this change, which

recognizes the Federal interest in such significant litigation. In addition, providing for consistent and uniform Federal adjudication of these claims will protect States and their citizens from other State courts' legal rulings from which there is no recourse.

Section 3, entitled "Class Action Bill of Rights and Improved Procedures for Interstate Class Actions," would establish long needed protections for class members whose rights are often being adjudicated by lawyers not of their choosing and in fora with which the class members have no connection, where settlements are, in effect, imposed on class members. Too often class members receive notices of class action settlement proposals that are too confusing to provide useful notice about the proposed settlement. This section appropriately would guard against settlements that were unreasonable or even harmful to individual class members by providing for thorough review by the courts. To ensure that class members receive adequate information, this section would establish more specific pleading requirements in appropriate circumstances and require settlement notices provided to class members to be in plain English and in a specified, easy-to-read format.

Section 6 would permit immediate appeal of class certification decisions but – avoiding concerns voiced about previous legislation – would not encourage or permit the destruction of documents or other evidence during the appeal of the certification decision. On the contrary, discovery would be stayed under this section unless it was necessary to preserve evidence. Thus, immediate appeal of certification decisions would be crucial to efficient management of class actions and to permit the re-filing of a proper class action or the filing of an individual action.

Opponents of class action reform similar to H.R. 2341 (such as H.R. 1875, passed by the House in the previous Congress), incorrectly assert that the expansion of Federal diversity jurisdiction infringes on State courts and will result in a flood of class action litigation in Federal courts. Such criticism overlooks both the valid interest Federal courts have in cases that involve interstate commerce and defendants and plaintiffs from many States, as well as the inefficiency that duplication in State courts causes in the current system. The Constitution's provision for diversity jurisdiction was intended to prevent just the sort of local biases that have resulted from State court class actions that often award higher settlements to in-State class members and award unsupportable damages against out-of-State defendants. The unique circumstances of class actions, a modern phenomenon, could not have been foreseen when section 1332 was initially enacted.

In sum, H.R. 2341 is an important step in reforming class action litigation. It would update diversity jurisdiction appropriately to account for class action litigation, while permitting State court actions to proceed in cases where no party sought removal and in specified circumstances involving a relatively small class where the primary defendants were within the State. Thus, State courts would be able to offer redress and provide a convenient forum for their citizens, while Federal courts would provide a forum for those class actions involving parties from numerous States.

As a result of the Department's review of H.R. 2341, we do have some suggested technical amendments, particularly with respect to sections 3 and 4, that we would be happy to discuss with the members of the Committee.

Thank you for this opportunity to present our views. We greatly appreciate your efforts in support of meaningful class action reform. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 83—COURTS OF APPEALS

* * * * * * *

§ 1292. Interlocutory decisions

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

(1) * * *

* * * * * * *

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

* * * * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

* * * * * * *

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

(a) * * *

* * * * * * *

(d)(1) In this subsection—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based

on a failure to satisfy the requirements of rule 23 of the Federal Rules of Civil Procedure.

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

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

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

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

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

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

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

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

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

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

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

section 1453 shall not apply to civil actions described under subparagraph (B).

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

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§ 1335. Interpleader

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

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

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Sec.
1441. Actions removable generally.

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1453. Removal of class actions.

* * * * * * *

§ 1446. Procedure for removal

(a) * * *

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

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

* * * * * * *

§ 1453. Removal of class actions

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

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

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

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

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

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

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

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

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

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

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

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CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

* * * * * * *

§ 1603. Definitions

For purposes of this chapter —

(a) * * *

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

(1) * * *

* * * * * * *

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

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PART V—PROCEDURE

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CHAPTER 114—CLASS ACTIONS

§ 1711. Judicial scrutiny of coupon and other noncash settlements

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

§ 1712. Protection against loss by class members

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

§ 1713. Protection against discrimination based on geographic location

The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to oth-

ers solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

§ 1714. Prohibition on the payment of bounties

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

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

§ 1715. Clearer and simpler settlement information

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

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

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

(A) the subject matter of the class action;

(B) the members of the class;

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

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

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

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

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

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

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

(E) any other material matter.

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

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

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

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

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

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

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

§ 1716. Definitions

In this chapter—

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

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

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

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

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

* * * * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MARCH 6, 2002

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

The Committee met, pursuant to notice, at 10:54 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order.

[Intervening business.]

Now, next on the agenda, pursuant to notice, I now call up the bill H.R. 2341, the "Class Action Fairness Act of 2001," for purposes of markup and move its favorable recommendation to the House.

Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 2341, follows:]

I

107TH CONGRESS
1ST SESSION

H. R. 2341

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

IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 2001

Mr. GOODLATTE (for himself, Mr. BOUCHER, Mr. SENSENBRENNER, Mr. MORAN of Virginia, Mr. ARMEY, Mr. STENHOLM, Mr. HYDE, Mr. DOOLEY of California, Mr. BRYANT, Mr. HOLDEN, Mr. COX, Mr. CHABOT, Mr. CRAMER, Mr. OXLEY, Mr. SUNUNU, Mr. BACHUS, Mr. BARTLETT of Maryland, and Mr. GOSS) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class

members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

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

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

(a) SHORT TITLE.—This Act may be cited as the ''Class Action Fairness Act of 2001''.

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

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

SEC. 2. FINDINGS AND PURPOSES.

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

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

(2) Over the past decade, there have been abuses of the class action device that have harmed class members with legitimate claims and defendants that have acted responsibly, and that have thereby undermined public respect for our judicial system.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"CHAPTER 114—CLASS ACTIONS

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

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

''§ 1712. Protection against loss by class members

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

''§ 1713. Protection against discrimination based on geographic location

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

"§ 1714. Prohibition on the payment of bounties

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

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

"§ 1715. Clearer and simpler settlement information

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

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

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

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

''(B) the members of the class;

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

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

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

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

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

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

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

''(E) any other material matter.

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

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

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

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

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

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

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

"§ 1716. Pleading requirements for class actions

''(a) PARTICULARITY.—In each class action, the complaint shall specify with particularity the nature and amount of all relief sought on behalf of any class member, and the nature of the injury allegedly caused to members of the class.

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

''(c) MOTION TO DISMISS; STAY OF DISCOVERY.—

''(1) DISMISSAL FOR FAILURE TO MEET PLEADING REQUIREMENTS.—In any class action, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of subsections (a) or (b) are not met.

''(2) STAY OF DISCOVERY.—In any class action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss or motion for judgment on the pleadings, unless the court finds upon the motion of any party that specific discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

"§ 1717. Definitions

''In this chapter—

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

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

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

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

''(5) PROPOSED SETTLEMENT.—The term 'proposed settlement' means an agreement that resolves claims in a class action, that is subject to court ap-

proval and that, if approved, would be binding on the class members.''.

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

''114. Class Actions ..... 1711.''.

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

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

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

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

''(d)(1) In this subsection—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

district courts of the United States have original jurisdiction.

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

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

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

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

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

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

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

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

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

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

(b) CONFORMING AMENDMENTS.—

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

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

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

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

''§ 1453. Removal of class actions

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

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

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

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

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

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

''(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS TO STATE COURTS.—The provisions of section 1447 shall apply to any removal of a case under this sec-

tion, except that, notwithstanding the provisions of section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise.

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

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

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

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

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

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

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

SEC. 6. APPEALS OF CLASS ACTION CERTIFICATION ORDERS.

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

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

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

SEC. 7. EFFECTIVE DATE.

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

○

Chairman SENSENBRENNER. And the Chair recognizes himself for 5 minutes for purposes of a statement.

Last August, the Washington Post editorial board wrote that: "No portion of the American civil justice system is more of a mess than the world of class actions. None is in more desperate need of policymakers' attention."

Today we are directing the overdue attention of this Congress to class action reform. The bill attempts to clean up the class action mess by expanding Federal diversity jurisdiction over interstate class actions to help curb the serious abuses that continue to take an enormous toll on our legal system and economy.

This legislation also implements necessary safeguards against the unwieldy settlements that give lawyers millions of dollars in fees while individual class members receive a small fraction of any settlement award, leaving them forever bowed with little or no remedy.

A quick examination of our current legal system shows that the need for this legislation is clear. Currently, attorneys lump thousands and sometimes millions of speculative claims into one class action and race to any available State courthouse in the hopes of a rubberstamp settlement. With the filing of State court class actions having increased 1,000 percent over the past 10 years, it is an aspect of our civil justice system that has gone wild, and its results have been dreadful.

The current system has transformed certain State courts into the epicenter for class action abuse. It is widely known that there are a handful of State courts notorious for processing even the most speculative class actions. This is particularly troubling because the impact of these cases is often contradictory to other State laws. This is exactly what diversity jurisdiction was intended to prevent.

Because of the cost, distraction, and potential embarrassment associated with litigation, many defendants are willing to settle class actions regardless of their merit. The cost of these settlements is then passed off to the American consumer in the form of higher prices for goods and services and to employees in the form of diminished returns on their retirement plans.

While some trial lawyers may improve their financial situation, the net effect of this is a drain on our national economy that prevents American consumers from realizing the benefits of unfettered innovation, then access to new markets.

H.R. 2341 addresses some of these problems by updating antiquated Federal jurisdictional rules, which have led to State courts having jurisdiction over most class actions. Currently, the Federal rules provide Federal Court jurisdiction for disputes dealing with Federal laws and disputes based on complete diversity. That means that all plaintiffs and defendants are residents of different States and that every plaintiff's claim is valued at $75,000 or more.

Not surprisingly, few class actions meet these requirements. This legislation would apply new diversity standards to class actions by changing the diversity requirements to any plaintiff and any defendant residing in different States where the aggregate of all claims is at least $2 million.

Another important element of the bill is to provide long-needed protections for class members from abusive settlements. Too often we have heard stories about how creative attorneys use class ac-

tions to game the system at their clients' expense. The Consumer Class Action Bill of Rights would prohibit the payment of bounties to class representatives, bar the approval of unreasonable net loss settlements, and establish a plain-English requirement clarifying class members' rights.

Additionally, the bill would require greater scrutiny of coupon settlements and settlements involving out-of-State class members.

With regards to Enron, there are many ongoing investigations, and there certainly will be many lawsuits to follow. It is important to note that nothing in this bill will limit the right of Enron employees to seek redress in court.

Under current law, lawsuits against the company will be heard in Federal bankruptcy court under the old bankruptcy law, for the same reasons Federal courts should be able to resolve many of these class actions.

Federal courts protect the interests of all parties and, in addition, section 4 of the bill specifically excludes a number of Federal securities and State-based corporate fraud lawsuits.

The bottom line is that this bill is a common-sense approach to promote national litigation, efficiency, and fairness to all potential plaintiffs. I urge my colleagues to put aside previous positions and support this legislation.

I recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I appreciate the fact that so far trial lawyers have only been knocked a couple of times.

This is a repeat of what we've done in the 105th Congress, and the 106th Congress, and now here we are in the 107th Congress, with essentially the same objective of, in effect, federalizing class actions. This—is this a good thing?

This is not a good thing.

This bill may not be leading consumers where they want to go. The bill I think has been placed on what could be called a fast track. And it goes on in the midst of, in effect, reducing the claims of people in a circumstance and in an environment where we ought to be providing more safeguards for citizens, consumers, and stockholders, employees. We're doing just the opposite.

Now, is there some reason that this is going to help most people in the country? Or maybe this is just a simple rules change that doesn't go as far as I'm afraid—as I think it's going.

Now, changes have been made by conservatives on behalf of corporations—this is not class warfare—in the last 5 years that have the result of making it much harder for employees, for example, who are scammed out of their retirement savings to get any relief. Great for Enron. They're in bankruptcy, so this doesn't apply. But what everybody else and all other corporations?

I can remember back to the awful period of 1994 in which the Congress of that year reduced the consequences for corporate bad actors in the area of securities fraud. And what did the securities people who engaged in rip-off who were very grateful—and now we want to do it, in effect, from my point of view, for every irresponsible national and multinational company in the country.

From this perspective, this would be a good time to put on more corporate responsibility, and not less. Our citizens need more protections against being swindled, not less.

And this bill, seen from that point of view, takes us in exactly the opposite direction.

Now, keep in mind, there's no crisis in the State courts. I don't know if I heard that asserted or not. We have not received any testimony—none—that class actions are overwhelming the State court system. The reason that you've not heard that is because they are not.

However, we do know that because of Congress' recently increasing propensity to federalize State crimes, we're facing a real workload crisis in the Federal judiciary. The result for victims will be far slower access to justice, which may be precisely the result that some corporate defendants would desire.

Now, what about the federalism concern? We're lawyers; constitutional questions reside in this Committee. And even though some may describe this as a procedural fix, a simple one, this measure before us could have the effect of wiping out virtually all State class action statutes. Now, you wouldn't want to do that, would you? This means that even if the vast majority of plaintiffs are even from the same State or a particular State is impacted by an action, citizens would be unable to obtain recourse in their own courts.

If there are specific problems, then we ought to consider fixing the problems not doing what we're doing, which is, in effect, banning State class actions. We owe it to our constituents and our consumers to protect them from Firestone tires, the Dalkon Shield, the little storytelling tobacco CEOs and many others.

And so, ladies and gentlemen of the Committee, please carefully consider the legislation that is before you.

Chairman SENSENBRENNER. The gentleman's time has expired.

Are there amendments?

The gentleman from——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER.—Virginia, Mr. Boucher.

Mr. BOUCHER. Mr. Chairman, I have an amendment——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 2341——

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

Chairman SENSENBRENNER. Without objection, so ordered.

[The amendment follows:]

AMENDMENT TO H.R. 2341

OFFERED BY MR. BOUCHER AND MR. GOODLATTE

Page 2, line 6, strike "2001" and insert "2002".

Page 10, strike lines 1 through 26 and redesignate the succeeding section accordingly.

Page 6, amend the table of sections accordingly.

Chairman SENSENBRENNER. And the gentleman is recognized for 5 minutes.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

I am pleased to join with my Virginia colleague, Mr. Goodlatte, as principal co-sponsor of the legislation that is the subject of our markup today. And I'm pleased to offer this amendment on behalf of myself and Mr. Goodlatte.

The amendment makes two changes in the Class Action Fairness Act, one that is technical in nature and another that is both important and substantive.

First the amendment simply updates the short title of the bill to read the "Class Action Fairness Act of 2002" rather than 2001.

Secondly, the amendment will delete all of section 1716, which had proposed specific pleading requirements in class action lawsuits. All of the language on page 10 of the bill—the subsections on particularity, on State of mind, and on stay of discovery pending resolution of a motion to dismiss—will be removed from the bill under this amendment.

During the Committee's hearing on this measure, some members were troubled by aspects of the bill that would establish specific pleading requirements in class actions. In response to the concerns that have been raised about the scope and the effect of this special pleading language, I'm offering this amendment that strikes that section of the bill.

Some Members were concerned that the bill as introduced would have required that plaintiffs' counsel state with particularity how the class members allegedly were injured and the recovery that they are seeking.

Some Members suggested that such a requirement would impede the filing of class action lawsuits.

Some Members have also expressed concern about the state of mind pleading requirement. As introduced, the bill would have required the initial pleading, in cases involving a defendant's particular state of mind, to state with particularity the facts which, if

proven, would demonstrate that the defendant acted with a required mental state.

Some Members suggested that obtaining these facts at an early stage in the class action litigation would prove onerous and difficult.

Concern was also expressed about the pleading provision that would stay discovery while a motion to dismiss on the pleadings was pending.

In the end, while I think all of these special pleading provisions were defensible and were in pursuit of appropriate policy, they are clearly not at the core of this bill and are not essential to achieving the real purposes of the class action reform. A prolonged debate on heightened pleading requirements would simply cloud the discussion and distract the Committee from focusing on the real and practical benefits that class action reform will produce for litigants, for consumers, and for the American economy.

In the effort to facilitate approval of the bill, both here and on the floor of the House, I urge adoption of this amendment, which will remove from the bill those provisions relating to pleading with particularity and stay of discovery pending consideration of motions to dismiss.

These are the provisions that seem to be causing some hesitation among Members of Congress, and with these provisions removed, I hope we will enjoy the support of those Members when the bill comes to final passage.

Thank you, Mr. Chairman. I urge adoption of this amendment, and I yield back.

Chairman SENSENBRENNER. Further discussion on the Boucher amendment?

The other gentleman from Virginia, Mr. Goodlatte.

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman. And I will be very brief.

I join with the gentleman from Virginia in offering this amendment. The provisions which are struck from the bill by this amendment were not included in the legislation that passed this Committee in the last Congress. And while I think there are considerable merits to pleading with particularity, I also acknowledge that one of the purposes of this legislation is not to impede the ability of people to bring class action lawsuits, but rather to make sure that the lawsuits are brought properly and in the proper forum.

This particular provision of the bill is not at the core of those provisions. And as such, I think it would be a wise step to remove them from the bill. And I urge my colleagues to support the amendment.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from North Carolina, Mr. Watt, seek recognition?

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I want to, at the risk of jeopardizing passage of the amendment, rise also in support of it. [Laughter.]

It does a couple of things that I think are important, but illustrates a couple of things, too.

Number one, the changing of the dates should remind us that this is not the first time we've seen this bill or some version of it. It's been around for a long time. So it's nice to update the dates on the bill when we have them.

But more importantly and substantively, the second part of the proposed amendment is something that I was—in fact, I already had an amendment at the desk, planning to try to strike. And I'm sure it wasn't going to pass with me being the sponsor, so I want to thank the two gentlemen from Virginia for sparing me the indignity of having my amendment go down. [Laughter.]

Thank you. I yield back.

Chairman SENSENBRENNER. The question is on the Boucher amendment.

Mr. CONYERS. Wait a minute, Mr. Chairman.

Chairman SENSENBRENNER. Does the gentleman from Michigan have more to say?

Mr. CONYERS. Yes, I do.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. I'm sorry for taking 5 whole minutes as we move on this bill, but Mr. Watt was going to have introduced this. I'm happy that he didn't. God knows what might have happened. [Laughter.]

But the authors of the bill realize quite appropriately that this was way, way out of line. Too bad they can't bring that same kind of concern to the heart of the bill, the heart of the bill of federalizing class actions, in effect, through procedural actions of this kind—the particularity, state of mind, intent.

And so I hope that nobody here thinks that this takes care of the problem, because it doesn't. It doesn't take care of the problem at all.

But I just wanted everybody to know that sweetness and light is not flowing from this bill as a result of the Boucher and Goodlatte amendment.

And I return the balance of my time.

Ms. JACKSON LEE. Mr. Chairman?

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

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Let me add my appreciation for the improvement that this particular amendment offers to the legislation. I will have some subsequent amendments. And clearly, I think the passion with which the Ranking Member speaks is worthy of our consideration. And I guess it's because I have experienced in recent months the dilemma of thousands of employees now left without remedy, particularly in the Enron case. That case happens to be a case before the bankruptcy court, but it certainly begs the question of what happens when thousands of employees are plagued and victimized by actions which they cannot address because of their individual inadequacies, financial inadequacies, and need the structure of a viable class action, if you will, vehicle, that I don't consider to be abused

by those who absolutely have the right and reason to access the court system.

So I'm glad that we have moved in the direction of lessening the burden on constructive and innocent plaintiffs. But I do think that we should be concerned of whether we're barring the courthouse door by those who by necessity have to enter in the form of a class action.

I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment from the gentleman from Virginia, Mr. Boucher.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the amendment is agreed to.

Are there further amendments?

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers?

Mr. CONYERS. I do have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 2341, offered by Mr. Conyers and Ms. Jackson Lee. Page 17, line 10, strike the quotation marks and second period. Page 17——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and open for amendment at any point.

[The amendment follows:]

AMENDMENT TO H.R. 2341
OFFERED BY MR. CONYERS AND MS. JACKSON-LEE

Page 17, line 10, strike the quotation marks and second period.

Page 17, insert the following after line 10:

"(10)(A) For purposes of this subsection and section 1453 of this title, a foreign corporation which acquires a domestic corporation in a corporate repatriation transaction shall be treated as being incorporated in the State under whose laws the acquired domestic corporation was organized.

"(B) In this paragraph, the term 'corporate repatriation transaction' means any transaction in which—

"(i) a foreign corporation acquires substantially all of the properties held by a domestic corporation;

"(ii) shareholders of the domestic corporation, upon such acquisition, are the beneficial owners of securities in the foreign corporation that are entitled to 50 percent or more of the votes on any issue requiring shareholder approval; and

"(iii) the foreign corporation does not have substantial business activities (when compared to the total business activities of the corporate affiliated

group) in the foreign country in which the foreign corporation is organized.''.

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

Mr. CONYERS. Thank you, Mr. Chairman.

This is an amendment to prevent companies who may try to use this legislation to avoid State liability by reincorporating as a foreign entity. Yes, corporations do that, and with increasing frequency they're doing it.

And here's how it works: The corporations set up paper companies, and let's take Bermuda, which is a frequently used site, for a nominal fee.

But the company—nothing else changes. The company continues to be owned by United States shareholders, continues to do business in the exact locations. The production goes on in the same place.

The only thing different is that new foreign company escapes substantial tax liability under this bill, under this bill, under these economic circumstances that we find that we're reading about in the paper almost every day. We've got a bill here that would allow companies to escape their national liability by reincorporating in a foreign country.

And this amendment attempts to prevent this. It is, I think, a modest amendment.

The new so-called foreign company escapes substantial tax liability under this bill and could more easily avoid legal liability as well. And these are the same companies that are stamped "made in the USA" on their products and, at the same time, are avoiding United States taxes and minimizing or making more difficult those who may seek legal redress to bring them to court after merely shuffling around some corporate documents.

I name a company: Stanley Works, which has made hammers and wrenches in the State of Connecticut for 159 years. According to a report last month in the New York Times, the company now plans to become a Bermuda corporation so it can cut its taxes by how much? $30 million each year.

And so, clearly, there's a big rush to Bermuda with companies.

And dare I raise the name Global Crossing? Yes, they're one of them. Foster Wheeler, Cooper Industries, Ingersoll-Rand, who are all announcing plans to reincorporate in Bermuda to avoid tax liability.

Now, these companies are a slap in the face of every citizen who has to meet their tax obligations next month, to every person in our military who is sacrificing much more than money to defend our country and its citizens.

So this amendment responds to this egregious behavior by treating the former U.S. company as a domestic corporation for class action purpose.

And so I hope that this amendment will address the irresponsible conduct, unpatriotic conduct, of a handful of companies whom—we should not permit profits to trump in these kinds of situations.

I thank you for the time, Mr. Chairman.

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. Discussion on the Conyers amendment?

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, I must strongly oppose this amendment. This is not a modest amendment as described by the gentleman from Michigan.

These are the very kinds of cases that most belong in Federal court. And attempting to redefine the home base of the corporation just for the purposes of class action lawsuit—won't affect any other lawsuits brought against them—and it certainly will not affect their tax liability.

I share the gentleman's concern that this is a tax dodges, but that should be dealt with in the Ways and Means Committee. And his amendment will not change that.

All this is intended to do is to keep class action lawsuits with clearly nationwide implications involving decisions on plaintiffs in a multitude of States from being brought in Federal court. This whole—the premise of this entire legislation is to bring the kinds of lawsuits that our Founding Fathers intended to be heard in Federal court, involving not just diversity of jurisdiction but a wide degree of diversity of jurisdiction, in Federal court.

And the fact of that matter is, it is simply a Federal rule that requires that you allege $75,000 per plaintiff that keeps most of these class actions from being heard in the jurisdiction where they should be heard.

The primary purpose of this bill is to change that to require a $2 million aggregate allocation for all of the plaintiffs in the class. And the purpose of this amendment is to subvert the clear intent of the legislation to have complex litigation involving parties from many States, involving, in many instances, billions of dollars in dispute, brought in the courts that were designed to be able to handle those cases and to stop the forum shopping that takes place right now, where the plaintiffs' attorney can chose from literally 4,000 different jurisdictions in the United States in which to bring the action.

So I urge my colleagues to oppose this amendment. It is something that would give State courts jurisdiction over cases that involve U.S. companies that have been purchased by foreign companies. These are generally large, nationwide lawsuits that we're talking about that affect these companies. And they're precisely the kind of actions that should be brought in Federal court. It doesn't limit anybody's right to bring a class action. It simply limits their ability to forum shop, and it limits the ability of the plaintiffs to choose judges that are most favorable to certifying class actions and applies a more nationwide standard.

I urge my colleagues to oppose the amendment.

Chairman SENSENBRENNER. The question is on the Conyers amendment.

Ms. JACKSON LEE. Mr. Chairman?

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

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I rise to support the Conyers-Jackson Lee amendment, and I beg to differ from the distinguished colleague from Virginia.

What is happening with the class action legislation that has been proposed and has now shown its face in a completely new year and possibly new look is that this legislation is about benefit with no burden.

Clearly, it is giving a gift to major corporations, large entities, who have been upset by the number of successful plaintiff actions, few and far in-between, might I add? If you use the State court systems in Harris County, for example, a pretty litigious community, in Houston, you'll find that in most instances, the defense—defendants in civil cases prevail.

So this is not a circumstance where we have a runaway court system and plaintiffs are winning in large numbers across the Nation. So we are excising an extra-added benefit where none is deserved. This legislation will probably get out of this Committee and, frankly, will help those who need little help.

What we're saying in this legislation is that, in addition to the benefit that you're going to give, you're going to allow companies to abscond from the United States and benefit not only from running away from the courthouse, but they will also benefit by large dollars of tax relief.

The Ranking Member mentioned Stanley Works. That was going to be about $30 million to about $80 million.

Mr. GOODLATTE. Will the gentlewoman yield?

Ms. JACKSON LEE. I'd be happy to yield in just a moment to my good friend.

Tyco would be saving $400 million a year. And, obviously, coming from Houston, Texas, all of us are concerned about what we call SPEs, 2,800 to 3,000 that were utilized by own constituent, Enron.

And so, to the distinguished gentleman, I'm not understanding why we're giving so much benefit with no burden.

I'll be happy to yield to the gentleman for a moment.

Mr. GOODLATTE. Well, I thank the gentlewoman for yielding. But the fact of the matter is that this bill nor the amendment offered by the gentleman from Michigan has anything to do with the tax burden on the corporations. It has to do with whether or not we're going to have a fair and uniform standard for determining whether or not class action lawsuits that involve millions of plaintiffs in a multitude of States can be heard in a uniform fashion that prohibits plaintiff attorneys from shopping for the one favorable judge in the one rural county in one particular State that has a long track record of having certified class actions.

If they choose to do that, that's fine. But then any party to the case, under this bill, would then be able to remove that case to Federal court provided they meet the diversity requirements provided in the legislation.

And it has absolutely nothing to do with the matters that you describe. And you're simply trying to draw a distinction between different types of corporations that has no merit in class action law.

Ms. JACKSON LEE. Well, reclaiming my time, I thank the gentleman for his perspective on the amendment, but I believe that

this is a legislative initiative. This legislation simply gives benefit with no burden.

And what we're suggesting, that if these companies want to abscond to a foreign jurisdiction, then they should be governed by State laws. And they should not have the ability to benefit from not paying taxes.

Most of us know that we are committed to death and taxes. Our corporate friends obviously don't find that kind of definitiveness. They can abscond and take money wherever they are and also take benefits.

This class action legislation gives, as I believe, benefits where none are necessary. If you looked at the documentation of how many corporations were abused by class action lawsuits, you'd find a paltry number of victories.

I happen to believe that the Microsoft case should've ended as it is. I believe that Microsoft is more productive unbroken-up, if I may use bad English.

I happen to support, hopefully, a resolution of that case. That is one example, however, of a class action case taken up by States and not by individuals.

And so this, I believe, legislation is detrimental to the judicial system. And I frankly believe any amendment that we can utilize to suggest that anybody who takes advantage of this, therefore, cannot take advantage by absconding to a foreign territory and then also be advantaged by this particular legislation that you're passing.

I would only ask my colleagues to consider the purposes of what we're doing, to look at the economics of it, to balance who is benefiting and who is being burdened by it. And I frankly think that here's another example of providing corporate opportunities for companies to leave the United States, be incorporated on foreign territories, not pay their taxes and take the benefit of class action legislation that they do not need.

I yield back the balance of my time.

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

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

Good morning Chairman Sensenbrenner and Ranking Member Conyers:

I am proud to join Mr. Conyers in offering this amendment, which would deny corporations who relocate to foreign countries simply to avoid paying income taxes from enjoying the benefits of this bill.

As the saying goes, "death and taxes are the only guarantees in life". You and I could never avoid paying taxes, but we try to minimize them to the best of our ability. The same philosophy applies to companies.

However, there is a growing trend in this country where American companies are incorporating in Bermuda, or other countries that do not have income taxes, to avoid paying taxes altogether while maintaining the benefits and security of doing business in the United States. But these companies don't actually relocate to Bermuda. Rather, they are a Bermuda corporation only on paper.

But the tax benefits are profound. Tyco International, a diversified manufacturer headquartered in New Hampshire but incorporated in Bermuda, saved more than $400 million last year in taxes alone. And Stanley Works, a Connecticut manufacturer for 159 years, will cut its tax bill by $30 million a year to about $80 million.

Although it is a growing trend, some companies hesitate to incorporate in Bermuda because of patriotism issues, especially after the tragedies of September 11. But low and behold, "profits trump patriotism".

Enron Corp had set up an estimated 2,800 to 3,000 "special purpose entities" (SPEs) in an attempt to hide amounting debt and losses and to avoid paying taxes. As a matter of fact, Enron had not paid any income taxes in the last five years.

And due to the nature of these transactions, and the fact that these SPEs were created as a separate entity from Enron, government officials have been unable to acquire more information to determine the extent of liability.

Allowing companies who relocate to foreign countries simply to avoid paying taxes and still benefit from class actions in a federal forum would enable a defendant corporation to avoid accountability and result in the plaintiff class having a more difficult time seeking redress.

Again, Mr. Chairman, this amendment would attempt to bring justice within the reach of the victims aggrieved by these corporate giants.

Thank you.

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

Mr. WATT. Mr. Chairman? Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from North Carolina seek recognition?

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. And I yield to Mr. Conyers.

Mr. CONYERS. I thank the gentleman for yielding.

Not only is this bill disingenuous but this debate is disingenuous as well. The innocence of one of the authors from Virginia is not surprising. But consider the favorite relocation point in the immediate hemisphere: Bermuda. Members of the Committee, they have no corporate tax. They have no corporate tax.

Now as crazy as it is, we already have a tax code that encourages corporations to relocate overseas. That ought to be disturbing. It encourages it. It isn't neutral. It encourages corporations to relocate.

Now, what this bill does and what my amendment tries to correct, is the bill is now encouraging corporations to relocate for yet an additional reason. And that reason is to escape legal liability as well as escaping tax liability.

So what we're doing here is continuing to encourage people to get out of the country and relocate.

This is just a little innocent change here. What's wrong with companies relocating in Bermuda, folks? I mean, they've been here for many years, most of them, and now they want to go to Bermuda to avoid the class action situation.

So one of the authors of the bill says, "Not a problem. It'll stop forum shopping." But what it's doing is creating another reason—to me, another wrong reason—for companies to relocate in name only. We're not talking about plants moving out of the U.S.; they'll still be here.

Are taxpayers going to be happy about this? I don't think so. And I don't think some of these complicated responses are going to work on ordinary people when they find out what the bottom line is.

And so, I am not happy that this amendment is being resisted as something that's pernicious and that this bill is really, in fact, a good thing for companies and for citizens. I don't think it is for either one.

And I return any time back to——

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

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, I yield my time to the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I thank the gentleman for yielding.

Very briefly, this is a most disingenuous amendment and the arguments offered for it are way off the mark.

The legislation provides that if a lawsuit is brought against the company that the gentleman cited in the State of Connecticut as a plaintiff would have the right to do, any party, plaintiff or defendant in the suit, would be able to remove the case. Not to Bermuda but to the United States District Court for the State of Connecticut. And it has absolutely nothing to do with the tax status of any corporation or the State in which—or nation in which is or was or in the future will be incorporated. It simply has to do with having a fair and uniform standard applied for how class action lawsuits will be brought and making sure that the most complex cases are brought in the United States Federal courts, in the same jurisdiction in which the original lawsuit was brought.

I yield back.

Mr. CONYERS. Would——

Mr. SMITH. Mr. Chairman, I yield back the balance of my time, too.

Chairman SENSENBRENNER. The question is on the Conyers amendment.

Those in favor will say aye.

Opposed, no.

Noes appear to have it. Noes have it, and the amendment is not agreed to.

Are there further amendments?

Mr. WATT. Mr. Chairman?

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

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

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. WATT. Watt number 4.

The CLERK. Amendment to H.R. 2341——

Mr. WATT. I ask unanimous consent the amendment be considered as read.

Chairman SENSENBRENNER. Have the clerk start passing it out a bit for——

The CLERK.—offered by Mr. Watt. Page 18, line 13, insert——

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

[The amendment follows:]

AMENDMENT TO H.R. 2341
OFFERED BY MR. WATT (N.C.)

Page 18, line 13, insert ", except that a plaintiff class member who is not a named or representative class member of the action may not seek removal of the action before an order certifying a class of which the plaintiff is a class member has been entered" before the period.

Chairman SENSENBRENNER. And the gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I believe that this an amendment that the sponsors of the bill are planning to accept, so I'll very brief.

The original bill that was introduced and passed the House floor one time before had a provision in it that allowed removal basically by anybody, even before they were determined to be a member of the class or even before the class had been certified. We were successful in amending the bill on the floor of the House to at least require that the removal wait until after the class was certified and that the person who was attempting to remove the case to Federal court be a member of the class. And Mr. Boucher agreed that that was probably a wise thing to do.

Unfortunately, this new bill went back to the original language of the old bill rather than picking up the amended language that I think everybody had agreed to. And this just gets it back to the form that passed the House floor the last time.

Mr. BOUCHER. Would the gentleman yield?

Mr. WATT. I'm happy to yield to the gentleman from Virginia.

Mr. BOUCHER. I thank the gentleman from North Carolina for yielding. I was pleased to work with the gentleman last year in structuring the language that he has offered in this amendment. It relates to plaintiff removal opportunities. It provides that plaintiffs who are not named or representative class members may remove the action to Federal court at a time prior to the State court entering a class certification order. Other plaintiff class members would only be able to remove after the certification order has been entered by the State court.

I think this language strikes a reasonable balance. I commend the gentleman from North Carolina for bringing this matter to our attention once again. And I urge adoption of the amendment.

Mr. GOODLATTE. Would the gentleman yield further?

Mr. WATT. I'm happy to yield to the gentleman from Virginia.

Mr. GOODLATTE. I have no objection to the amendment.

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

Chairman SENSENBRENNER. The question is on the adoption of the amendment by the gentleman from North Carolina, Mr. Watt.

Those in favor will signify by saying aye.

Opposed, no.

The ayes appear to have it. They ayes have it.

And the Committee will recess until 9:30 tomorrow morning. Please be prompt.

[Whereupon, at 11:50 a.m., the Committee recessed, to reconvene at 9:30 a.m., Thursday, March 7, 2002.]

* * * * *

The Committee met, pursuant to notice, at 9:35 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order.

When the Committee recessed yesterday, the bill H.R. 2341, the Class Action Fairness Act, was being considered. A motion had been made to report the bill favorably, and the bill was open for amendment at any point. Are there further amendments?

The gentleman from Massachusetts.

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

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 2341, offered by——

Mr. FRANK. I ask unanimous consent it be considered as read.

Chairman SENSENBRENNER. Let's look at it first.

The CLERK.—offered by Mr. Frank and Mr. Meehan and Mr. Berman. Page 19, line 20, strike the quotation marks and second period. Page 19, insert the following after line 20——

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

AMENDMENT TO H.R. 2341

OFFERED BY MR. FRANK AND MR. MEEHAN.

and Mr. Berman

Page 19, line 20, strike the quotation marks and second period.

Page 19, insert the following after line 20:

"(g) PROCEDURE AFTER REMOVAL.—If, after an action is removed under this section, the court determines that any aspect of the action that is subject to its jurisdiction solely under the provisions of section 1332(d) may not be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, the court shall remand all such aspects of the action to the State court from which the action was removed. In such event, the State court may certify the action or any part thereof as a class action pursuant to the laws of that State, and such action may not be removed to Federal court unless it meets the requirements of section 1332(a).".

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

Mr. FRANK. Thank you, Mr. Chairman.

When I was first approached and this issue was described to me, it was described, and I agreed with a major part of it, which was that if in fact you were dealing with an issue that involved nationwide issues, it would be better to have it tried in Federal court rather than in State court. That is, I agreed with an amendment to the diversity rule that would prevent technical obstacles to removal to Federal court when in fact subsequently the issue ought to be decided in Federal court.

But as we looked at the bill, it became clear that it went further than that. I think there would be a good deal of support—there's a good deal of support for the current bill. But there would be even more support for a bill which said, when we are talking about a

class action suit that has national implications, it ought to be tried in Federal court rather than State court.

But the way bill is worded, if someone, a defendant, takes advantage of the removal proceedings, which are a change in the law, and moves it into Federal court, which would now encompass a much larger number of cases, and the Federal court finds that it does not meet the Federal class action standards, that then ends it, and it cannot be renewed in State court.

And what the amendment says is that if it is removed under these changes to Federal court, and the Federal court finds insufficient basis for going forward, that's without prejudice to the ability of the plaintiffs to refile it in State court.

So we have a bill that meets at least one of the stated objectives, which is, if there's going to be a trial on an issue like this, it ought to be in Federal court, not State court. But I don't think we ought to be acting now to prevent the States from trying State class action cases on these sorts of economic issues if the Federal courts don't want to do it.

I must say, to go beyond that, it is one thing, I think, to say that when there's this kind of diversity, it should go to Federal court. It's another to say that if the Federal court decides it doesn't meet class action standards, we forbid the State to do it.

I cannot think of a more massive vote of no confidence in the courts or the States. It is really quite extraordinary.

We've commented from time to time about the variability of people's belief in States' rights. I think this makes it just conclusive, because what this says is, we will have the Federal courts decide not whether or not to try the case, but whether or not the case ought to be tried. And the only justification for that is the belief that the State courts are irresponsible; that the State courts, if left to their own devices, when the Federal courts have turned it down, will inappropriately deal with class action cases.

And I am surprised that so many of my colleagues are prepared to write into law what is really a very severe condemnation of the courts of at least some States. It may not be—obviously, it's not of all States, but it is of some of the States.

I also believe that, at this point in America's economic situation, the notion that the business sector needs more protection from the consumers is wrong. I have supported in the past efforts to change the balance. I have supported efforts to limit and prohibit frivolous suits or at least make them less likely. But this bill, if my amendment is defeated, says that we will, as a Congress, tell the States that there are apparently significant numbers of cases—because if it wasn't significant, we would not be taking the time of this Committee and bringing it to the floor next week—that there are significant number of cases where we will tell the States: No, you cannot do that. You cannot try this case. Citizens of your State may come before you and want to do something, but we will not let you do that. We, the Congress, will simply block that lawsuit.

The alternative is to say that, as I said, if in fact the Federal courts find substantively that it ought to be dealt with because it's a multistate issue on the Federal level, it can be. But the Federal courts will not be empowered, as this law without the amendment would empower them simply to prevent the State courts from con-

sidering cases which they believe are in the interests of the citizens of their State to have litigated.

Mr. GOODLATTE. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia.

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I speak in strong opposition to this amendment. It would defeat the purpose of the legislation, which is to stop forum shopping amongst 4,000 different jurisdictions.

Basically what the gentleman's amendment does, and he has expressed his concern previously and offered this amendment the last time the bill moved through the Committee, and we defeated it at that time, and I would urge my colleagues to defeat it again. But what the amendment does is give the plaintiff, the class action attorney and the named plaintiff, two bites of the apple. The purpose of this is to say, if you're going to pick a jurisdiction you want to bring this lawsuit in—and with a nationwide class action lawsuit, you can pick from thousands of different jurisdictions, and you pick your favorite judge and your favorite jurisdiction, and anybody in the case, plaintiff or defendant, who chooses to do so, can remove it to Federal court. If the Federal court says that the case does not rise to certification as a class, what the gentleman is suggesting is, okay, you go back to that favorite court that you picked and resume the process that you originally sought out to the bring the case in.

That is entirely contrary to what we're trying to do here, which is to achieve some standardization in this process. I think this amendment constitutes a full endorsement, not a correction, of the rampant class action abuse that is occurring in State courts today. When I say that, I do not cast a condemnation on all State courts. I am simply observing what any good attorney representing a plaintiff in one of these cases would do: Look for the court that you think is most favorable to your cause.

The problem is that, in these class actions, that constitutes several thousand jurisdictions. And all we're trying to do is say, look, you can go ahead and do that, but in order to achieve balance and fairness, we're going to allow any party in the case, plaintiff or defendant, to remove the case to Federal court.

And we corrected the concern raised by the gentleman from North Carolina, Mr. Watt, to say that if someone has not yet been identified as a part of the class as a plaintiff, they can't remove the case to Federal court under those circumstances. But anybody who's a named party to the case, plaintiff or defendant, before certification, or anybody who has been certified as part of the class after certification, can remove the case to Federal court. That eliminates the forum shopping.

The second thing that it does is that eliminates the abuses because it makes sure that we're going to have more standard application of class action rules. This amendment, I think, is based on the myth that most States have class action rules that are radically different from Federal class action rules, and that if a Federal judge says a case may not proceed as a class action under the Federal rule, counsel should be able to take their case back to State court and try their luck under State rule. The fact of the matter

is that most States have very similar rules, but they have widely varying application of the rules based upon the judge who makes that application. And the plaintiffs' attorneys know, across the country, which of those judges—there aren't a huge number, but there are certainly plenty of alternatives amongst the States in which to bring these actions and get it in the hands of a judge or a jurisdiction that has historically been favorable to certifying class actions.

And that is where we have seen most of the abuse, where we have seen most of the cases that result in coupon settlements or settlements where the plaintiffs even have to wind up paying money in the cases, and all the other abuses that we heard during the hearings and that we've heard during the first day of debate on this issue.

Mr. FRANK. Would the gentleman yield?

Mr. GOODLATTE. I would yield.

Mr. FRANK. The question I have is, does that not mean that, according to the gentleman from Virginia, the appellate courts of all the States are of no real value? You talk about thousands of jurisdictions. Those are the trial courts, I suppose, in the States. There are appellate systems. Does the gentleman mean that we should put no faith in the appellate systems of the 50 States to protect against these kinds of abuses?

Mr. GOODLATTE. Well, in cases that are truly State class action lawsuits, we should rely on that. But in cases where you have individuals from many, many jurisdictions, cases that really should be in Federal court under diversity because that's what the diversity provisions in the Constitution were intended for, under current rules, can't be brought in Federal court.

Mr. FRANK. I'm not changing that part of the bill.

Mr. GOODLATTE. Well, I——

Mr. BOUCHER. Would the gentleman from Virginia yield to me?

Mr. GOODLATTE. Well, if the gentleman—I'm about out of my time, if he would seek time.

The fact of the matter is——

Chairman SENSENBRENNER. The time of the gentleman has expired.

For what purpose does the gentleman from Virginia seek recognition?

Mr. BOUCHER. Mr. Chairman, I rise in opposition to the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

I'll be brief in my remarks in opposition to this amendment. First, to the point that was just raised by the gentleman from Massachusetts, with respect to appeals to State courts from decisions of the trial court to certify a class, in many if not most States, there is not interlocutory right of appeal, meaning that the sole decision to certify the class is not appealable until the entire trial has taken place.

And so even in those instances where a certification wrongly occurs, all of the parties go to the expense of a full trial before the question of whether or not the certification was proper can be

heard by the State court. And that is a major shortcoming in many States.

Let me say a few other words about the difficulties that this amendment poses. Frankly, if it's adopted, the basic reform that we're seeking will simply not be achieved. Some cases should not be certified as class actions at all, either in State courts or in Federal courts.

Federal Rule of Civil Procedure 23, which governs class actions in Federal courts, is narrowly drawn so as to protect the rights of both plaintiffs and defendants to traditional due process as their claims are litigated. Rule 23 says that cases that are overly broad because of conflicting laws that establish the rights of individual plaintiffs that are purported members of the class or because of factual differences in the circumstances of the individual class members will not be certified as class actions.

To certify cases such as that, that are that broad, as class actions does violence to the rights of the plaintiffs who are the purported class members. And so rule 23 is narrowly drafted in such a way as to make sure that their rights are protected and that only those cases that should be certified because of clear commonality in the issues of law and fact will be certified as class actions.

When cases are denied class action status, either in State or Federal court, the plaintiffs then are free to file their individual claims, and so no one will be denied a right to recover simply because the class that that person is purportedly a part of is denied class action status.

Another class action could also be filed after the original certification of class action is denied. The case could be reconfigured as a State-centered class action under the terms of the bill that we've put forward and could go forward as a class action in State court. Or it could be reconfigured in such a way as to comply with the requirements of rule 23 and then proceed as a Federal class action.

But if the gentleman's amendment is adopted, any case which, because of its broad scope cannot meet the requirements of Federal Rule 23, and, therefore, is dismissed as a class action in Federal court, could then be certified as a class action in the State court from which it was removed. That State court could then certify the class, and no further removal to Federal court would occur.

Under this amendment, the cases that are truly national in scope, which it is our purpose to have removable to Federal court, would still be heard in State court. And that is the fundamental problem with the amendment that the gentleman has put forward.

Some States would continue to apply their often unique laws in a way that governs the rights of plaintiff class members who live in States that have laws under which exactly the opposite result would be obtained.

We have a long list of examples of situations where courts applying their unique law have bound plaintiffs who live in all 50 States, even in instances where most of the other States have laws that would reach exactly the opposite result. And one of the major goals of this reform is to prevent that event from occurring.

The extraterritorial application of State law that practice reflects does very serious damage to our traditional principles of federalism and actually constitutes a kind of reverse federalism in which one State can apply its law to the exclusion of the laws of other States

that would dictate a contrary result for the residents of those States.

Under the gentleman's amendment, this practice would continue. And that practice does serious damage to federalism and would assure that this reform is not achieved.

And so I oppose the amendment, and I would urge Members of the Committee to reject it.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from North Carolina seek recognition?

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I won't take 5 minutes, Mr. Chairman. I actually was intending to stay out of this debate, but got provoked by my colleague from Virginia, whose definition of federalism is a fascinating one and a very convenient one, as many Members of this Committee and this Congress are prone to do.

Basically what he said was, if we don't like the result at the State level or if federalism or if States actually have a different opinion or a different way of doing things, then we ought to federalize something. That is not an adequate justification, in my opinion, for federalizing something. And I think it's absolutely inconsistent with what I've heard a number of my colleagues on this Committee say they believe in.

So I'll yield back.

Chairman SENSENBRENNER. The question is on the Frank amendment.

Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Mr. FRANK. rollcall, Mr. Chairman, please.

Chairman SENSENBRENNER. A rollcall is requested. The question is on the adoption of the amendment offered by the gentleman from Massachusetts, Mr. Frank. Those in favor will, as your names are called, answer aye. Those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK Mr. Gekas?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no.

Mr. Bryant?

Mr. BRYANT. No.

The CLERK. Mr. Byrant, no.

Mr. Chabot?
[No response.]
The CLERK. Mr. Barr?
[No response.]
The CLERK. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no.
Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no.
Mr. Graham?
[No response.]
The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no.
Ms. Hart?
[No response.]
The CLERK. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Frank?
Mr. FRANK. Aye.
The CLERK. Mr. Frank, aye.
Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no.
Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?

[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye.
Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there additional Members who wish to cast or change their vote?
The gentleman from Wisconsin?
Mr. GREEN. Nay.
The CLERK. Mr. Green, nay.
Chairman SENSENBRENNER. The gentlewoman from Pennsylvania?
Ms. HART. No.
The CLERK. Ms. Hart, no.
Chairman SENSENBRENNER. The gentleman from Alabama?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no.
Chairman SENSENBRENNER. The gentleman from Massachusetts?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Chairman SENSENBRENNER. Are there further Members in the chamber who wish to cast or change their votes? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 9 ayes and 14 nays.
Chairman SENSENBRENNER. And the amendment is not agreed to.
Are there further amendments?
Mr. WATT. Mr. Chairman?
Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.
Mr. WATT. Mr. Chairman, I have an amendment at the desk. It's Watt 7.
Chairman SENSENBRENNER. The clerk will report the amendment.
Mr. WATT. Number 7.
Chairman SENSENBRENNER. Watt 7.
The CLERK. Amendment to H.R. 2341, offered by Mr. Watt. Beginning on page 17, omit line 16 through line 3 on page 20.
[The amendment follows:]

AMENDMENT TO H.R. 2341
OFFERED BY MR. WATT (N.C.)

Beginning on Page 17, omit line 16 through line 3 on page 20.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I ask unanimous consent that the word "omit" be changed to delete.

Chairman SENSENBRENNER. Without objection, the modification is agreed to.

Mr. WATT. Thank you, Mr. Chairman.

I, as the chairman of the "States' Rights Caucus," and perhaps the only remaining Member on this Committee of it—— [Laughter.]

—and as an unapologetic former plaintiffs' attorney, do not, obviously, feel as kindly toward this bill as the supporters of it, probably not even as kindly toward it as Mr. Frank has expressed that he might, with some changes being made to it.

I considered kind of tampering with this around the edges and offering a series of amendments but decided that I should do this with integrity and honesty, and so I want to save my colleagues the trouble of saying this: This amendment will, in fact, if it is passed, gut this bill. [Laughter.]

It would remove the removal provisions from the bill, and that is exactly what my intentions are.

And I'm not going to be original about this. I want to just read from my 1999, September 23, 1999, statement on the floor about the last version of this bill.

Chairman SENSENBRENNER. Without objection, the statement will be included in the record.

[The statement of Mr. Watt follows:]

PREPARED STATEMENT OF THE HONORABLE MELVIN L. WATT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

ON SEPTEMBER 23, 1999, MR. WATT (N.C.) MADE THE FOLLOWING STATEMENT ON THE HOUSE FLOOR:

"Mr. WATT of North Carolina. Mr. Chairman, I thank the gentleman for yielding time to me.

Mr. Chairman, let me make several points, as many as my time will allow me to make, about this bill, and encourage my colleagues to vote against this proposal.

First of all, I practiced law for a number of years before I ever thought about running for Congress. There is just a basic fairness argument that I think we all need to be aware of.

If a plaintiff is injured, he goes and hires a lawyer, they cultivate, research, put together a case, decide where the appropriate place is to litigate that case, spend months and months preparing for the case, file the case. Two days later somebody who has done absolutely nothing to get that case to trial under this bill has the ability to walk in and move that case to another forum. There is just something patently unfair about that. I just want us to focus on that.

The second point I would make is that in 1994 when my Republican colleagues came riding into the House, one of the principles that they gave major lip service to was the whole notion that there was too much going on at the Federal level, that we needed to decentralize government, that our whole system of Federalism was in jeopardy, and we needed to return power to the States.

Time after time after time since 1994 we have seen our Republican colleagues say, well, we do not like the result that we got at the State level, so let us federalize this and let us juste take it over, an absolute erosion of States' right in the criminal law area.

In the area of tort reform they have tried to do it, in the area of juvenile law they have tried to do it. We do not even have a juvenile court, a juvenile judge, a juvenile counselor, and yet, we have tried to federalize juvenile law, and the people who are behind that are the very same people who in 1994 were railing and rhetorically saying, this is terrible, to federalize all this stuff. We need to be returning rights and responsibilities to the most local level, to the State level, the local level, the individual level. Here we are again in this matter trying to bring something else into a Federal court.

The third point I want to make, the Federal courts are hopelessly backlogged. The cannot handle the business they are doing now. We cannot get the Senate to confirm enough people to fill the vacancies that exist on the Federal bench. Even if they did fill them, there would not be enough judicial power to handle all of these cases.

Yet, here we are in our infinite wisdom saying that the Federal courts know better; the State law, the Federal law, we know everything at this level. This is absolutely contrary to the horse that my colleagues rode into this House on, the States' rights horse. We should not sanction this. It is just a bad idea.

The final point I want to make, and I will talk about this a little bit more in the context of an amendment that I have to offer, is that even if this were a good idea, this bill is so badly drafted, there are some irrationalities in the drafting of the bill, that we are going to try to correct some of them during the course of the debate, and hopefully we will get some of those things worked out.

But there are some just severe unintended, or maybe they are intended. I never know whether my colleagues are accomplishing things that they intend or accomplishing things that they do not intend, since they told me they intended to preserve States' rights, and they keep cutting the legs from under it."

Mr. WATT. I don't object to it being included in the record in its totality. In fact, my plan is to offer it in its totality, but I want to read excerpts from it, with the Chairman's permission. And I'll do this quickly, just quickly.

First of all, I practiced law for a number of years before I ever thought about running for Congress. There is just a basic fairness argument that I think we all need to be aware of.

If a plaintiff is injured, he goes and hires a lawyer. They cultivate, research, put together a case, decide where the appropriate place is to litigate that case, spend months and months preparing for the case, file the case. Two days later, somebody who has done absolutely nothing to get that case to trial, under this bill, has the ability to walk in and move that case to another forum.

There is something patently unfair about that.

I just want us to focus on that.

The second point I want to make is that in 1994, when my Republican colleagues came riding into the House, one of the principles that they gave major lip service to was the whole notion that there was too much going on at the Federal level, that we needed to decentralize government, that our whole system of federalism was in jeopardy, and we needed to return power to the State. But time after time after time since 1994, we have seen our Republican colleagues say, "Well, we do not like the result that we got at the State level, so let us federalize this and let us just take it over," an absolute erosion of States' rights in the criminal area.

And in the area of tort reform, they have tried to do it.

In the area of juvenile law, they have tried to do it. We do not even have a juvenile court, a juvenile judge, a juvenile counselor,

and yet we have tried to federalize juvenile law. And the people who are behind that are the very same people who in 1994 were railing and rhetorically saying, "This is terrible, to federalize all this stuff."

We need to be returning rights and responsibilities to the most local level, to the State level, the local level, the individual level. Here we are again in this matter, trying to bring something else into a Federal court.

The third point I want to make: The Federal courts are hopelessly backlogged. They cannot handle the business that they are doing now.

And then I go on to talk about some of the drafting problems with this bill, and there are serious drafting problems with it that have not been resolved since it was introduced originally and reintroduced and again reintroduced this time.

I think we're making a major mistake, both in terms of historical precedent and in terms of the federalism that many of the people on this Committee have given lip service to.

And I encourage you to gut this bill. Pass this amendment. I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired.

The question is on the gutting amendment offered by the gentleman from North Carolina. [Laughter.]

Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Mr. WATT. Recorded vote, Mr. Chairman.

Chairman SENSENBRENNER. The recorded vote is demanded. The question is on adoption of the amendment by the gentleman from North Carolina. Those in favor will, as your names are called, answer aye. Those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. No.

The CLERK. Mr. Gekas, no.

Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no.

Mr. Bryant?

[No response.]

The CLERK. Mr. Chabot?

[No response.]

The CLERK. Mr. Barr?

[No response.]

The CLERK. Mr. Jenkins?

[No response.]

The CLERK. Mr. Cannon?

[No response.]
The CLERK. Mr. Graham?
[No response.]
The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no.
Ms. Hart?
[No response.]
The CLERK. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Frank?
Mr. FRANK. Aye.
The CLERK. Mr. Frank, aye.
Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no.
Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye.

Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there additional Members who wish to cast or change their vote?
The gentleman from North Carolina?
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Chairman SENSENBRENNER. The gentleman from Tennessee?
Mr. BRYANT. I vote no.
The CLERK. Mr. Bryant, no.
Chairman SENSENBRENNER. The gentleman from Wisconsin?
Mr. GREEN. Mr. Green votes no.
The CLERK. Mr. Green, no.
Chairman SENSENBRENNER. The gentleman from Georgia?
Mr. BARR. No.
The CLERK. Mr. Barr, no.
Chairman SENSENBRENNER. The other gentleman from Tennessee?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no.
Chairman SENSENBRENNER. The gentlewoman from Pennsylvania?
Ms. HART. No.
The CLERK. Ms. Hart, no.
Chairman SENSENBRENNER. The gentleman from Arizona?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Chairman SENSENBRENNER. Are there additional Members who wish to cast or change their votes? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 9 ayes and 15 nays.
Chairman SENSENBRENNER. And the amendment is not agreed to.
Are there further amendments?
The gentleman from California, Mr. Schiff.
Mr. SCHIFF. Mr. Chairman, I have a modest, nongutting amendment at the desk. [Laughter.]
Chairman SENSENBRENNER. The clerk will report the amendment, and the Members will decide whether his statement is accurate. [Laughter.]
Mr. SCHIFF. Okay, it may not be modest. [Laughter.]
The CLERK. Amendment to H.R. 2341, offered by Mr. Schiff and Ms. Lofgren.
Chairman SENSENBRENNER. Without objection, the amendment is considered as read.
[The amendment follows:]

AMENDMENT TO H.R. 2341

OFFERED BY MR. SCHIFF AND MS. LOFGREN

Page 16, line 14, strike ''if—'' and all that follows through line 25 and insert the following: ''if monetary relief claims in 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.''.

Page 17, line 4, strike ''The'' and all that follows through ''subparagraph (A).'' on line 7.

Page 17, line 10, strike ''subparagraph (B)'' and insert ''this paragraph''.

Chairman SENSENBRENNER. and the gentleman is recognized for 5 minutes.

Mr. SCHIFF. Mr. Chairman, this bill, while attempting to reform class action law has a far more reaching effect on California, and perhaps at least one other State, because of our current statutes.

Californians have chosen to enact strong unfair competition laws that protect consumers by prohibiting deceptive business practices. These laws are often enforced by the California attorney general, but sometimes the attorney general does not act and California laws allow a citizen to act as a private attorney general.

These cases are not class action lawsuits. They're lawsuits brought by private citizens and based entirely on California law. They have more limited rights and remedies than class actions, and there's no certification of a class in these private attorney general lawsuits.

Unfortunately, this bill would force all of these cases into Federal court as well. It does so because of an expansive definition of class action, which includes private citizens that represent the interests of the general public.

This amendment would merely amend the definition of class action lawsuits so that laws like that in California, and I believe at least one other State, would not be negated.

And so this is, I think, a modest States' rights amendment. It would allow these private attorney general lawsuits to go forward in State court.

Attempting to eliminate class action abuses is certainly an admirable goal. But allowing a corporation that does millions of dollars of business in California and avails itself of all the protections of California law, and then may easily avoid California State courts

when it comes to a consumer protection action brought by a California private attorney general, is an unjust result for California consumers.

And I would urge the Committee to consider this amendment, its limited scope, the fact that it does not gut the bill, but does preserve the ability of States like California to enact private attorney general laws.

Mr. GOODLATTE. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. SCHIFF. Yes.

Chairman SENSENBRENNER. The gentleman from Virginia?

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

This is the gutting-over-time amendment, and I must strongly oppose it. A rose by any other name would smell as sweet, and a class action suit by any other name is still a class action suit.

It is true that only a few States have this private attorney general action. However, if this amendment were passed, it would open the door for any State to adopt a similar provision and pursue it in that fashion.

The fact of the matter is, if this is a truly California private attorney general action, with only California parties, it could not be removed to Federal court if this legislation were enacted into law. But if it includes a multitude of parties, not only California citizens but citizens of other States and defendants of other States, it fits into the same diversity jurisdiction concept that was written into our Constitution and which this bill seeks to fulfill by changing the statutory requirement from $75,000 per plaintiff to $2 million for the entire class.

And the fact of the matter is, if you have a multitude of plaintiffs seeking action in this regard, it is effectively the same thing as a class. When those actions seek monetary relief, they are basically the same as class actions. Thus, H.R. 2341 would treat such cases as class actions for jurisdictional purposes. This amendment would seek to strike that language in an effort to prevent the removal of such cases to Federal court.

This bill is designed to make sure that Federal court, the court best able to handle a multitude of jurisdictions involved in the case, has the opportunity to do so where appropriate. And I'd also point out to the gentleman that the U.S. district judge has, under this legislation, wide latitude in remanding back to State court any actions that that judge feels are inappropriately brought into Federal court. And, therefore, I don't see the need for this amendment.

I would urge my colleagues to oppose it.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. GOODLATTE. I do.

Mr. WATT. Mr. Chairman?

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

Mr. WATT. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I think I'd be remiss as the chairman of the "States' Rights Caucus" not to rise in support of the gentleman's amendment. And I yield the balance of my time to Mr. Schiff.

Mr. SCHIFF. I thank the gentleman for yielding, and I'm proud to join the "States' Rights Caucus" of the Judiciary Committee. [Laughter.]

I want to respond just very briefly to the comment that this doesn't gut the bill, but it is the first step on a long, multistate conspiracy that eventually could gut the bill.

The fact of the matter is, the amendment simply provides that a State like California that passes a private attorney general law to protect its consumers ought not to have that right taken away by the Federal Government and certainly ought not to have that right taken away by Federal Government without any proof of abuse of that law, merely by the speculation that 49 other States may decide to follow that same course and then there would pandemonium.

The fact of the matter is, under this bill, if a corporation that does 90 percent of its business decides to incorporate in Delaware instead of California, it does 90 percent of its business in California and undertakes actions which are injuring the consumers in California, and a private attorney general brings a lawsuit to enjoin that action, to seek restitution for the damage done to Californians, this Committee is prepared to say no, the States don't have the right to do that; we're going to take that away.

Mr. GOODLATTE. Would the gentleman yield?

Mr. SCHIFF. I will be glad to yield to the gentleman in just a moment.

It seems to me that that is an extraordinary action to take for a Committee that is normally very respectful of the rights of States, particularly vis-a-vis protecting their consumers. And while this may only affect California and one other State currently, we are effectively cutting off this method of recompense in the future for others.

And I'd be delighted to yield.

Mr. WATT. I'm happy to yield to the gentleman from Virginia.

Mr. GOODLATTE. I appreciate the gentleman.

I'd just ask the gentleman if he thinks it appropriate that a $75,000 slip and fall case involving a California resident and a Nevada company, which can be brought in Federal court, if the gentleman thinks it isn't appropriate that a multimillion dollar case involving a multitude of plaintiffs ought also to be able to be brought in Federal court.

Mr. WATT. Just reclaiming my time, I'll tell the gentleman that, really, if you believe in the principles that we've been operating under in this country for years and years, there really shouldn't be a different answer on those. The amount of money really shouldn't be driving this and that's——

Mr. GOODLATTE. If the gentleman yield further, are you——

Mr. WATT. That's really where you have this going now.

Mr. GOODLATTE. Are you saying that you would eliminate the diversity——

Mr. WATT. No, I'm not saying that. I'm saying we've had the diversity rules in place for years and years and years, and this goes

so far beyond any diversity rules that are in place now, you are radicalizing and revolutionizing the whole process here.

And this bill doesn't have anything to do with the diversity rules. If you believed in the diversity rules, you wouldn't need this bill. The diversity rules stay in place and continue to be in place.

And this novel argument that you're making, that over time, the States will decide to do something that we don't like, is exactly what the Founding Fathers decided was important for the States to be able to do.

And you're coming in, making it sound like you are the defender of good here. The Founding Fathers set up this system so that exactly what you're saying might happen over time can happen over time, because they believed that the States had as much sense as the people up here, sitting in this Judiciary Committee.

Mr. FRANK. Will the gentleman yield?

Mr. WATT. I yield to the gentleman from Massachusetts.

Mr. FRANK. I thank the gentleman from North Carolina.

The gentleman from North Carolina is one of the Members I admire most, and I hate to think of him as ever being lonely, so I have a suggestion. Namely, as Chair of the "States' Rights Caucus," I suggest that he establish memberships by the week, unlike other caucuses. [Laughter.]

And I think that's the only way he can avoid being the continuing only member of his caucus. [Laughter.]

Mr. WATT. I think membership by the week, unfortunately, is way, way too long.

Mr. FRANK. By the bill?

Mr. WATT. It ebbs and flows by the moment——

Mr. DELAHUNT. Will the gentlemen yield?

Mr. WATT.—depending on whether they think it's convenient to their cause or not or convenient to their purpose. They want to change the laws of federalism if they don't agree with the States are doing.

And that's exactly what Mr. Goodlatte has just admitted his concern is about this amendment.

Mr. DELAHUNT. Will the gentleman yield?

Mr. WATT. And we're sitting here accepting it, as if that's something that is good.

I yield to the other gentleman from Massachusetts.

Mr. DELAHUNT. Yes, I just want to remind the gentleman from North Carolina that I am the co-chair of the "States' Rights Caucus," and I want to be acknowledged——

Mr. WATT. On which day? [Laughter.]

Mr. DELAHUNT.—as such.

And I'm beginning to think my friend and colleague from Massachusetts is right, but maybe we can make it hourly, as opposed to weekly.

I'd just like to——

Chairman SENSENBRENNER. The gentleman's time has——

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

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, I oppose this amendment and yield to the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I thank the gentleman for yielding to me to allow me the opportunity to defend myself against this assault.

I would just say to the purported chairman of the "States' Rights Caucus" that he has States' rights turned on its head, if you think that it's appropriate for one State court judge to decide the laws of the 49 other States. What about the rights of those States to have their laws determined in the very forum that our Founding Fathers recognized as the appropriate place to determine disputes between residents of different States—the Federal courts.

That's why diversity jurisdiction was created. Class action lawsuits were not known at that time. There's only been an explosion of class action lawsuits in the last couple of decades.

And this legislation is long overdue to address the problem that those cases most needing to be heard in Federal court, to resolve disputes among citizens of a variety of States, can be heard in the jurisdiction appropriate for it.

This legislation has everything to do with States' rights, and that is protecting the rights of States to be heard in an independent forum.

Mr. WATT. Will the gentleman from Texas yield?

Mr. SMITH. I'll be happy to yield to the gentleman from North Carolina.

Mr. WATT. I just—I don't want to disagree with my colleague from Virginia. There are some abuses taking place.

The problem I have is that this bill will allow manifold abuses in the opposite direction than the ones that are taking place now.

And this is one of the cases—the amendment that's under debate is one of those cases. The attorney general in this State files a lawsuit in California, and that lawsuit is going to end up in Delaware or Mississippi or Massachusetts or somewhere, just because of the provisions of this bill.

And you say you are defending the integrity of the system. That's not defending the integrity of the system. That's corrupting the system.

Mr. SMITH. Mr. Chairman, I'll reclaim my time and yield to the gentleman from Virginia.

Mr. GOODLATTE. Just to respond briefly, the gentleman has completely mischaracterized how the bill will operate. If the lawsuit can be removed, it's going to be removed to the U.S. District Court for the Southern or Northern District of California. It's not going to be removed to Mississippi or Alabama or any other place.

And that Federal court judge, if he believes it is more appropriately heard in the California State courts, has an abundance of discretion in this legislation to remand the case back to the State courts, if he feels it's primarily a State court action.

All this bill does is allow for the removal to Federal courts of truly Federal diversity questions involving plaintiffs from a multitude of different States and defendants from a multitude of different States. And it certainly is not going to accomplish what the gentleman describes.

I think it's a very fair and reasonable measure to give real meaning to diversity in class action lawsuits.

Mr. SMITH. Mr. Chairman, I'll yield back the balance of my time.

Chairman SENSENBRENNER. The question——

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman——

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

Chairman SENSENBRENNER.—from the Commonwealth of Massachusetts seek recognition?

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. DELAHUNT. I intend to yield to my friend from North Carolina——

Mr. WATT. If you yield to me on the front end, I'll get out of your way. I just want to read——

Mr. DELAHUNT. Okay.

Mr. WATT.—the language that the gentleman——

Chairman SENSENBRENNER. Would the gentleman turn his mike on so the reporter can hear every word you're saying?

Mr. WATT. On the top of page 18, let me read exactly what this bill says: A class action may be removed to a district court of the United States.

That can be in Mississippi, Delaware, Alabama.

So this—if the gentleman is saying I'm misstating what the bill does, he needs to read the bill.

I yield back. Thank you.

Mr. BOUCHER. Would the gentleman yield to me, the gentleman from Massachusetts? Just for a moment? [Laughter.]

I accept silence as consent. [Laughter.]

Mr. DELAHUNT. For the gentleman from Virginia, I will yield, for a moment.

Mr. BOUCHER. Thank you very much.

Let me simply say to the gentleman from North Carolina that venue is a separate requirement and also would have to be observed in these matters. And so you can look at the language that the gentleman from North Carolina has cited, and, yes, it does not designate a specific United States district code, but the venue rules clearly do.

Mr. WATT. Will the gentleman yield briefly to me?

Mr. DELAHUNT. I yield to Mr. Watt.

Mr. WATT. And the point I'm making is, if you've got a class member who has done absolutely nothing, who lives in Alabama, an appropriate venue for that case may well be Alabama, even though the attorney general is representing 80 percent of the people in the class in the State of California.

So that doesn't address this. You may like for this problem to go away, but that's one of those issues that—I mean, I didn't go item-by-item, as I did in the last markup, and try to amend this bill. I just did one fell swoop, and I did it honestly and on top of the table.

Mr. BERMAN. Would the gentleman yield for——

Mr. DELAHUNT. I'll yield to the gentleman.

Mr. BERMAN. Thank you.

The gentleman from North Carolina refers to the attorney general. I thought this amendment was focused on private attorney generals. Does this bill have the impact of affecting actions brought by the elected attorney general? Does the bill which the gentleman from California seeks to amend—in other words, I guess I'm asking the gentleman from North Carolina, when you say "the attorney general," do you mean under the private attorney general concept or the actual elected attorney general?

Mr. WATT. I assume that this bill applies to any class action.

Mr. BERMAN. Including those——

Mr. WATT. I don't see anything contrary in the bill.

Mr. DELAHUNT. I yield to the gentleman from California, Mr. Schiff.

Mr. SCHIFF. I thank the gentleman for yielding.

The California business and professional code section dealing with unfair competition empowers the attorney general to take action or, in the absence of attorney general action, a city or a county or a person acting in the public interest. The bill does have a provision in it that says—that excludes an action by a State attorney general. So this would only, as I read it, negate that section of the California law applies when a citizen becomes a private attorney general, not the State attorney general himself or herself.

Mr. DELAHUNT. Reclaiming my time, I just want to mention to my friend from California that the concept of devolution in States' rights used to be in vogue here in this particular institution back in 1994, '95, '96. And it's really been in decline over the course of the past several years. We might just put it—might as well just call it the end of federalism, the way we're heading.

But it was—an observation was made relative to your amendment that this is gutting over time. If you had served on this particular Committee during the course of the last six years, you would have seen that proposals continue to come forward that erode the entire concept of class action, because they have really become a nuisance, class action suits, for corporate America. And maybe it's just about time we get legislation before us just to abolish them.

With that, I'll——

Mr. FRANK. Will the gentleman yield to me?

Mr. DELAHUNT. I'll yield back to my friend from Massachusetts.

Mr. FRANK. Historically, let me make the record clear, because I was here in '95. It has never been the mainstream Republican argument to be for States' rights. They want to decide it at whatever level of government the business community is likeliest to get its——

Chairman SENSENBRENNER. The time of the gentleman to make Republican arguments is expired. [Laughter.]

The question is on the——

Mr. WEINER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York, Mr. Weiner, seek recognition?

Mr. WEINER. I move to strike the last word to yield to the gentleman from California, Mr. Schiff.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. I thank the gentleman for yielding.

A very brief clarification on the point that was raised: The bill proposes to exclude this—its application when the State attorney general acts; however, it does not make reference to other provisions that are within the California code.

So actions under California law for unfair competition that are brought not only by a person acting in the interest of a public who is not attorney general, but also by the district attorney or by the city attorney—would appear to be swept within the ambit of the bill.

So the bottom line is, although this bill might not impact an action brought by the California attorney general himself, if an action was brought by the district attorney or the city attorney or by a private person acting as an attorney general, then it could be removed out of a California court, even though the claim is purely based on California law and diversity is incomplete.

So it does have fairly broad action in negating the work of the California Legislature.

And I yield back to the gentleman.

Mr. WEINER. I yield the balance of my time to the gentleman from New York, Mr. Nadler.

Mr. NADLER. And I yield my time to the gentleman from Massachusetts, who didn't have a chance to finish his remark, pointing out that Republican Members——

Chairman SENSENBRENNER. The time belongs to the other gentleman from New York, Mr. Weiner——

Mr. NADLER. He yielded to me.

Chairman SENSENBRENNER.—and only he can yield it.

Mr. NADLER. He yielded it to me.

Chairman SENSENBRENNER. Yes.

Mr. NADLER. Fine. Mr. Chairman, reclaiming the time we just wasted—— [Laughter.]

Mr. Chairman, I simply want to point out—I want to complete the remark I assume Mr. Frank had started to make before he was cut off, which is that the Republican reverence for States' rights is not constant but is very consistent. That is, they want power at whatever level of government, on any given subject, that would be more hostile to consumers, most hostile to anyone trying to enforce safety regulations, and most friendly to big business and corporations trying to evade regulation.

And that's what the record shows, and that's what this bill is all about. And I'll yield back.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner, has 2 minutes and 32 seconds left. Do you wish to yield back or use it?

Mr. WEINER. I will gladly yield back, Mr. Chairman.

Chairman SENSENBRENNER. Okay.

Mr. BRYANT. Mr. Chairman? Mr. Chairman, I have a brief statement.

Chairman SENSENBRENNER. For what purpose does the gentleman from Tennessee seek recognition?

Mr. BRYANT. Move to strike the requisite number of words.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BRYANT. Let me say that what the proponents of this amendment are saying is that when a State adopts a statute that creates

a cause of action, they should not—we should not be able to remove that Federal court even though the law allows that. And that's essentially an argument to eliminate completely the diversity jurisdiction provisions of Article III.

And I know our States' rights folks over there on that side don't like to recognize the existence of the Constitution, but it is there. And Article III does allow this diversity or this removal process.

And any case that is brought pursuant to diversity, removed to Federal court, is, by definition, a State claim. And that's exactly what we're talking about here. Otherwise it would be a Federal claim with exclusive jurisdiction in the Federal courts.

Without this provision, there'd be a giant loophole in the bill. And I just think it's a bad amendment.

And I would like to correct one point that's being made over there, that a case could be removed from a State court in California to a Federal court in Mississippi or Alabama or any State under this proceeding. That's simply not the cases.

Mr. WATT. Would the gentleman yield?

Mr. BRYANT. Well, let me make my point here, and I'll be happy to yield.

Under the bill, it says that, on page 18, line 1, it begins: A class action may be removed to a district court of the United States in accordance with this chapter.

Now, you're reading only—you stopped reading awhile ago about "to a district court of the United States." You didn't read the rest of the sentence, which said: with this—in accordance with this chapter.

Now, this chapter is chapter 89, title 28, chapter 89, which says, in addition to 30 days and all that, and it sets parameters for how you remove a case, it says a defendant or a defendant's desire to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States or the district and division within which such action is pending notice of removal.

In other words, if a State—if a private action is filed in the Northern District of California in, let's say, San Francisco court, if you were to remove that, you'd be limited to removing that only to the Northern District Federal court of California, not even the Southern District.

So I think that is an incorrect assessment of this law. And if that's the only reason you're going to vote against it, then you should vote for it.

Mr. WATT. Would the gentleman yield?

Mr. BRYANT. I would yield my time back—or, I would yield my time to Mr. Watt.

Mr. WATT. I thank the gentleman for yielding.

And I have to advise the gentleman that is he is guilty of exactly what he has accused me of, because he stopped reading in the middle sentence, too.

He should read the rest of the sentence, which says, "without regard to whether any defendant is a citizen of the State in which the action is brought." Which means that, basically, you can remove it wherever you want to. You don't even have to have diversity anymore.

So this argument that this about diversity jurisdiction is shot down by the very language of—that you stopped reading in the

middle of the sentence on, just like you accused me of stopping reading in the middle of the sentence. You don't even have to have diversity because this is done without regard to where the citizen lives.

Mr. BRYANT. Well, let me reclaim my time. And I would just say, I think you're misreading that completely. We're talking about the defendant here. It's done without regard to where the defendant is located. The chapter that will decide where this case is to be determined, that provision is in the chapter of the existing code, which says that it only can be removed to the district and division of that district where the action, the State action, is pending.

So I don't think there's any question. We have, perhaps——

Mr. SCHIFF. Will the gentleman yield?

Mr. BRYANT.—a legitimate disagreement.

But I think the law is clear that it will only be, in the example I gave, to the Northern District of California.

So I think it's——

Mr. SCHIFF. Will the gentleman yield?

Mr. BRYANT. Yes, I'd be happy to yield to the gentleman from California.

Mr. SCHIFF. I thank the gentleman for yielding.

I think both the strengths and weaknesses of this amendment are being overstated. We come back to the fact, at the end of this debate, that it is a modest amendment, after all.

What this is really about is not removing diversity jurisdiction. Diversity jurisdiction remains. What is at stake in the bill and in the amendment is what happens when there is incomplete diversity, when there are parties from different States but not completely different States, so that the plaintiff may be a Californian, bringing a private attorney general action in California, against a majority of defendants what are Californians, but because the diversity is not complete, because one of the defendants that does 90 percent of their business in California is actually incorporated in Delaware, it can be taken out of the California courtroom.

So you have quintessentially California action with a California cause of action——

Mr. BRYANT. Let me reclaim my time.

Mr. SCHIFF.—removed to Federal court.

Mr. BRYANT. Let me reclaim my time so that I can say that——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. BRYANT.—is not the case. That's not the case.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from California, Mr. Schiff.

Those in favor will signify by saying aye.

Opposed, no.

The noes appear to have it.

Mr. SCHIFF. Mr. Chairman, I request a rollcall.

Chairman SENSENBRENNER. The rollcall will be ordered.

The question is on the adoption of the Schiff amendment. Those in favor will, as your names are called, answer aye. Those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

Mr. Gekas?

Mr. GEKAS. No.

The CLERK. Mr. Gekas, no.

Mr. Coble?
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Mr. Smith?
Mr. SMITH. No.
The CLERK. Mr. Smith, no.
Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte, no.
Mr. Bryant?
Mr. BRYANT. No.
The CLERK. Mr. Byrant, no.
Mr. Chabot?
[No response.]
The CLERK. Mr. Barr?
Mr. BARR. No.
The CLERK. Mr. Barr, no.
Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no.
Mr. Cannon?
[No response.]
The CLERK. Mr. Graham?
[No response.]
The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no.
Ms. Hart?
Ms. HART. No.
The CLERK. Ms. Hart, no.
Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Frank?
Mr. FRANK. Aye.
The CLERK. Mr. Frank, aye.
Mr. Berman?
Mr. BERMAN. Aye.

The CLERK. Mr. Berman, aye.
Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no.
Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye.
Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye.
Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there additional Members in the chamber who wish to change or cast their vote?
The gentleman from Ohio?
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no.
Chairman SENSENBRENNER. The gentleman from South Carolina?
Mr. GRAHAM. No.
The CLERK. Mr. Graham, no.
Chairman SENSENBRENNER. The gentleman from Arizona?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 11 ayes and 17 nays.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

The gentleman from New York, Mr. Nadler.

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

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 2341, offered by Mr. Nadler. Page 10, add the following after line 23 and redesignate the succeeding section accordingly:

Mr. NADLER. Mr. Chairman, I ask unanimous consent that reading of the amendment be dispensed with.

Chairman SENSENBRENNER. Without objection, so ordered.

[The amendment follows:]

AMENDMENT TO H.R. 2341 (Modified)
OFFERED BY MR. NADLER

Page 10, add the following after line 26 and redesignate the succeeding section accordingly:

"§1717. Availability of court records

"No order or opinion of the court in the adjudication of a class action may be sealed. Any court record in a class action, including a record obtained through discovery, whether or not formally filed with the court, may not be sealed or subjected to a protective order, and access to such record may not otherwise be restricted, except by a court order issued pursuant to a finding of fact by the court that— (except as provided in this section)

"(1) such order would not restrict the disclosure of information which is relevant to public health or safety; or

"(2)(A) the public interest in disclosing potential health or safety hazards is clearly outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(B) the order is no broader than necessary to protect the privacy interest asserted.

Page 6, in the matter preceding line 1, strike the item relating to section 1717 and insert the following:

"1717. Availability of court records.
"1718. Definitions.".

Chairman SENSENBRENNER. And the gentleman is recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, this amendment is about sealing secret information that could be used to protect the health and safety of others. This amendment would prohibit a court from sealing the records of a class action case if the records are relevant to public health and safety.

I've been concerned for a number of years about records from lawsuits that affect public health and safety being sealed off from the public in the settlement of a lawsuit. To me, there's no justification for this practice.

More often than not, the whole reason—the reason why a class action lawsuit is filed is because a number of people have been harmed by a large corporation. They come together to recover damages by proving that a company behaved in a way that is harmful to their health and safety.

So what happens? The company settles the lawsuit, pays the people it harms, and then tells them to shut up and continues with the dangers, people figuring a few every now and then, we'll bring a class action suit, they'll pay off the people bringing the suit, and they'll continue. And the cost of settlements is a cost of doing business.

But meanwhile, many hundreds of thousands of people continue being harm by the secret practice that continues to go on. They force the plaintiffs never to discuss the problems with anyone else. More people end up getting hurt. This is reprehensible.

The Firestone tire situation is a case in point. One of the main reasons why there was not timely public disclosure of the dangers of Firestone tires is because Firestone insisted on a series of gag orders when settling product liability lawsuits. And let me read here from an article in the September something-or-other—September 25th, 2000, addition of the Legal Times article on Firestone. It says: "One of the principle roadblocks to timely public disclosure of the danger of Firestone tires has been a series of gag orders the company insisted on as a condition of settling product liability lawsuits in the early 1990's."

"Simply put, Firestone made a calculated determination that they would compensate victims so long as the plaintiffs agreed not to share their stories with other victims or the public. Congress was given the opportunity to address this very problem in 1995 when an amendment was offered that would prevent such gag orders if the public safety need outweighed the privacy interests of the litigants."

"Unfortunately, the amendment was defeated, with opponents arguing that the information was proprietary information that does not belong in the public domain."

The reality is that the release of such information in the Firestone case 7 or 8 years ago potentially could've saved scores of human lives.

We should not allow this to happen again. We can't blame the people who settled their cases for recovering damages and agreeing to the gag orders as a condition of getting the money. But as a result, the public was kept in the dark, and many more people were injured.

This should not happen again. It's important for the people to be aware of the health and safety hazards that may exist so that other people can make informed choices about their lives, and, I might add, so that public agencies, perhaps, can crack down on such dangers.

Too often, critical information is sealed from the public and other people are harmed as a result. When it comes to health and safety, public access to the information that is adduced in class action lawsuits is absolutely essential.

I urge my colleagues to accept this amendment. I yield back.

Mr. GOODLATTE. Mr. Chairman?

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

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I must oppose this amendment. I think that this discretion should be left in the hands of the judge. Settlements often include private information that deter individuals from entering settlements. Publicizing these details would have a chilling effect on individuals interested in settlement rather than protracted and expensive litigation.

Furthermore, settlements are reviewed by the court. Releasing details will have the effect of opening judicial determination to public scrutiny——

Mr. NADLER. Well, that's terrible.

Mr. GOODLATTE.—possibly affecting the outcome or judgment from the bench in future settlements with similar facts.

This amendment would eliminate an effective negotiating tool for plaintiffs and force more cases to be litigated at the expense of the client and to the benefit of his or her lawyer.

There are plenty of cases where the information that the gentleman describes definitely should be made public. And I share the gentleman's concern in that regard.

But there are also plenty of cases in which terms of settlement do not need to be made public and always requiring, as a matter of law, that it be done so, handcuffing the judge in the case and creating a chilling effect on the ability of the parties to settle is not a good idea.

I urge opposition to the amendment.

Chairman SENSENBRENNER. The question is on the——

Mr. SCOTT. Mr. Chairman? Move to strike the last word.

Chairman SENSENBRENNER. The Committee is recessed.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order.

Pending when the Committee recessed was the amendment of the gentleman from New York, Mr. Nadler, to the bill H.R. 2341.

For what purpose does the gentleman from Virginia seek recognition?

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I rise in support of the amendment, and yield the balance of the time to the gentleman from New York.

Mr. NADLER. Thank you, Mr. Chairman.

I just wanted to comment or reply to the comments of, I think it was the gentleman Virginia, who first of all said that one of problems with this amendment was that it would open judicial rulings to public scrutiny, which I think it might very well do, and I don't think it's a terrible thing. I think, in fact, it's one of the things we normally like to do with judicial rulings.

But second of all, his other major point was that he agrees that gag orders should not be issued when it would affect the public health and safety, but sometimes have to be, and you have to leave that to the discretion of the judge. And unfortunately, he said, we can't have an amendment that doesn't leave it to the discretion of the judge. But this amendment, sir, does leave it to the discretion of the judge.

And maybe it hasn't been read in its entirety. Let me read the relevant part. It says: Any access to such record may not otherwise be restricted—and I'm reading line 7 now—except by a court order issued pursuant to a finding of fact by the court that one such order would not restrict the disclosure of information which is relevant to public health or safety, or, two, the public—A, the public interest in disclosing potential health or safety hazards is clearly outweighed by a specific and substantial interests in maintaining the confidentially of the information or records in question; and, B, the order is no broader than necessary to protect the privacy interests asserted.

So in other words, what this amendment does is command the judge that he must make a finding of fact where a gag order is requested. And if he finds that the privacy interest is broader than the public interest or the order, then he must issue the gag order. If he finds that the public interest in health and safety outweighs the privacy interests asserted, he may not issue the gag order. He also has to find out that the gag order is drafted as tightly as possible.

So this amendment seems to do exactly what the gentleman from Virginia thinks is the proper thing to do, so I hope he and the other Members on both sides of the aisle will vote for this amendment.

I thank the gentleman for yielding, and I yield back to him.

Chairman SENSENBRENNER. The question is——

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. Has the gentleman from Massachusetts been recognized earlier on this amendment?

Mr. DELAHUNT. No, I have not.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

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

Mr. Chairman, I find it interesting that the argument is put forth that when it comes to settlements, we can encourage discretion and trust those judges. Yet, there has been a history, a record, that this Committee, when it comes to imposing criminal sentences, we really can't trust those same judges. And that's why, again and again and again, from this Committee, we continue to report out favorably proposals for mandatory sentences.

I really find an inconsistency there. But then again, earlier, in the previous amendment, we talked about the inconsistency when it comes to States' rights. So I guess there's a consistency in terms of the inconsistency.

But maybe, I don't know, maybe the sponsor of the amendment can help me with that? I just find it amazing—amazing.

And of course, we hear from the opponent of the amendment that it will have a chilling effect, in terms of settlement. I don't know, maybe the gentleman from Virginia or maybe the gentleman from New York can point us to some——

Mr. NADLER. Will the gentleman yield?

Mr. DELAHUNT. Yes, I yield to the gentleman from New York.

Mr. NADLER. First of all, I find it amazing, too.

But, second of all, I think the only chilling effect the amendment might have is that a corporation that is really grossly ashamed of shameful and terrible conduct would be, might be, reluctant to allow that to go public as part of a settlement.

But I frankly think that in such a case——

Mr. DELAHUNT. Reclaiming my time, you mean, for example, in the case of Firestone? Is that what the gentleman is suggesting?

Mr. NADLER. Yes. I mean, that was a clear case. There are other cases, too. But that's the only conceivable chilling effect. If the conduct that is admitted, in effect, or even not admitted—because a settlement can say, listen, just let's get this off our heads without admitting any facts.

That conduct might not be so opprobrious and then they——

Mr. DELAHUNT. Reclaiming my time, is the gentleman from New York aware of any survey, any data, any research done in terms of a chilling effect?

Mr. NADLER. No, sir.

Mr. DELAHUNT. In terms of settlements?

Mr. NADLER. No, sir.

Mr. DELAHUNT. If there were somehow disclosure?

Mr. NADLER. No, sir.

Mr. DELAHUNT. I see. Well, I guess my questions go unanswered, and I'll yield back my time.

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

Mr. WATT. Mr. Chairman? Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from North Carolina seek——

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

Chairman SENSENBRENNER. The gentleman is—was the gentleman recognized on this amendment before?

Mr. WATT. I haven't even been here on this amendment, so I know I wasn't——

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I thank the Chairman for yielding time. And I just wanted to ask Mr. Nadler, perhaps, if he would make the first sentence of his amendment also subject to the same requirements that he has made the rest of it.

There is an absolute bar to sealing a class action opinion or order, which I think may go—I could conceive of situations where that would go too far. And I'm wondering if the gentleman might consider making the first part of the amendment also subject to the same finding of fact order that the second part of the amendment is subject to?

Mr. NADLER. Would the gentleman yield?

Mr. WATT. I yield.

Mr. NADLER. Thank you. I don't think you're reading it correctly, sir. And that's certainly not the intent.

The first sentence says: No order or opinion may be sealed.

The second sentence goes on to say under what circumstances it can't be sealed. Any court reading this would understand that the first sentence is subject to the second sentence, because the whole point of the amendment is to do that.

And if you read the first sentence to be independent of the rest of the amendment, the rest—the amendment would have no meaning at all; the rest of the amendment would have no meaning. So I see no possibility of reading it that way.

But if it concerns you, I'll be happy to make that more clear after it gets out of Committee.

Mr. WATT. I do think that the first sentence could be read independently, because the second sentence really is dealing with discovery and other things, not necessarily the opinion itself. And I do think it's important——

Mr. NADLER. Would the gentleman yield?

Mr. WATT. I'll yield, yes.

Mr. NADLER. Mr. Chairman, I ask unanimous consent to amend the amendment by adding the following phrase at the conclusion of the first sentence—let me read the first sentence as I would amend it: No order or opinion of the court in the adjudication of a class action may be sealed except as provided in this section.

Chairman SENSENBRENNER. Without objection, the amendment is so modified.

Mr. WATT. I thank the gentleman. I think that clears it up.

Mr. NADLER. Thank you.

Mr. WATT. And I think it makes it a better amendment.

Chairman SENSENBRENNER. Does the gentleman yield back? The gentleman from North Carolina?

Mr. WATT. I yield back, yes.

Chairman SENSENBRENNER. The question is on the Nadler amendment as modified.

Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York.

Mr. NADLER. rollcall vote, please.

Chairman SENSENBRENNER. rollcall is ordered. Those in favor of the Nadler amendment will, as your name is called, answer aye. Those opposed, no. And the clerk will call the roll.
The CLERK. Mr. Hyde?
[No response.]
The CLERK. Mr. Gekas?
[No response.]
The CLERK. Mr. Coble?
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Mr. Smith?
Mr. SMITH. No.
The CLERK. Mr. Smith, no.
Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte, no.
Mr. Bryant?
Mr. BRYANT. No.
The CLERK. Mr. Byrant, no.
Mr. Chabot?
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no.
Mr. Barr?
[No response.]
The CLERK. Mr. Jenkins?
[No response.]
The CLERK. Mr. Cannon?
[No response.]
The CLERK. Mr. Graham?
[No response.]
The CLERK, Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Mr. Issa?
[No response.]
The CLERK. Ms. Hart?
[No response.]
The CLERK. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Conyers?
[No response.]
The CLERK. Mr. Frank?
[No response.]

The CLERK. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no.
Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye.
Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye.
Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there further Members in the room who wish to cast or change their vote?
The gentleman from Utah, Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no.
Chairman SENSENBRENNER. The gentleman from South Carolina, Mr. Graham?
Mr. GRAHAM. No.
The CLERK. Mr. Graham, no.
Chairman SENSENBRENNER. The gentleman from Tennessee, Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no.
Chairman SENSENBRENNER. The gentlewoman from Pennsylvania, Ms. Hart?
Ms. HART. No.

The CLERK. Ms. Hart, no.

Chairman SENSENBRENNER. Further Members who wish to—the gentleman from Arizona, Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no.

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan?

Mr. MEEHAN. Yes.

The CLERK. Mr. Meehan, aye.

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green.

Mr. GREEN. No.

The CLERK. Mr. Green, no.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner?

Mr. WEINER. Aye.

The CLERK. Mr. Weiner, aye.

Chairman SENSENBRENNER. Anybody else who wishes to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 9 ayes and 16 nays.

Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments? If not, the question occurs on the motion to report the bill H.R. 2341 favorably as amended. The Chair notes a reporting quorum is present.

All in favor will say aye.

Opposed, no.

The ayes appear to have it.

Mr. NADLER. Mr. Chairman, a recorded vote, please?

Chairman SENSENBRENNER. A recorded vote on the motion to report favorably is ordered. Those in favor will, as your names are called, answer aye. Those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye.

Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye.

Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Mr. Bryant?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Mr. Barr?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye.
Mr. Cannon?
[No response.]
The CLERK. Mr. Graham?
[No response.]
The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye.
Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye.
Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye.
Mr. Issa?
[No response.]
The CLERK. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye.
Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye.
Mr. Conyers?
[No response.]
The CLERK. Mr. Frank?
[No response.]
The CLERK. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman, no.
Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye.
Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no.
Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no.
Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no.
Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no.

Mr. Delahunt?
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no.
Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no.
Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no.
Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no.
Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Other Members in the room who wish to cast or change their vote?
The gentleman from Utah, Mr. Cannon?
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye.
Chairman SENSENBRENNER. The gentleman from South Carolina, Mr. Graham?
Mr. GRAHAM. Aye.
The CLERK. Mr. Graham, aye.
Chairman SENSENBRENNER. The gentleman from Tennessee, Mr. Bryant?
Mr. BRYANT. Aye.
The CLERK. Mr. Bryant, aye.
Chairman SENSENBRENNER. Anybody else who wish to cast or change their vote?
The gentleman from Arizona, Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye.
Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Frank?
Mr. FRANK. Aye. No. [Laughter.]
Chairman SENSENBRENNER. Anybody else who wish to cast or change their vote?
Can we make sure that Mr. Frank is recorded how he really wants to vote?
The CLERK. Mr. Frank, no.
Chairman SENSENBRENNER. Okay, the clerk will report.
The CLERK. Mr. Chairman, there are 16 ayes and 10 nays.
Chairman SENSENBRENNER. And the motion to report favorably is agreed to. Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted. Without objection, the Chair is authorized to move to go to conference pursuant to House Rules. Without objection, the staff is directed to make any technical and conforming changes. And all Members will be given 2 days as provided by the House Rules in which to submit additional dissenting, supplemental, or minority views.

ADDITIONAL VIEWS

Section 4 of this bill has a far more reaching effect than "federalizing" Consumer Protection Class Actions. Section 4 "federalizes" any State cause of action that is brought on behalf of the general public.

California, like many other States, has enacted strong antitrust laws that prohibit unfair combinations and unlawful restraints of trade.[1] California has chosen to allow its District Attorneys, along with the California Attorney General, to enforce these laws in State courts.

*ERR13*This bill usurps California's choice. Under Section 4(a)'s expansive definition of "class action," a District Attorney who attempts to enforce State antitrust laws on behalf of the general public is subject to the act's constraints.

The Federal Government should not be forcing local prosecutors to try state antitrust lawsuits in Federal court. Nor should the Federal Government force local prosecutors to comply with Federal class certification requirements or risk dismissal of their State antitrust actions.

Put simply, H.R. 2341 is a stealthy attempt to chill State and local antitrust law enforcement. That effort is contrary to longstanding legal doctrines of our nation. It will also adversely impact competition and business development in the high tech sector, which is vital to this nation's future. I, therefore, strongly oppose H.R. 2341.

ZOE LOFGREN.

[1] See California Business and Professions Code sections 16700, et seq. and 17000, et seq.

DISSENTING VIEWS

We strongly oppose H.R. 2341, the "Class Action Fairness Act of 2001." Although the legislation is described by its proponents as a simple procedural fix, in actuality it represents a major rewrite of the class action rules that would bar most forms of state class actions. H.R. 2341 (or its predecessor version)[1] is opposed by both the state[2] and federal[3] judiciaries, as well as consumer and public interest groups, including Public Citizen[4] and Consumers Union.[5]

By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation. This legislation will undercut that important principle by making it far more burdensome, expensive, and time-consuming for groups of injured persons to obtain access to justice. Thus, it would be more difficult to protect our citizens against violations of fraud, consumer health and safety, 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.

As Consumers Union has written, "This 'class action reform' legislation is especially inappropriate and ill-timed right now. With the bankruptcy of Enron leaving many investors and employees of the company with vastly diminished retirement savings, while Enron's executives sold stock and made millions of dollars months before the stock value plummeted, these investors deserve the right to hold any corporate wrongdoers accountable. This is no time to

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[1] H.R. 2341 is the third time class action legislation has been offered in Congress. During the 105th Congress, the Full Committee marked-up and reported out on a party line vote the "Class Action Jurisdiction Act of 1998," which was also similar in most respects to H.R. 2341. The bill, however, was never considered by the Full House during the 105th Congress. In 1999, after a hearing and mark-up, the House Committee on the Judiciary reported out, by a 15–12 vote, the "Interstate Class Action Jurisdiction Act of 1999," which was similar in most respects to H.R. 2341 under consideration today. On September 23, 1999 the House passed the legislation 22–207. It was never voted on in the Senate.

[2] *See* Letter from David A. Brock, President, Conference of Chief Justices (July 19, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter Conference of Chief Justices letter] (stating that "H.R. 1875, in its present form, is an unwarranted incursion on the principles of judicial federalism.").

[3] *See* Letters from Leonias Ralph Mecham, Secretary, Judicial Conference of the United States (July 26, 1999 & August 23, 1999) (letters on file with the minority staff of the House Judiciary Committee) [hereinafter Judicial Conference letter] (stating that on July 23, 1999, the Executive Committee of the Conference voted to express its opposition to the class action provisions in H.R. 1875).

[4] *See* Letter from Joan Claybrook, President, Public Citizen (March 5, 2002)(letter on file with minority staff of the House Judiciary Committee).

[5] *See* Letter from Sally J. Greenberg, Senior Product Safety Counsel, Consumers Union (March 5, 2002)[hereinafter Consumers Union Letter](letter on file with minority staff of the House Judiciary Committee).

constrict legal remedies by curtailing access to the courts, including state courts.[6]

H.R. 2341 provides for the removal of state class action claims to Federal court in cases involving violations of state law where any member of the plaintiff class is a citizen of a different state than any defendant.[7] The only exceptions provided in H.R. 2341 are that Federal courts are directed to abstain from hearing a class action where (1) a "substantial majority" of the members of the proposed class are citizens of a single state of which the primary defendants are citizens and the claims asserted will be governed primarily by laws of that state ("an intrastate case"); (2) all matters in controversy do not exceed $2,000,000 or the membership of the proposed class is less than 100 ("a limited scope case"); or (3) the primary defendants are states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief ("a state action case").[8] In the event the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Procedure 23, under the bill the court must dismiss the action,[9] which has the effect of striking the class action claim.[10]

H.R. 2341 also contains a so-called "Consumer Class Action Bill of Rights." This includes some nominal safeguards, such as judicial scrutiny of coupon and other noncash settlements, protection against a proposed settlement that would result in a net loss to a class member, protection against discrimination based on geographic location, prohibition on class representatives receiving a greater share of the award and plain English requirements. However, the bill fails to do anything to address the greatest consumer abuse "sweetheart" deals which payoff one class in order to eradicate future claims which were not even before the court.[11]

H.R. 2341 will damage both the Federal and state courts. As a result of Congress' increasing propensity to federalize state crimes, the Federal courts are already facing a dangerous workload crisis. By forcing resource intensive class actions into Federal court, H.R. 2341 will further aggravate these problems and cause victims to wait in line for as much as 3 years or more to obtain a trial. Alter-

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[6] *See* Consumers Union Letter

[7] H.R. 2341, § 4(a). Current law requires there to be complete diversity before a state law case is eligible for removal to Federal court, that is to say that all of the plaintiffs must be citizens residing in different states than all of the defendants. *See Stawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Snyder v. Harris*, 394 U.S. 332 (1969), the Supreme Court held that the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.

[8] H.R. 2341, § 4(a). The legislation also excludes securities-related and corporate governance class actions from coverage and makes of number of other procedural changes, such as easing the procedural requirements for removing a class action to Federal court (i.e., permitting removal to be sought by any plaintiff or defendant and eliminating the 1-year deadline for filing removal actions) and tolling the statute of limitation periods for dismissed class actions.

[9] H.R. 2341, § 4(a).

[10] While the class action may be refiled again, any such refiled action may be removed again if the district court has original jurisdiction.

[11] These include collusive settlements, in which the parties agree to a far broader settlement than was originally sought in order to insulate defendants from future liability, and coupon and other deficient settlements which provide little in the way of real relief to plaintiffs. For example, *In re Prudential Insurance Company of America Sales Practice Litigation*, 962 F. Supp. 450 (D. N.J. 1997) (class action based on misrepresentations to customers regarding future premiums for which settlement was approved releasing defendant from any abusive sales practice), involved a class action case which as filed was based only on misrepresentations to customers regarding future premiums, but as settled, released defendants from all claims concerning abusive sales practices.

natively, to the extent class actions are remanded to state court, the legislation effectively only permits case-by-case adjudications, potentially draining away precious state court resources. For these and the other reasons set forth herein, we dissent from H.R. 2341.

I. H.R. 2341 WILL DAMAGE THE FEDERAL AND STATE COURT SYSTEMS

A. Impact on Federal Courts

Expanding Federal class action jurisdiction to include most state class actions, as H.R. 2341 does, will inevitably result in a significant increase in the Federal courts' workload. As the Justice Department observed last Congress, "[c]lass action cases are among the most resource-intensive litigation before the judiciary [and enactment of the bill] could move most of this litigation into the Federal judicial system. Addressing the resulting caseload could require substantial additional Federal resources." [12]

In actuality, the workload problem in the Federal courts continues to be at an acute stage. For example, in 2001, the Federal courts faced the following:

- On February 2, 2002, 68 judicial vacancies existed, or over 10% of the Federal judicial positions.[13]
- On average, Federal district court judges had 416 civil filings pending.[14]

It is because of these and other workload problems that Chief Justice Rehnquist took the important step of criticizing Congress for taking actions which have exacerbated the courts' workload problem:

> I also criticized Congress and the president for their propensity to enact more and more legislation which brings more and more cases into the Federal court system. This criticism received virtually no public attention. . . . [I]f Congress enacts, and the president signs, new laws allowing more cases to be brought into the Federal courts, just filling the vacancies will not be enough. We will need additional judgeships.[15]

Further, the Judicial Conference of the United States also has serious reservations regarding this legislation. In a letter last Congress opposing class action legislation, the Judicial Conference stated the following:

> While it is difficult to predict with precision the impact that the federalization of class actions will have on the Federal judicial system, one can predict with confidence that it will impose a very substantial burden . . . the federalization of class actions holds the potential for increasing significantly the num-

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[12] *See* Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to the Honorable Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property, House Judiciary Committee 1 (June 18, 1998) (on file with the minority staff of the House Judiciary Committee).

[13] *See generally* Judicial Nominations, Department of Justice, Office of Legal Policy, *available at* http://www.usdoj.gov/olp/judicialnominations.htm (last viewed February 2, 2002).

[14] *See* Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the United States Courts (2000).

[15] Chief Justice William Rehnquist, An Address to the American Law Institute, *Rehnquist: Is Federalism Dead*? (May 11, 1998), in *Legal Times* (May 18, 1998).

ber of such cases currently being litigated in the Federal system.[16]

B. Impact on the State Courts

In addition to its impact on the Federal courts, the legislation will also undermine state courts. This is because in cases where the Federal court chooses not to certify the state class action, the bill prohibits the states from using class actions to resolve the underlying state causes of action. It is important to recall the context in which this legislation arises—a class action has been filed in state court involving numerous state law claims, each of which if filed separately would not be subject to Federal jurisdiction (either because the parties are not considered to be diverse or the amount in controversy for each claim does not exceed $75,000). When these individual cases are returned to the state courts upon remand, hundreds if not thousands of potential new cases may be unleashed.[17]

In addition to these workload problems, the legislation raises constitutional issues. H.R. 2341 does not merely operate to preempt an area of state law, rather it unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes. As the Conference of Chief Justices stated, the legislation in essence "unilaterally transfer[s] jurisdiction of a significant category of cases from state to Federal courts" and is a "drastic" distortion and disruption of traditional notions of judicial federalism.[18]

In this regard, the courts have previously found that efforts by Congress to dictate such state court procedures implicate important Tenth Amendment federalism issues and should be avoided. For example, in *Felder* v. *Casey*[19] 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*[20] 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'"[21] 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"

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[16] *See* supra note 2.

[17] To counter this problem, Congressman Berman, Frank, and Meehan offered an amendment at the Judiciary Committee markup that 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 of certifying but not denying the State court jurisdiction over the class action if the court determined it did not meet the Federal requirement. The amendment was defeated 9 to 14.

[18] *See id.*

[19] 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).

[20] 520 U.S. 911 (1997) (holding that Idaho procedural rules concerning appealability of orders are not preempted by 42 U.S.C. § 1983).

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

and "it is a matter for each State to decide how to structure its judicial system." [22]

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. He observed, "[f]or Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism." [23]

Arguments that the bill is nonetheless justified because state courts are "biased" against out of state defendants in class action suits also lacks foundation.[24] First, the Supreme Court has already made clear that state courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co.* v. *Shutts*,[25] the Supreme Court held that in class action cases, state courts must assure that: (1) the defendant receives notice plus an opportunity to be heard and participate in the litigation; [26] (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.[27]

Secondly, it is important to note that as fears of local court prejudice have subsided and concerns about diverting Federal courts from their core responsibilities increased, the policy trend in recent years has been towards *limiting* Federal diversity jurisdiction.[28]

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[22] *Id.* at 922. *See also* Howlett v. Rose, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954) for the proposition that Federal law should not alter the operation of the state courts); New York v. United States, 505 U.S. 144, 161 (1992) (stating that a law may be struck down on federalism grounds if it "commandeer[s] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program"); Printz v. United States, 117 S.Ct. 2365 (1997) (invalidating portions of the Brady Handgun Violence Protection Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

[23] *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).

[24] Of course the entire premise of the argument would need to be based on bias by the judges, since the juries would be derived from citizens of the state where the suit is brought, whether the case is considered in state or Federal court.

[25] 472 U.S. 797 (1985).

[26] The notice must be the "best practicable, reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 812 (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950)).

[27] *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) (state class actions entitled to full faith and credit so long as, *inter alia*, the settlement was fair, reasonable, and adequate and in the best interests of the settlement class; notice to the class was in full compliance with due process; and the class representatives fairly and adequately represented class interests).

[28] Ironically, during the 105th Congress, the Republican Party was extolling the virtues of state courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional state law convictions in Federal court. At that time Chairman Hyde stated:

> I simply say the state judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest . . . when the judge raises his hand, State court or Federal court, they swear to defend

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For example, less than 6 years ago Congress enacted the Federal Courts Improvement Act of 1996,[29] which *increased* the amount in controversy requirement needed to remove a diversity case to Federal court from $50,000 to $75,000. This statutory change was based on the Judicial Conference's determination that fear of local prejudice by state courts was no longer relevant[30] and that it was important to keep the Federal judiciary's efforts focused on Federal issues.[31] In this same regard, the American Law Institute has found "there is no longer the kind of prejudice against citizens of other states that motivated the creation of diversity jurisdiction,"[32] and the most recent Federal Courts Study Committee report on the subject concluded that local bias "is no longer a major threat to litigation fairness" particularly when compared to other types of prejudice that litigants may face, such as on account of religion, race or economic status.[33] Indeed, in 1978, the House twice passed legislation that would have abolished general diversity jurisdiction.[34]

Thirdly, as the legislation is currently written, it assumes a defendant will be automatically subject to prejudice in any state where the corporation is not formally incorporated (typically Delaware) or maintains its principal place of business. In so doing, it can be said the bill ignores the fact that many large businesses have a substantial commercial presence in more than one state, through factories, business facilities or employees. For example, if General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees, it does not seem reasonable to expect the defendants to face any great risk of bias.[35] Similarly, if the Disney Corporation, one of Florida's largest employers, were to face a class action brought by a class of plaintiffs in a Florida court, it would make little sense to involve the Federal courts of concern of local preju-

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the U.S. Constitution, and it is wrong, it is unfair to assume, *ipso facto*, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

142 Cong. Rec. H3604. (daily ed. April 18, 1996).

[29] 28 U.S.C. § 1332(a) (West Supp. 1998).

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

[31] *Id.*

[32] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 101, 106 (1996).

[33] Federal Courts Study Committee, Report of the Federal Courts Study Committee 40 (April 2, 1990). *See also, Ball, Revision of Federal Diversity Jurisdiction*, 28 Ill. L. Rev. 356 (1988); Bork, *Dealing with the Overload in Article III Courts*, 1976, 70 F.R.D. 231, 236–237 (1976); Butler & Eure, *Diversity in the Court System: Let's Abolish It*, 11 Va.B.J. 4, (1995); Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 Brookings Rev. 34 (1992); Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 1–49 (1968); Feinberg, *Is Diversity Jurisdiction An Idea Whose Time Has Passed*?, N. Y. St. B. J. 14 (1989); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Corn. L. Q. 499 (1928); Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. Pa. L. Rev. 1097 (1931); Haynsworth, Book Review, 87 Harv. L. Rev. 1082, 1089–1091 (1974); Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. Rev. 347 (1978); Jackson, *The Supreme Court in the American System of Government*, 38 (1955); Sheran & Isaacman, *State Cases Belong In State Courts*, 12 Creighton L. Rev. 1 (1978).

[34] *See* 124 Cong. Rec. 5008 (1978); 124 Cong. Rec. 33, 546 (1978). The legislation was not considered in the Senate.

[35] General Motors and Ford both have their principal place of business in Michigan and are incorporated in Delaware.

dice.[36] Yet under H.R. 2341, both of these hypothetical cases would be subject to removal to Federal court.[37]

It is for these reasons that the State courts believe that the enactment of the legislation goes against the underlying judicial principles of our system of government. Specifically, the Conference of Chief Justices said in a letter opposing a predecessor version of the bill, "So drastic a distortion and disruption of judicial federalism is not justified, absent clear evidence of the inability of the state judicial systems to process and decide class action cases in a fair and impartial manner and in timely fashion." [38]

II. H.R. 2341 WILL WEAKEN ENFORCEMENT OF LAWS CONCERNING CONSUMER HEALTH AND SAFETY, THE ENVIRONMENT, AND CIVIL RIGHTS

H.R.2341 will have a serious adverse impact on the ability of consumers and other harmed individuals to obtain compensation in cases involving widespread harm. At a minimum, the legislation will force most state class action claims into Federal courts where it is likely to be far more expensive for plaintiffs to litigate cases and where defendants could force plaintiffs to travel long distances to attend proceedings.

It is also likely to be far more difficult and time consuming to certify a class action in Federal court. In 1999, fourteen states, representing some 29% of the nation's population,[39] adopted different criteria 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 a counterpart to Rule 23, the Federal courts are likely to represent a far more difficult forum for class certification to occur. This is because, as noted above, in recent years a series of adverse Federal precedent, has made it more difficult to establish the predominance requirement of rule 23(b)(3) necessary to establish a class action under the Federal rules.

Further, the legislation will inevitably result in substantial delay before civil class action claimants are able to obtain a trial date in Federal court. Given the backlog in the Federal courts and the fact that the Federal courts are obligated to resolve criminal matters on an expedited basis before civil matters,[41] even where plaintiffs are able to successfully certify a class action in Federal court, it will

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[36] Disney's corporate headquarters are located in Burbank, California, and it is incorporated in Delaware.

[37] With increasing frequency, companies are setting up paper companies in places like Bermuda for a nominal fee. The company continues to be owned by the U.S. shareholder and continues to do business in the exact same U.S. locations. This allows the company to escape substantial tax liability and possibly avoid legal liability. To stop this abuse, Representative John Conyers, Jr. offered an amendment at the Judiciary Committee markup, which would allow former U.S. companies to be treated as domestic corporations for class action purposes. This amendment was defeated by voice vote.

[38] Letter from Chief Justice David A. Brock , President of the Conference of Chief Justices to Congressman Henry J. Hyde, Chairman of the Committee on the Judiciary (July 19, 1999)(on file with the House Judiciary Committee Democratic Staff).

[39] *See Hearing on H.R. 1875 Before the House Comm. On the Judiciary, 106th Cong.* (1999)(statement of Brian Wolfman, Staff Attorney, Public Citizen)[hereinafter Wolfman testimony](stating "H.R. 1875 is an unwise and ill-considered incursion by the Federal Government on the jurisdiction of the state courts. It works a radical transformation of judicial authority between the state and Federal judiciaries that is not justified by any alleged 'crisis' in state-court class action litigation.").

[40] *See supra* note 2.

[41] Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (1994).

take longer to obtain a trial on the merits than it would in state court.

The legislation also poses unique risks and obstacles for plaintiffs that they do not face under current law. Because the Federal courts are required to dismiss cases they choose not to certify, plaintiffs will be foreclosed from forming a reconstituted class in state court upon remand which conforms to the legislation's requirements.[42]

Consumers may also be disadvantaged by the vague terms used in the legislation. The terms "substantial majority" of plaintiffs, "primary defendants," and claims "primarily" governed by a state's laws[43] are new and undefined phrases with no precedent in the United States Code or the case law. It will take many years and conflicting decisions before these critical terms can begin to be sorted out. The vagueness problems will be particularly acute for plaintiffs—if they guess incorrectly regarding the meaning of a particular phrase, their class action could be permanently preempted and barred. However, if a defendant guesses wrong and jurisdiction does not lie in the Federal courts, the defendant will be no worse off than they are under present law, and will have benefitted from the additional time delays caused by the failed removal motion.

The legislation goes so far as to federalize 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.[44] 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 a private attorney general. Although such a suit may have been brought by private citizens, this legislation may force the case into Federal court because the private citizen also represents the interest of the "general public".[45]

The net result of these various changes is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the state or Federal level. This means, as noted above, it will be far more difficult for consumers to bring class actions in state court involving violations of fraud, health and safety laws, and environmental laws.[46]

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[42] For example, if certification had been denied by the Federal court because a particular conflict among the class members made it impossible to meet the "adequate representation" requirement of Federal Rule of Civil Procedure 23(a)(4), the plaintiffs in the remanded action would likely be prohibited from narrowing the class in an effort to resolve that conflict.

[43] H.R. 2341 § 4, 107th Cong. (2001).

[44] Michigan and California are two states that have "private attorney general" suits.

[45] H.R. 2341 § 4(a). Representatives Lofgren and Schiff introduced an amendment to address this issue. The amendment limited the bill to affect only consumer class actions. This amendment failed 11 to 17.

[46] For example, in an incident in Washington state, the parent company of Jack-in-the-Box restaurants agreed to pay $14 million in a class-action settlement. The class included 500 people, mostly children, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli bacteria. The Washington Superior Court in King County approved the settlement on September 25, 1996.

Another example of a state class action is a recent case in Richmond, California. On July 26, 1993, a railroad tank car filled with Oleum, a sulfuric acid compound, leaked from General Chemical's Richmond, California plant when a valve malfunctioned during unloading. A cloud of chemicals formed over a heavily-populated community in North Richmond, and over 24,000 people sought medical treatment in the days immediately following the leak. Individual plaintiffs received up to $3,500 in compensation.

H.R. 2341 also poses unique risks and obstacles for plaintiffs that they do not face under current law. Under H.R. 2341, if the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Civil Procedure 23, the court must dismiss the action. This has the effect of striking the class action claim and forcing all states to conform to Federal class actions standards.[47] While the class action may be refiled again, any such refiled action may be removed again to Federal court. Therefore, even if a state court would subsequently certify the class, it could be removed again, creating a revolving door between Federal and state court—hardly a desirable result. As Consumers Union has written about this feature of the bill stating, "This legal 'ping-pong' could well deprive consumers of access to their own state courts, and ultimately deny them their day in court through the class action process—in many cases their only effective remedy."[48]

Consumers will also be disadvantaged by the vague terms used in the legislation. The terms "substantial majority" of plaintiffs, "primary defendants," and claims "primarily" governed by a state's laws[49] are new and undefined phrases with no antecedent in the United States Code or the case law. It will take many years and conflicting decisions before these critical terms can begin to be sorted out.

The net result is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the state or Federal level. The types of cases affected by this legislation range from consumer fraud and health and safety to environmental and civil rights actions. The following are examples of important class actions previously brought at the state level, but which could have been forced into Federal court under H.R. 2341, where the actions may be delayed or rejected:

- In the Baptist Foundation of Arizona case, a mirror image of the Enron scandal, the Foundation issued worthless notes and sold them in many Arizona communities. Approximately 13,00 investors in Baptist Foundation of Arizona case loss millions of dollars in this scheme in "off the books" transactions with sham companies that were controlled by the Foundation and corporate insiders. As it was, the victims were able to bring a successful state class action suit against Arthur Anderson which resulted in a $217 million settlement. If H.R. 2341 was law, this case would have been forced

[47] In this regard, it is unfortunate the Majority rejected an amendment offered by Representatives Conyers, Berman and Meehan which would have largely eliminated the federalism problem by amending the bill to simply allow the Federal courts the first opportunity of certifying a class action, but not to deny state court jurisdiction over the class action if the court determined it did not meet Federal requirements. This would have responded to the most serious complaint leveled by corporate defendants, that class actions encourage a race to the court house by permitting the Federal courts to use their powers to consolidate class actions into a single forum in the appropriate circumstances.

[48] *See* Consumers Union letter.

[49] H.R. 2341, § 4(a).

into Federal court because the legislation provides no exemption for state securities claims.[50]

- The proposed legislation would also make it far more difficult to maintain class action cases such as the Firestone/Ford Explorer tire liability case. A lawsuit is currently pending in South Carolina state court against Firestone and Ford charging that the two companies were "negligent and careless" in producing and distributing tires that went on Ford vehicles. On December 28, 2001, the Circuit Court in Greenville, South Carolina certified the lawsuit as a class action, allowing South Carolina residents to join the lawsuit against Firestone and Ford. If the proposed legislation was enacted, this case could automatically be removed from state court to federal court at the election of the defendant making it difficult to keep the lawsuit as a class action.
- Foodmaker Inc., a Delaware corporation and the parent company of Jack-in-the-Box restaurants, agreed to pay $14 million in a state class-action settlement involving a violation of Washington's negligence law. The class included 500 people, mostly children and Washington residents, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli 0157:H7 bacteria. The victims suffered from a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died.[51]
- Equitable Life Assurance Company, an Iowa corporation, agreed to a $20 million settlement of two class-action lawsuits involving 130,000 persons filed in Pennsylvania and Arizona state courts. The class action alleged that Equitable misled consumers, in violation of state insurance fraud law, when trying to sell "vanishing premium" life insurance policies in the 1980's. Equitable sold the policies when interest rates were high, informing potential customers that after a few years, once the interest generated by their premiums was sufficiently high, their premium obligations would be terminated. However, when interest rates dropped, customers ended up having to continue to pay the premium in full.[52]
- On July 26, 1993, a California plant operated by General Chemical, a Delaware corporation with offices in New Jersey, erupted leading to a hazardous pollution cloud when a valve malfunctioned during the unloading of a railroad tank car filled with Oleum, a sulfuric acid compound. The cloud settled directly over North Richmond, California, a heavily-populated community, resulting in over 24,000 residents needing medical attention. General Chemical entered into a settlement for violation of California negligence law with

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[50] Craig Harris, *Andersen settles Baptist Suit*, azcentral.com (March 2, 2002), http://www.arizonarepublic.com; *Settlement Sum Revives Hope for Baptist Investors: Andersen to pay $217 million* (March 3, 2002)http://www.arizonarepublic.com.

[51] The settlement was approved on 25 September 1996 in King County, Washington Superior Court. "Last Jack in the Box Suit Settled," *Seattle Times*, October 30, 1997 at B3.

[52] *See* David Elbert, "Lawsuits to Cost Equitable $20 Mill," *Des Moines Register*, July 19, 1997 at 12 and "Cost of Settling Lawsuits Pulls Equitable Earnings Down," *Des Moines Register*, August 6, 1997 at 10.

60,000 North Richmond residents who were injured or sought treatment for the effects of the cloud, or were forced to evacuate their homes. Individual plaintiffs received up to $3,500 in compensation.[53]

- On April 21 of this year, Nationwide entered into a state class action settlement concerning a redlining discrimination claim with the Toledo, Ohio Fair Housing Center. The lawsuit had been brought in Ohio state court by residents living in Toledo's predominately black neighborhoods, and charged that Nationwide redlined African-American neighborhoods by discouraging homeowners in minority neighborhoods from buying insurance and by denying coverage to houses under a certain value or a certain age. As a result of the settlement, Nationwide agreed to modify its underwriting criteria, increase its agency presence, step up its marketing in Toledo's black neighborhoods. Nationwide also agreed to place up to $2 million in an interest-bearing account to provide compensation to qualified class members, and agreed to deposit $500,000 with a bank willing to offer low-interest loans to residents buying homes in Toledo's black neighborhoods.[54]
- Under current law, class action claims against managed care must often distinguish between ERISA and non-ERISA patients. Non-ERISA patients have a full range of remedies available to them under state law. On the other hand, ERISA patients have a very limited set of remedies—the cost of the benefit denied, which in most cases is woefully inadequate. The managed care reform debate in Congress includes the elimination of the ERISA preemption which would allow patients who receive their health care from their employer to hold their HMO accountable if it denies care. However, legislation such as H.R. 2341 would move in the opposite direction by enacting legislation which would deny more patients access to justice in state court.[55] Moreover, the House passed the Patients Bill of Rights legislation, H.R. 2653, which contained severe restrictions on class actions against HMO's such as limiting class action lawsuits under ERISA and RICO to participants in a group health plan established by a sign plan sponsor. This restriction was contained in the Norwood Amendment to the Patients Bill of Rights.
- The regulation of funeral homes, cemeteries and crematoria should remain an issue best handled by state courts. However, federalizing of such class actions under this bill likely

[53] *See* Mealey's Litigation Reports: *Toxic Torts, $180 Million Settlement of Toxic Cloud Claims Wins Judges O.K.*, November 17, 1995 at 8.

[54] *See* Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co., No CI93–1685, Ohio Comm. Pls, Lucas County; see also "Nationwide and Ohio Fairhousing Announce Attempt to Settle Class Action," *Mealey's Insurance Law Weekly*, April 27, 1998 at 3.

[55] One example is *Kaitlin* v. *Tremoglie, et al.*, No. 002703 (Pa. Comm. Pls., Philadelphia Co. 1997). On June 23, 1997, Harold Kaitlin filed a class action in Pennsylvania State court against his psychiatrist, David Tremoglie, and Keystone Health Plan East Inc., his HMO, alleging that thee psychiatrist had treated hundreds of patients without a medical license. The case was filed on behalf of himself and all other patients treated by Tremoglie at the Bustleton Guidance Center. The suit alleges that the class was treated by an unlicenced and fraudulent psychiatrist who unlawfully prescribed powerful medications not suitable for their illness and that the HMO failed to verify that Tremoglie was a licensed psychiatrist, failed to supervise him, and referred patients to him.

would force these families to travel untold miles from their homes—in some cases into entirely different states—just to exercise their legal rights. For example, the largest operator of funeral homes in the United States is the defendant in a state class action in Florida accuses Services Corporation International, a Texas Corporation and owner of Menorah Gardens, of breaking open burial vaults and dumping the remains in a wooded area, crushing vaults to make room for others, mixing body parts from different individuals, and digging up and reburying remains in locations other than the plots purchased.[56] Similarly, in Georgia, Tri-State Crematory failed to cremate bodies and return remains to loved ones. Although the issues raised in this class action are clearly state issues, such a class action would be removable to Federal court under H.R. 2341.

CONCLUSION

H.R. 2341 will remove class actions involving state law issues from state courts—the forum most convenient for victims of wrongdoing to litigate and most familiar with the substantive law involved—to the Federal courts—where the class is less likely to be certified and the case will take longer to resolve. In our view, this incursion into state court prerogatives is no less dangerous to the public than many of the radical forms of "tort reform" and "court stripping" legislation previously rejected by the Congress.

Contrary to supporters' assertions, H.R. 2341 will not serve to prevent state courts from unfairly certifying class actions without granting defendants an opportunity to respond. This is already barred by the Constitution,[57] and the few state trial court decisions to the contrary have been overturned.[58] H.R. 2341 also cannot be seen as merely prohibiting nationwide class actions filed in state court. The legislation goes much further and bars state class actions filed solely on behalf of residents of a single state, which solely involve matters of that state's law, so long as one plaintiff resides in a different state than one defendant—an extreme and distorted definition of diversity which does not apply in any other legal proceeding.

This legislation would seriously undermine the delicate balance between our Federal and state courts. At the same time it would threaten to overwhelm Federal courts by causing the removal of resource intensive state class action cases to Federal district courts, it also will increase the burdens on state courts as class actions rejected by Federal courts metamorphasize into numerous additional individual state actions. We therefore strongly oppose H.R. 2341.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.

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[56] Joel Engelhardt, *State Seeks Control of Menorah Gardens*, The Palm Beach Post, March 2, 2002 at 1A.

[57] *See supra* notes 26–28 and accompanying text.

[58] *See Ex Parte State Mut. Ins. Co.*, 715 So.2d 207 (Ala. 1997); *Ex Parte Am. Bankers Life Assurance Co. of Florida*, 715 So.2d 207 (Ala. 1997) (holding that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied).

ROBERT C. SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
WILLIAM D. DELAHUNT.
TAMMY BALDWIN.

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