Calendar No. 732

106TH CONGRESS *2d Session* | SENATE | REPORT 106–420

THE CLASS ACTION FAIRNESS ACT OF 2000

SEPTEMBER 26 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 353]

The Committee on the Judiciary, to which was referred the bill (S. 353) a bill to provide for class action reform, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill, as amended, to pass.

CONTENTS

I. TEXT OF S. 353

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Class Action Fairness Act of 2000".

SEC. 2. NOTIFICATION REQUIREMENT OF CLASS ACTION CERTIFICATION OR SETTLEMENT.

(a) IN GENERAL.—Part V of title 28, United States Code, is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"§ 1711. Definitions

"In this chapter the term—

"(1) 'class' means a group of persons that comprise parties to a civil action brought by 1 or more representative persons;

"(2) 'class action' means a civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State statutes or rules of procedure authorizing an action to be brought by 1 or more representative persons on behalf of a class;

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

"(4) 'class member' means a person that falls within the definition of the class;

"(5) 'class counsel' means the attorneys representing the class in a class action;

"(6) 'plaintiff class action' means a class action in which class members are plaintiffs; and

"(7) 'proposed settlement' means a settlement agreement regarding a class action that is subject to court approval and would be binding on the class.

"§ 1712. Application

"This chapter shall apply to all plaintiff class actions filed in or removed to Federal court, except any such class action solely involving—

"(1) claims 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) claims that relate 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) claims that relate 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).

"§ 1713. Notification of class action certifications and settlements

"(a) Not later than 10 days after a proposed settlement in a class action is filed in court, class counsel shall serve the State attorney general of each State in which a class member resides and the Attorney General of the United States as if such attorneys general and the Department of Justice were parties in the class action with—

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

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

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

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

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

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

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

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

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

"(7)(A) if feasible the names of class members who reside in each State attorney general's respective State and the estimated proportionate claim of such members to the entire settlement; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each attorney general's State and the estimated proportionate claim of such members to the entire settlement; and

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

"(b) A hearing to consider final approval of a proposed settlement may not be held earlier than 120 days after the date on which the State attorneys general and the Attorney General of the United States are served notice under subsection (a).

"(c) Any court with jurisdiction over a plaintiff class action shall require that—

"(1) any written notice provided to the class through the mail or publication in printed media contain a short summary written in plain, easily understood language, describing—

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

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

"(C) 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

"(D) any other material matter; and

"(2) any notice provided through television or radio to inform the class members of the right of each member to be excluded from a class action or a proposed settlement, if such right exists, shall, in plain, easily understood language—

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

"(B) explain that the failure of a person falling within the definition of the class to exercise such person's right to be excluded from a class action will result in the person's inclusion in the class action.

"(d) Compliance with this section shall not provide immunity to any party from any legal action under Federal or State law, including actions for malpractice or fraud.

"(e)(1) A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member resides in a State where the State attorney general has not been provided notice and materials under subsection (a).

"(2) The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, State attorneys general or the Attorney General of the United States.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V of title 28, United States Code, is amended by inserting after the item relating to chapter 113 the following:

SEC. 3. DIVERSITY JURISDICTION FOR CLASS ACTIONS.

Section 1332 of title 28, United States Code, is amended—

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

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

"(d)(1) In this subsection, the terms 'class', 'class action', and 'class certification order' have the meanings given such terms under section 1711.

"(2) The district courts shall have original jurisdiction of any civil action where 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 members of all proposed plaintiff classes in the aggregate is less than 100.

"(4) In any class action, the claims of the individual members of any class 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.

"(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 conditions 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, but any such filed action may be removed 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 subsection 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 limitation periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitation periods on any claims that were asserted in a class action dismissed under this subsection 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 solely involving a claim that relates to—

"(A) 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

"(B) 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.".

SEC. 4. REMOVAL OF CLASS ACTIONS TO FEDERAL COURT.

(a) IN GENERAL.—Chapter 89 of title 28, United States Code, is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) In this section, the terms 'class', 'class action', and 'class member' have the meanings given such terms under section 1711.

"(b) 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) This section shall apply to any class action before or after the entry of any order certifying a class.

"(d) 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) This section shall not apply to any class action solely involving—

"(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) of title 28, United States Code, is amended in the second sentence by inserting "(a)" after "section 1332".

(c) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 of title 28, United States Code, is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

SEC. 5. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.—Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.—The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that—

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.—Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 6. EFFECTIVE DATE.

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

II. LEGISLATIVE HISTORY

The Senate began consideration of the Class Action Fairness Act in the 105th Congress. The Senate Judiciary Subcommittee on Administrative Oversight and the Courts held a hearing on October 30, 1997. John H. Church, Jr., John C. Coffee, Jr., Lewis H. Goldfarb, Paul V. Niemeyer, Martha Preston, and Brian Wolfman testified at the hearing on issues such as unfair class settlements, attorneys' fees, and State court abuses. On September 28, 1998, the Subcommittee on Administrative Oversight and the Courts approved S. 2083, the "Class Action Fairness Act of 1997," introduced by Senators Charles Grassley (R–IA) and Herb Kohl (D–WI), with

an amendment in the nature of a substitute. No further action was taken on S. 2083 in the 105th Congress.

On February 3, 1999, S. 353, "The Class Action Fairness Act of 1999," was introduced in the 106th Congress by Senators Charles Grassley (R–IA), Herb Kohl (D–WI), and Strom Thurmond (R–SC). Five Senators—Senators Spencer Abraham (R–MI), Paul Coverdell (R–GA), Phil Gramm (R–TX), Jesse Helms (R–NC), and Jeff Sessions (R–AL)—joined as cosponsors of the bill. S. 353 was referred to the Senate Committee on the Judiciary. On May 4, 1999, the Judiciary Subcommittee on Administrative Oversight and the Courts held a legislative hearing (S. Hrg. 106–465) on the bill, and received testimony from Eleanor D. Acheson, John H. Beisner, Richard A. Daynard, E. Donald Elliot, John P. Frank, and Stephan G. Morrison.

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

III. VOTES OF THE COMMITTEE

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each Committee is to announce the results of rollcall votes taken in any meeting of the Committee on any measure or amendment. The Senate Judiciary Committee, with a quorum present, met on June 29, 2000, at 10 a.m. to mark up S. 353. Six amendments were rejected by the Committee. The following rollcall votes occurred on S. 353:

A Leahy amendment to S. 353 to exclude tobacco-related class actions from the act was rejected 7 yeas to 10 nays.

YEAS	NAYS
Leahy	Thurmond
Kennedy (Proxy)	Grassley
Biden	Specter (Proxy)
Feinstein (Proxy)	Kyl
Feingold	DeWine (Proxy)
Torricelli	Aschroft (Proxy)
Schumer (Proxy)	Abraham (Pass)
	Sessions
	Smith
	Kohl
	Hatch

A Torricelli amendment to S. 353 to exclude from the act class actions related to firearms injury was rejected 7 yeas to 10 nays.

YEAS	NAYS
Leahy	Thurmond
Kennedy (Proxy)	Grassley
Biden	Specter (Proxy)
Feinstein (Proxy)	Kyl
Feingold	DeWine (Proxy)
Torricelli	Aschroft (Proxy)
Schumer (Proxy)	Abraham (Pass)
	Sessions

	Smith
	Kohl
	Hatch

A Leahy amendment to S. 353 to exclude any class actions arising under a State environmental protection statute from the act was rejected 7 yeas to 10 nays.

YEAS	NAYS
Leahy	Thurmond
Kennedy (Proxy)	Grassley
Biden	Specter (Proxy)
Feinstein (Proxy)	Kyl
Feingold	DeWine (Proxy)
Torricelli	Aschroft (Proxy)
Schumer (Proxy)	Abraham (Pass)
	Sessions
	Smith
	Kohl
	Hatch

A Feingold amendment to S. 353 to exclude from the act class actions arising solely under State consumer protection statutes was rejected 7 yeas to 10 nays.

YEAS	NAYS
Leahy	Thurmond
Kennedy (Proxy)	Grassley
Biden	Specter (Proxy)
Feinstein (Proxy)	Kyl
Feingold	DeWine (Proxy)
Torricelli	Aschroft (Proxy)
Schumer (Proxy)	Abraham (Pass)
	Sessions
	Smith
	Kohl
	Hatch

A Feingold amendment to S. 353 to alter the bill so that in any class action brought in or removed to a Federal court under the jurisdictional provisions of the bill, if the Federal court determines that the case cannot proceed as a class action, the court must remand the case to a State court, was rejected 7 yeas to 10 nays.

YEAS	NAYS
Leahy	Thurmond
Kennedy (Proxy)	Grassley
Biden	Specter (Proxy)
Feinstein (Proxy)	Kyl
Feingold	DeWine (Proxy)
Torricelli	Aschroft (Proxy)
Schumer (Proxy)	Abraham (Pass)
	Sessions
	Smith
	Kohl
	Hatch

A Feinstein amendment to S. 353 to authorize 13 new judgeships for the southwestern border of the United States was rejected 7 yeas to 10 nays.

YEAS	NAYS
Leahy	Thurmond
Kennedy (Proxy)	Grassley
Biden	Specter (Proxy)
Feinstein (Proxy)	Kyl
Feingold	DeWine (Proxy)
Torricelli	Aschroft (Proxy)
Schumer (Proxy)	Abraham (Pass)
	Sessions
	Smith
	Kohl
	Hatch

Motion to report favorably S. 353. The motion was adopted 11 yeas to 7 nays.

YEAS	NAYS
Thurmond	Leahy
Grassley	Kennedy (Proxy)
Specter (Proxy)	Biden
Kyl	Feinstein (Proxy)
DeWine (Proxy)	Feingold
Aschroft (Proxy)	Torricelli
Abraham (Proxy)	Schumer (Proxy)
Sessions	
Smith	
Kohl	
Hatch	

IV. PURPOSES

Our current class action system is plagued by numerous problems and abuses that are attributable largely to inadequate judicial supervision. Most of these problems and abuses are arising in State court class actions and threaten to undermine the rights of both plaintiffs and defendants. In too many cases, plaintiff class members do not know what their rights are, or what a class action settlement has accomplished. Judges too readily approve settlements that primarily benefit the class counsel, not the class members who they supposedly represent. Attorneys are awarded outrageous attorneys' fees, while class members receive little or nothing. Often, multiple class action cases purporting to assert the same claims on behalf of the same people proceed simultaneously in different State courts, causing judicial inefficiencies and promoting collusive activity between plaintiffs, attorneys, and defendants. Lawyers frequently "game" the procedural rules to keep class actions in State courts before judges carefully selected for their tendency to readily certify classes regardless of the procedural irregularities or their penchant for approving settlements without regard to class member interests. Increasingly, frivolous class action lawsuits are being filed with the intent of extorting large, unwarranted settlements from defendants. And many State courts freely issue rulings in class action cases that have nationwide impacts, even when those

rulings overturn established State and even national laws and policies.

The "Class Action Fairness Act of 2000" is a modest, balanced first step to address these and some of the other most egregious problems in class action practice. The Committee emphasizes, however, that the act is not intended to be a "panacea" that will correct all class action abuses.

The Class Action Fairness Act has four key components:

First, S. 353 implements additional and simplified notice requirements to better inform plaintiff class members of the specifics of proposed class action settlements and their rights with respect thereto. The act requires that notice to class members be in "plain English" and include details about attorneys' fees and settlement rights and obligations.

Second, S. 353 provides an additional mechanism to safeguard plaintiff class members' rights by requiring that detailed notice of class action settlements be sent to the Attorney General of the United States and State attorneys general, so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens. This provision enables an independent third party to help ensure that unfair class action settlements are not rubber-stamped by courts.

Third, S. 353 directs the Judicial Conference of the United States to conduct a review of class action settlements and attorneys' fees and to present Congress with recommendations for ensuring that attorneys' fees are determined in a fair and reasonable way. This provision will help address the problem of excessive attorneys' fees and will provide legislative oversight of the Judicial Conference's efforts in this area.

Fourth, S. 353 corrects a flaw in the current diversity jurisdiction statute (28 U.S.C. 1332), which frequently prevents interstate class actions from being adjudicated in Federal courts. One of the primary historical reasons for diversity jurisdiction "is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court."[1] Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in Federal court. To that end, this bill (a) amends section 1332 to allow Federal courts to hear more interstate class actions on a diversity jurisdiction basis and (b) modifies the Federal removal statutes to ensure that qualifying interstate class actions initially brought in State courts may be heard by Federal courts if any of the real parties in interest (the unnamed class members or the defendants) so desire. Thus, S. 353 makes it harder for plaintiffs' counsel to "game the system" by trying to defeat diversity jurisdiction, creates efficiencies in the judicial system by allowing overlapping and "copycat" cases to be consolidated in a single Federal court, and places the determination of more interstate class action lawsuits in the proper forum—the Federal courts.

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

V. Background and Need for Legislation

As outlined in article III of the Constitution,[2] diversity jurisdiction was established by the Framers to ensure fairness for defendants from one State who are sued in the local court of another State. Interstate class actions—which often involve millions of parties from numerous States—embody the precise scenario that diversity jurisdiction was designed to prevent—local prejudice by a court against out-of-State defendants. Yet, because of a technical glitch in the diversity jurisdiction statute (28 U.S.C. 1332), such cases are usually excluded from Federal court. (That glitch is understandable; class actions as we now know them did not exist when the statute's concept was crafted in the late 1700's.)

This Committee believes that the current diversity and removal standards, as applied in interstate class actions, have facilitated a parade of abuses, and are thwarting the underlying purpose of the constitutional requirements of diversity jurisdiction.

CLASS ACTIONS

Although class actions have some roots in common law, the general concept was first codified in 1849, when several States adopted the field code.[3] To successfully plead and prosecute class actions, the field code merely required that numerous parties demonstrate a common interest in law or fact.

Rule 23 of the Federal Rules of Civil Procedure, the rule governing Federal court class actions, was initially adopted in 1938.[4] However, the concept of class actions that are a familiar part of today's legal landscape did not arise until 1966, when rule 23 was substantially amended to expand the availability of the device. Under the current law, a class action can be brought in Federal court if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[5] In addition, a proponent must show that the proposed class meets one of three additional requirements set forth in rule 23(b). For example, for a rule 23(b)(3) damages class actions to be certified, a proponent must show that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other

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[2] In the words of article III, "[t]he judicial power shall extend to * * * controversies in between citizens of different states."

[3] See Newburg on class actions, 3d §§ 13–14 to 13–17 (1997).

[4] For a fuller history of rule 23, see e.g., "The Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee of the Judiciary," 106th Cong. (1999) (statement of John P. Frank) (hereinafter "Hearings on S. 353 ").

[5] Alternatively for a rule 23(b)(1) class, the proponent must show that the prosecution of separate actions by or against individual members of the class would create a risk of either (i) inconsistent or varying adjudication which would establish incompatible standards of conduct for the party opposing the class or (ii) adjudications which, as a practical matter, would be dispositive of the interests of the other members not parties to the adjudications or which would substantially impair or impede their ability to protect their ability to protect their interests. To obtain certification of a rule 23(b)(2) class, the proponent is required to show that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

available methods for the fair and efficient adjudication of the controversy."

As originally envisioned, class action lawsuits were to be primarily a tool for civil rights litigants seeking injunctions in discrimination cases.[6] John P. Frank, one of two surviving members of the 1966 Advisory Committee on Civil Rules that amended rule 23 to reflect its basic current form, testified that those who wrote the class action rule thought it would rarely, if ever, apply to products liability or mass tort cases.[7] In the 1980's, however, some plaintiffs' lawyers successfully persuaded judges to expand class actions to the area of mass torts.[8] These courts began to expand the types of claims they were willing to certify as class actions because they feared that the large number of individual mass tort cases could slow or stop the judicial system.[9] Thus, class actions have evolved from their original primary purpose—to counter civil rights abuses—and have become a common tool for plaintiffs' attorneys bringing personal injury or product liability claims. Yet, while the landscape of class actions has changed dramatically, the procedural rules regarding which courts can hear class actions, and, consequently, which procedural law will apply to such cases have remained the same since 1966.

DIVERSITY JURISDICTION

The Constitution extends Federal court jurisdiction to cases of a distinctly Federal character—for instance, cases raising issues under the Constitution or Federal statutes, or cases involving the Federal Government as a party—and generally leaves to State courts the adjudication of local questions arising under State law. Nonetheless, the Constitution specifically extends Federal jurisdiction to encompass one category of cases involving issues of State law: "diversity" cases, or suits "between Citizens of different States."[10]

According to the Framers, the primary purpose of diversity jurisdiction was to protect citizens in one State from the injustice that might result if they were forced to litigate in out-of-State courts.[11]

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

[7] Administrative Office of the U.S. Courts, "Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23," (vol. 2) ("Advisory Committee Working Papers"), at 260 (1997). The other surviving member—William T. Coleman, Jr.—has testified to a similar effect. Id. (vol. 3), Nov. 22, 1996, public hearing transcript at 204 ("I assure you that what the courts have done with respect to rule 23(b)(3) is far beyond what we * * * ever intended. To the extent that there's difficulty [with class actions, it] is not because of anything that was drafted in 1966, but [because] of how the rule has been handled since that time.").

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

[9] Id. at 1356–58, 1363–64.

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

[11] See *Pease* v. *Peck,* 59 U.S. (18 How) 518, 520 (1856) ("The theory upon which jurisdiction is conferred on the court of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly, the State tribunal might not be impartial between their own citizens and foreigners."); see also *Martin* v. *Hunter's Lessee,* 14 U.S. (1 Wheat) 304, 347 (1816); *Bank of the United States* v. *Deveaux,* 9 U.S. (5 Cranch) 61, 87 (1809); *Barrow S.S. Co.* v. *Kane,* 170 U.S. 100 (1898) ("The object of the provisions of the constitution and statutes of the United States in conferring upon the circuit courts of the United States jurisdiction of controversies between citizens of different States of the Union * * * was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant resides."); "The Federalist," No. 80, at 537–38 (Alexander Hamilton) (Jacob E. Cooke, ed.

Continued

Quoting James Madison, Judge Henry Friendly explained that diversity jurisdiction is essential to a strong Union because it "may happen that a strong prejudice may arise in some state against the citizens of others, who may have claims against them."[12] Justice Frankfurter expressed a similar understanding of Madison's concerns: "It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of the state court and yet not be sufficiently apparent to be made the basis of a federal claim."[13]

In addition to protecting individual litigants, diversity jurisdiction has two other important purposes. In his testimony to the Subcommittee on Administrative Oversight and the Courts, Prof. E. Donald Elliott of the Yale Law School expressed the view that diversity jurisdiction was designed not only to protect against actual discrimination, but also "to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents."[14] In addition, several legal scholars have also noted that the Framers were concerned that State courts might discriminate against interstate businesses and commercial activities, and thus viewed diversity jurisdiction as a means of ensuring the protection of interstate commerce.[15] Both of these concerns—judicial integrity and interstate commerce—are strongly implicated by class actions.

Over the years since the First Congress enacted provisions in the Judiciary Act if 1789 setting forth the parameters of Federal diversity jurisdiction, two statutory limitations on that jurisdiction have evolved. The first is the "amount in controversy" requirement (currently $75,000), which Congress enacted in order to ensure that diversity jurisdiction extends only to nontrivial State-law cases.[16] The second is the "complete diversity" requirement, a rule that Federal jurisdiction lies only when *all* plaintiffs are diverse from *all* defendants.[17] It is important to recognize that these procedural limitations regarding interstate class actions were policy decisions, *not* constitutional ones. In fact, the Supreme Court has repeatedly acknowledged that the complete diversity and minimum amount-in-controversy requirements are political decisions not mandated by the Constitution.[18] It is therefore the prerogative of Congress to modify these technical requirements as it deems appropriate.

1961) ("In order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.").

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

[13] *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 316 (1943) (Frankfurter, J., dissenting).

[14] Hearings on S. 353, statement of E. Donald Elliott; see also, Adrienne J. Marsh, "Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts," 48 Brooklyn L. Rev. 197, 201 (1989).

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

[16] See 28 U.S.C. 1332(a).

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

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

REMOVAL

The concept of "removing" cases from State courts to Federal courts shares the premise as diversity jurisdiction—the notion that an out-of-State defendant in a State court proceeding should have access to an even-handed Federal forum.[19] The general removal statute, 28 U.S.C. 1441(a), provides that any civil action brought in a State court may be removed by the defendant(s) to Federal court *if* the claim could have originally been brought in Federal court. In other words, so long as a U.S. district court could exercise original jurisdiction over the claim, a defendant may remove the case to Federal court in order to protect itself from local prejudice.

Section 1446(b) of title 28 outlines the procedure for removal. Under this provision, a defendant must file papers seeking removal to Federal court within 30 days after receiving a copy of the initial pleading (or service of summons if a pleading has been filed in court and is not required to be served on the defendant). If the original complaint was not removable, but the plaintiff subsequently amends the pleadings in such a way that removal becomes proper, then the notice of removal must be filed within 30 days of receipt by the defendant of "a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case [is removable]."[20] Under current law, however, a case can only be removed on grounds of diversity jurisdiction within a year from commencement of the action.[21]

HOW DIVERSITY AND REMOVAL STATUTES ARE ABUSED

The current Federal diversity and removal rules have the unintended consequence of keeping most class actions out of Federal court. Moreover, these rules enable plaintiffs' lawyers who prefer to litigate in State courts to easily "game the system" in order to avoid removal to Federal court. This defeats the underlying purpose of diversity jurisdiction and generally recognized principles of federalism, which establish Federal courts as the major forum for adjudicating cases like class actions, which involve interstate commerce or otherwise have nationwide implications.[22]

The first hurdle to Federal jurisdiction over class actions is created by the "complete diversity" requirement. Although the Supreme Court has held that only the named plaintiffs' citizenship should be considered for purposes of determining if the parties to a class action are diverse, the "complete" diversity rule still mandates that *all* named plaintiffs must be citizens of different States from *all* the defendants.[23] In interstate class actions, plaintiffs' counsel frequently and purposely evade Federal jurisdiction in multi-State class actions by adding named plaintiffs or defendants simply based on their State of citizenship in order to defeat complete diversity. Thus, it is no surprise that few interstate class actions meet the complete diversity requirement.

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[19] See David P. Currie, "Federal Jurisdiction" at 140 (3rd ed. 1990).
[20] 28 U.S.C. 1446(b).
[21] Id.
[22] For an interesting discussion of this issue, see generally, Victor E. Schwartz, Mark A. Behrens & Leah Lorber, "Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform," 37 Harv. J. on Legis. 485, summer, 2000.
[23] See *Snyder* v. *Harris,* 394 U.S. 332 (1969).

The second problem is created by the amount-in-controversy requirement. In interpreting 28 U.S.C. 1332(a), the Supreme Court has held that the amount-in-controversy requirement is normally met in class actions only if *each* of the class members individually seeks damages in excess of the statutory minimum.[24] That means Federal courts can only hear class actions in which *each* plaintiff claims damages in excess of $75,000. The Committee believes that requiring each plaintiff to reach the $75,000 threshold makes little sense in the class action context. Many plaintiffs' class action lawyers have misused this rule to keep their cases out of Federal court. They restrict the class claims that no class member may obtain more than $75,000, even though certain class members may be entitled to more and even though the class action seeks millions of dollars in the aggregate. This leads to the nonsensical result under which a citizen can bring a "federal case" by claiming $75,001 in damages for a simple slip-and-fall case against a party from another State, while a class of 25 million people living in all 50 States and alleging claims against a manufacturer that are collectively worth $15 billion must usually be heard in State court (because each individual class member's claim is for less than $75,000). Put another way, under the current jurisdictional rules, Federal courts can assert diversity jurisdiction over a typical State law claim arising out of an auto accident between a driver from one State and a driver from another, or a typical trespass claim involving a trespasser from one State and a property owner from another, but they cannot assert jurisdiction over claims encompassing large-scale, interstate class actions involving thousands of plaintiffs from multiple States, defendants from many States, the laws of several States, and hundreds of millions of dollars—cases that have obvious and significant implications for the national economy.

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

- The leading Federal civil procedure law treatise has noted: "The traditional principles [regarding Federal diversity jurisdiction over class actions] have evolved haphazardly and with little reasoning. They serve no apparent purpose."[25]
- Recently, the U.S. Court of Appeals for the Eleventh Circuit apologized for sending an interstate class action back to State court, noting that "an important historical justification for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court." Observing that the out-of-State defendant in that case was confronting "a state court system [prone to] produce[] gigantic awards against out-of-state corporate defendants," the court stated that "[o]ne would think that this case is exactly what those who espouse the historical justification for [diversity jurisdiction] would have in mind * * *"[26]
- In that same case, Judge John Nangle, who chairs the Judicial Panel for Multidistrict Litigation, concurred: "Plaintiffs' attor-

[24] See *Zahn* v. *International Paper Co.,* 414 U.S. 291 (1974).
[25] 14B Charles A. Wright, et al., "Federal Practice and Procedure," § 3704, at 127 (3d ed. 1998).
[26] *Davis* v. *Cannon Chevrolet-Olds, Inc.,* 182 F.3d 792, 797 (11th Cir. 1999).

neys are increasingly filing nationwide class actions in various state courts, carefully crafting language * * * to avoid * * * the federal courts. Existing federal precedent * * * [permits] this practice * * *, although most of these cases * * * will be disposed of through 'coupon' or 'paper' settlements * * * virtually always accompanied by munificent grants of or requests for attorneys' fees for class counsel. * * * [T]his judge is of the opinion that the present [jurisdictional rules] do[] not accommodate the reality of modern class litigation and settlements."[27]

- In another case, Judge Anthony Scirica (Chair of the Judicial Conference's Standing Committee on Rules and Procedure) observed that although "national (interstate) class actions are the paradigm for federal diversity jurisdiction because * * * they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises, * * * the current jurisdictional statutes [put] such class actions * * * beyond the reach of the federal courts."[28]

The Committee notes that several witnesses at congressional hearings (including former Carter administration Attorney General Griffin Bell and Clinton administration Solicitor General Walter E. Dellinger) and other legal experts agree that if Congress were to enact the Federal diversity jurisdiction statute anew, it would undoubtedly conclude that interstate class actions are among the cases that *most* warrant access to the Federal courts because they involve the most people, put the most money in controversy, and have the greatest implications for interstate commerce.[29] In other words, class actions arguably fit the historic rationale of diversity jurisdiction better than any other type of civil action.

EXPLOSION OF CLASS ACTIONS IN STATE COURTS—A SYSTEM RIPE FOR ABUSE

The ability of plaintiffs' lawyers to evade Federal diversity jurisdiction has helped spur a dramatic increase in the number of class actions litigated in State courts—an increase that is stretching the resources of the State court systems. E. Donald Elliott pointed out in his testimony to the Subcommittee on Administrative Oversight and the Courts that the flood of class actions in our State courts is too well documented to warrant significant discussion, much less debate.[30] According to recent studies, Federal class action filings over the past 10 years have increased by more than 300 percent. At the same time, class action filings in State courts have grown more than three times faster—by more than 1,000 percent.[31]

The reason for this dramatic increase in State court class actions cannot be found in class action rules—the rules governing the decision whether cases may proceed as class actions are basically the same in Federal and State courts. Forty States have adopted the

[27] Id. at 798.

[28] In re "Prudential Ins. Co. America Sales Practice Litig.," 148 F.3d 283, 305 (3d Cir. 1998).

[29] See generally, Senate hearings on S. 353; House hearings on H.R. 1875.

[30] Hearings on S. 353, prepared statement of E. Donald Elliott.

[31] See "Analysis: Class Action Litigation—A Federalist Society Survey," Class Action Watch at 5 (vol. 1, No. 1); Deborah R. Hensler, et al., "Class Action Dilemmas: Pursuing Public Goals for Private Gains," 19 (Executive Summary 1999); see also "Advisory Committee Working Papers," (vol. 1) at ix–x (May 1, 1997) (memorandum of Judge Paul V. Niemeyer to members of the Advisory Committee on Civil Rules).

basic Federal class action rule (rule 23), sometimes with minor revisions. Of the other States, some have rules that are more restrictive about the availability of class actions (e.g., Michigan, Nebraska), and others have rules that are guided by Federal court class action policy. (Two States do not have rules or statutes authorizing class actions.) In short, there are wide variations in Federal and State court class action policies.

The Committee finds, however, that one reason for the dramatic explosion of class actions in State courts is that some State court judges are less careful than their Federal court counterparts about applying the procedural requirements that govern class actions. Many State court judges are lax about following the strict requirements of rule 23 (or the State's governing rule), which are intended to protect the due process rights of both unnamed class members and defendants. In contrast, Federal courts generally do scrutinize proposed settlements much more carefully and pay closer attention to the procedural requirements for certifying a matter for class treatment.[32]

Another problem is that a large number of State courts lack the necessary resources to supervise proposed class settlements properly.[33] Many State judges do not have law clerks, and the explosion of State court class actions has simply overwhelmed their dockets. Not surprisingly, abuses are much more likely to occur when State court judges are unable to give class action cases and settlements the attention they need.

The lack of a Federal forum for most interstate class actions and the inconsistent administration of class actions in State courts have led to several forms of abuse. The first such abuse involves settlements in which the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves.

In the now infamous *Bank of Boston* class action settlement,[34] for example, the Bank of Boston was accused of over-collecting escrow monies from homeowners and profiting from the interest. The settlement, approved by an Alabama State court judge, awarded up to $8.76 to individual class members while the class counsel got more than $8.5 million in fees. To make matters worse, the fees were simply debited directly from individual class members' escrow accounts leaving many of them worse off than they were before the suit. In testimony to the Subcommittee on Administrative Oversight and the Courts, Martha Preston recounted how she received $4 from the class settlement, but was charged a mysterious $80 "miscellaneous deduction," which she later learned was an expense used to pay the class lawyers' $8.5 million settlement fee. Ms. Preston expressed her disbelief over how "people who were supposed to be my lawyers, representing my interests, took my money and got away with it."[35]

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[32] See hearings on S. 353, oral statement of Senator Charles E. Grassley.

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

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

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

There are numerous other and equally disturbing examples of State court class actions in which class members were short-changed through coupon settlements. For example:

- In one case involving faulty pipes, lawyers for a group of Alabama plaintiffs received more than $38.4 million in fees and lawyers for a class of Tennessee plaintiffs case received $45 million, or the equivalent of about *$2,000 an hour.* In contrast, the homeowners only received 8 percent rebates toward new plumbing—and to get those rebates, they had to first prove that they had suffered leaks and then go out and buy a new System.[36]
- In another recent case, an Illinois court approved a coupon settlement of a class action filed against Southwestern Bell Mobile Systems, Inc., alleging that the company failed to fully disclose the fact that it rounded up customer calls to the next minute. Under the State court settlement, the class members received *$15 vouchers* toward Cellular One products, while the lawyers took home more than *$1 million* in fees.[37]
- A California State court approved a settlement under which class members, who had alleged that manufacturers misrepresented the size of computer monitor screens, received a *$13 rebate* if they purchased new monitors. The class attorneys, however, received approximately *$6 million* in fees.[38]
- The Chicago Tribune reported that in a State court class action against a record company to recover the prices paid for albums by the group Milli Vanilli (that contained the voices of other performers), class members were given a settlement of *$1 to $3* each. But the court awarded the lawyers *$675,000.* And the lawyers turned around and petitioned the court for an increase to *$1.9 million.*
- Several attorneys brought a class action against a golf equipment manufacturer when it ran out of the gloves it was giving free for an advertised promotion and substituted three golf balls. Under the class settlement, the manufacturer sent class members three more free golf balls. Meanwhile, the class representative got *$2,500,* and the attorneys got *$100,000*.[39]
- In another case, class action plaintiffs alleged that discount stores overstated the value of software bundles that came with computers. In a class settlement, consumers received coupons worth the lesser of a 7 percent or $25 discounts off the future purchases of products from defendants' stores. The attorneys received *$890,000* in fees.[40]

A second abuse that is common in State court class actions is the use of the class device as "judicial blackmail." Because class actions are such a powerful tool, they can give a class attorney unbounded leverage. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than liti-

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

[37] See Michelle Singletary, "Coupon Settlements Fall Short," Wash. Post, Sept. 12, 1999, at H01. For more examples of coupon settlements, see hearings on S. 353, prepared statement of Stephen G. Morrison.

[38] See id.

[39] Jerry Heaster, "Enough Already with the Lawsuits," Kansas City Star, July 10, 1999, at C1.

[40] Los Angeles Times, June 8, 1998, at D3.

gating—frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit. Nonetheless, State court judges often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial.[41] As Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has explained, "certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability. * * * [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."[42] Hence, when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a 5-percent chance of success.

Not surprisingly, the ability to exercise unbounded leverage over defendant corporations and the lure of huge attorneys' fees have led to the filing of many frivolous class actions. Within days after the fight in which Mike Tyson bit Evander Holyfield's ear, for example, lawsuits were filed. These were not actions by Holyfield, the only person who really got hurt—they were class actions filed on behalf of pay-per-view cable television subscribers alleging that they did not get their money's worth because the fight was cut short.[43]

Other brow-raising examples of frivolous suits are common. One such case was brought against Ford Motor Co. in New York State court. The case involved an inadvertent mistake made by Ford—it had put a slightly overstated price on the window stickers on certain vehicles. As soon as Ford discovered the mistake, the company began sending letters to the affected customers apologizing for the error and enclosing checks that more than compensated them. Nonetheless, and fully knowing that this refund program was already well underway, a class action lawsuit charging that Ford had committed fraud was filed. Even worse, the court was asked to immediately enjoin Ford from continuing its refund efforts—presumably so that the lawyers could get a cut of the refund money. In this case, the court properly dismissed the action; nonetheless, Ford was required to waste time and corporate resources on a lawsuit that clearly served no legitimate purpose.[44]

A third type of class action abuse occurs when State courts ignore the due process rights of out-of-State defendants by denying them the opportunity to contest the plaintiffs' claims against them. One witness who testified before the Subcommittee on Administrative Oversight and the Courts blamed this phenomenon on a "laissez faire" attitude of some State courts.[45] The most egregious ex-

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

[42] In re *Rohne-Poulenc Rorer Inc.,* 51 F.3d 1293, 1299 (7th Cir. 1995).

[43] See "Hearings on Mass Torts and Class Actions Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary," 105th Cong., (1998) (statement of John W. Martin).

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

[45] See hearings on S. 353, prepared statement of John H. Beisner.

amples of this are the so-called drive-by class certification cases, in which a class is certified before the defendant has a chance to respond to the complaint, or in some cases, has even received the complaint. In one lawsuit filed against an auto manufacturer in a Tennessee State court, for example, the complaint was filed on July 10, 1996. Plaintiffs filed several inches of documents with their complaint. Amazingly, by the time the court closed that same day, the judge had entered a 9-page order granting certification of a nationwide class of 23 million members. The defendant was not even notified about the lawsuit before the certification and thus had no opportunity to tell its side of the story.[46] And upon checking, the defendant discovered that a group of record companies had the same experience with the same judge in an antitrust class action filed several days earlier.[47] In Tennessee, this phenomenon is still occurring. Only a few weeks ago, a Tennessee State court certified a nationwide class before the defendants were even served (and obviously without benefit of any input from defendants).[48] And in another case, a Kentucky State court ordered injunctive relief in favor of the class before the defendant was even notified of the lawsuit.[49]

A fourth type of class action abuse that is prevalent in State courts in some localities is the "I never met a class action I didn't like" approach to class certification.[50] Some State courts that adopt this permissive attitude have even certified classes that Federal courts had already found uncertifiable. In one case, for example, a State court judge certified a nationwide class of persons who claimed that the house siding they had purchased was defective. Later, a Federal district court judge presented with the same case rejected any prospect of certifying a class in that manner, finding that affording class treatment in that case would clearly violate the due process rights of the defendants and the purported class members.[51]

Yet another common abuse is the filing of "copy cat" class actions (i.e., duplicative class actions asserting similar claims on behalf of essentially the same people). Sometimes these duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers. In other instances, the "copy cat" class actions are blatant forum shopping—the original class lawyers file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class. When these similar, overlapping class actions are filed in *State courts* of different jurisdictions, there is no way to consolidate or coordinate the cases. The "competing" class actions must be litigated separately in an uncoordinated, redundant fashion because there is no State court mechanism for consolidating State court cases. The result is enormous waste—multiple judges of different courts must spend considerable time adjudicating precisely the same claims as-

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[46] See hearings on S. 353, prepared statement of Stephan G. Morrison.
[47] Id.
[48] See Order of National Class Certification, *Davison* v. *Bridgestone/Firestone, Inc.,* case No. 00C2298 (Eighth Cir. Ct., 20th Jud. Dist., Nashville, TN) (dated Aug. 18, 2000).
[49] See Order, *Farkas* v. *Bridgestone/Firestone, Inc.,* case No. 00–CI–5263 (Cir. Ct., Jefferson County, KY) (dated Aug. 18, 2000).
[50] See hearings on S. 353, prepared statement of Stephen G. Morrison.
[51] Compare *Naef* v. *Masonite Corp.,* No. CV–94–4033 (Cir. Court, Mobile County, AL), with In re *Masonite Hardboard Siding Prods. Litig.,* 170 F.R.D. 417, 424 (E.D. La. 1997).

serted on behalf of precisely the same people.[52] As a result, State courts and class counsel may "compete" to control the cases, often harming all the parties involved. In contrast, when overlapping cases are pending in different Federal courts, they can be consolidated under one single judge to promote judicial efficiency and ensure consistent treatment of the legal issues involved.

Many of the abuses taking place in State courts are magnified by the growing trend among plaintiffs' attorneys to bring huge class actions on behalf of hundreds of thousands or even millions of consumers. These cases, which generally involve overly broad claims, put any class members with real injuries at risk. The incentive for class lawyers to gather the largest class possible is clear: why sue on behalf of just 1,000 people when you can sue for 1 million and increase your intake? The problem with such broad claims, however, is that the entire lawsuit proceeds on a lowest common denominator basis. As a result, persons with legitimate injuries will be lumped in with the "average," often meritless claim and will not be given individual attention for their grievances.[53] A good example of this trend is a class action that was brought last year in an Illinois State court against the American Dental Association and several toothbrush manufacturers for failing to warn of the risk of a toothbrush-related injury known as "toothbrush abrasion." The "hard evidence" in this suit, which was brought on behalf of 40 million people is a toothpaste commercial that claimed people brush their teeth too hard.[54] Although there may well be a few people in this class who have actually suffered physical injury from toothbrushes, they are lumped in with millions of people who simply claim to be at such a risk. Clearly, those persons who have actual claims will get lost in the lawsuit, and the class action will proceed based on the biggest group—those who are "at risk." As a result, if the lawyers reach a settlement, all class plaintiffs will receive the same award—most likely a coupon toward new toothbrushes—and any individuals who have actual claims will forfeit their ability to collect real damages for their injuries.

Class action abuse is also made worse by the trend toward "nationwide" class actions, which invite one State court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles.[55] Clearly, 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. In one recent case, for example, plaintiffs filed suit in an Alabama county court on behalf of more than 20 million people alleging that the design of federally

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[52] For example, in the current controversy concerning Firestone tires, over 40 virtually identical class actions seeking to represent the same purported class members have been filed in courts all over the country. And in the recently publicized HMO cases, multiple overlapping class actions were filed against each of the major health insurance companies. No less than 17 class actions have been filed against Humana, most of which assert similar allegations and claims on behalf of similarly defined nationwide classes. In the Humana situation, the Federal cases were consolidated for pretrial proceedings before a single judge. See In re *Humana Inc. Managed Care Litig.*, 2000 U.S. Dist. LEXIS 5099 (J.P.M.L. Apr. 13, 2000). There is no parallel methodology for consolidating State court class actions. Last year alone, over 11,000 cases were centralized for pretrial proceedings through the MDL process. See Administrative Office of the U.S. Courts, "Judicial Business of the United States Courts," 31 (2000) ("Judicial Business").

[53] See hearings on S. 353, prepared statement of John H. Beisner.

[54] See "Not Too Abrasive, But Suit Causes Ache," The Chicago Tribune, Apr. 14, 1999, at Business 1.

[55] See hearings on S. 353, prepared statement of John H. Beisner.

mandated airbags is faulty.[56] From the standpoint of federalism, this suit defies logic. Why should an Alabama State court tell 20 million people in all 50 States what kind of airbags they can have in their cars?

The most egregious of such cases are those in which one State court issues nationwide rulings that actually contradict the laws of other States. One case reported in the New York Times, for example, involved a longstanding State Farm practice (shared by other insurers) of using nonoriginal equipment manufacturer (OEM) parts to repair cars.[57] The practice was fully disclosed to policyholders, and the majority of States expressly permit insurers to specify non-OEM parts. Indeed, two States, Hawaii and Massachusetts, actually *require* the specification of non-OEM parts. Nonetheless, plaintiffs brought suit in Illinois State court claiming that all non-OEM parts used by policyholders were inferior to OEM parts, and that State Farm had breached its contractual obligation to policyholders and committed fraud each time it specified such parts. Even though the plaintiffs eventually dropped their claim that all non-OEM parts were inferior, and conceded that this could only be determined on a part-by-part basis, the trial court still permitted the jury to reach a group judgment on the class action. The court was not even deterred by the fact that the plaintiffs in the class came from States throughout the Nation with widely varying laws regarding the use of non-OEM parts, including the two States, Hawaii and Massachusetts, that required the very practice condemned by plaintiffs.[58]

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

- Not long ago, a State court in Minnesota recently approved for class treatment a case involving millions of plaintiffs from 44 States that will have the effect of dictating the commercial codes of all those States.[59] The specific issue in the case is whether individuals have a State law right to recover interest on refundable deposits paid to secure an automobile lease. In certifying a class in that case, the court adopted an understanding of Minnesota's version of the Uniform Commercial Code that was contrary to the interpretation of every other State to have considered the issue under their own versions of the UCC. And by certifying the class, the court decided that its unprecedented interpretation of the UCC would bind the remaining 43 States that had yet to decide the question (even though the "Uniform Commercial Code is not uniform" and is interpreted differently in different States.[60] In essence, the action of the Minnesota court will dictate the interpretation of 43 other States' UCC provisions even though the other States

[56] See *Smith* v. *General Motors Corp., et al.,* Civ. A. No. 97–39 (Cir. Ct. Coosa County, AL).
[57] "Suit Against Auto Insurer Could Affect Nearly All Drivers," The New York Times, Sept. 27, 1998, at p. 29.
[58] See *Snider* v. *State Farm Mutual Automobile Insurance Co.,* Cir. Ct. for Williamson City, IL, Docket No. 97–L–114 (1999).
[59] *Rosen* v. *PRIMUS Automotive Fin. Servs., Inc.,* No. CT 98–2733 (Minn. D. Ct., 4th Jud. Dist., May 4, 1999).
[60] *Walsh* v. *Ford Motor Co.,* 807 F.2d 1000, 1016–17 (D.C. Cir. 1986).

might well have reached a different conclusion in applying their own State's laws.

- A similar result occurred last year in a California State court case addressing whether home loan borrowers had been overcharged for collateral homeowners' insurance by the defendant bank.[61] In that case, the State court decided to preside over a class action involving a nationwide class of 25,000 borrowers in all 50 States, even though States have widely varying rules regarding the provision of collateral homeowners' insurance by banks. The effect of the California State court decision is to overlook those differences and to dictate that California's resolution of the issue will be binding on all other States. Tellingly, the California court relied on a prior California case involving a nationwide class action, which stated that "California's more favorable laws may properly apply to benefit nonresident plaintiffs when their home states have no identifiable interest in denying such persons full recovery."[62] That sort of sentiment flies in the face of basic principles of federalism by embracing the view that other States should abide by California law whenever a California court determines that its own laws are preferable to other States' contrary policy choices. Indeed, such examples of judicial usurpation, in which one State's courts try to dictate its laws to 49 other jurisdictions, has been duly criticized by some congressional witnesses as "false federalism."[63]

Given the range and severity of class action abuse, it is not surprising that defendants find it necessary to remove actions against them to a Federal forum—a forum where the threat of prejudice is significantly lower. Under current law, however, plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the State level. The two most common tactics employed by plaintiffs' attorneys in order to guarantee a State court tribunal are: adding parties to destroy diversity and shaving off parties with claims for more than $75,000. It is not rare to see complaints in which plaintiffs sue several major corporations and then add one local supplier or dealer as a defendant merely to defeat diversity.[64] Other complaints seek $74,999 in damages on behalf of each plaintiff or explicitly exclude from the proposed class anybody who has suffered $75,000 or more in damages.[65]

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

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[61] *Washington Mutual Bank* v. *Superior Ct.,* 70 Cal. App. 4th 299 (Cal. Ct. App. 1999).

[62] Id. at 302 (quoting *Clothesrigger Inc.* v. *GTE Corp.,* 191 Cal. App. 3d 605, 616 (Cal. Ct. App. 1987)).

[63] See hearing of H.R. 1875 "The Class Action Jurisdiction Act of 1999 Before the House Committee on the Judiciary," (1999) (statement of Hon. Walter E. Dellinger).

[64] See hearings on S. 353, prepared statement of Stephan G. Muhidon.

[65] Id.

VI. How S. 353 Works

S. 353 is a modest step toward addressing a number of the problems and abuses in the current class action system. First, S. 353 implements additional notice requirements to better inform plaintiff class members about: (a) the terms of a class action settlement, (b) the rights they will forfeit as members of the class, (c) the obligations the settlement agreement places on the defendants, and (d) the amount of attorneys' fees that will be awarded to counsel representing their interests. S. 353 also provides an additional mechanism to safeguard plaintiff class members' rights by requiring class counsel to provide State attorneys general and the U.S. Attorney General with notice of class action settlements, so that the State and Federal Governments have the opportunity to intervene in a case if they feel that a class action settlement is not in the best interests of their citizens.

Second, S. 353 relaxes diversity jurisdiction and removal rules so that larger interstate class actions can be heard in Federal court. In doing so, the act also makes it harder for plaintiffs' counsel to "game the system" by inappropriately keeping class actions in State courts where certain judges are quick to certify a class regardless of due process concerns or to approve a settlement regardless of the fairness to class members. Moreover, the act creates efficiencies in the judicial system by enabling overlapping and "copycat" cases to be consolidated in a single Federal court, rather than leaving them to proceed in numerous State courts as does the current system.

Finally, S. 353 addresses the problem of unfair settlements and excessive attorneys' fees by directing the Judicial Conference of the United States to conduct a review of class action settlements and attorneys' fees and to present Congress with recommendations to improve the system.

NOTIFICATION

S. 353 would amend the class action rules by requiring that class counsel serve the State attorneys general of every State in which any class member resides and the Attorney General of the United States with notice of a proposed settlement. This notice must occur no later than 10 days after the proposed settlement is filed in Federal court.

The notice to the State attorneys general and the Attorney General of the United States would include: (1) a copy of the complaint and amended complaints, unless those materials are available through the Internet and the notice includes directions on how to access the materials on-line; (2) notice of any scheduled judicial hearing in the class action; (3) proposed or final notification to class members of their right to be excluded from the class; (4) any proposed or final class action settlement; (5) any settlement made between class counsel and defendants' counsel; (6) any final judgment or notice of dismissal; and (7) the names of the class members who reside in each State attorney general's respective State and the proportionate claims of such members. The State attorneys general and the Attorney General of the United States would then have at least 120 days to review the proposed settlement before a court could hold a hearing on final settlement approval.

A class member whose State attorney general did not receive notice could choose not to be bound by the settlement agreement or consent decree. Nonetheless, nothing in this section creates an affirmative duty for either the State attorneys general or the Attorney General of the United States to take any action in response to a class action settlement. Moreover, nothing in this section expands the current authority of the State attorneys general or the Attorney General of the United States.

S. 353 also aims to help class members better understand their rights in a class action, by requiring that any notice provided to class members explain in plain, easily understood language: (1) the subject matter of the class action; and (2) the legal consequences of being a member of the class action. In addition, if the notice involves a proposed settlement, it must explain, also in plain, easily understood language: (1) the benefits a settlement will offer the class; (2) the rights a plaintiff would waive through settlement; (3) the obligations a defendant would incur in the proposed settlement; and (4) the amount of the attorneys' fees or a good-faith estimate of the fees being sought, and an explanation of how the fees will be calculated.

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

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

DIVERSITY JURISDICTION AND REMOVAL

S. 353 would amend the diversity jurisdiction and removal statutes applicable to larger interstate class actions. S. 353 would modify 28 U.S.C. 1332 to grant the Federal courts original jurisdiction to hear interstate class action cases where *any* member of the proposed class is a citizen of a different State from *any* defendant. Put another way, the bill changes the current "complete diversity" requirement created by courts for class actions to a "minimal diversity" rule for class actions.

Nonetheless, this expanded Federal jurisdiction would not include three types of class actions that are truly local in nature: (1) cases in which a "substantial majority" of class members and defendants are citizens of the same State and the claims will be governed primarily by the laws of that State; (2) cases involving fewer than 100 class members; and (3) cases in which the primary defendants are States, State officials or other governmental entities against whom the district court may be foreclosed from ordering relief. S. 353 also exempts from its reforms any securities class action cases covered by the Securities Litigation Reform Act and corporate governance cases.

S. 353 would also create a separate amount-in-controversy requirement for diversity jurisdiction over class actions, by requiring that the claims of the individual class members be aggregated to

determine whether the amount in controversy exceeds the sum or value of $2 million, exclusive of interest and costs.

In addition, in order to enable more class actions to be removed to Federal court, S. 353 would create four new rules regarding the removal of class actions filed in State court. *First,* unnamed plaintiff class members would be able to remove class actions to Federal court. *Second,* parties would be able to remove a class action to Federal court without the consent of any other party. *Third,* any plaintiff or defendant would be able to remove a class action to Federal court, regardless of whether that party is a citizen of the State in which the action was brought. And *fourth,* the current ban on removal of a class action to Federal court after 1 year would be eliminated, although the requirement that removal occur within 30 days of notice of grounds for removal would be retained.

S. 353 provides that a Federal court must dismiss a class action without prejudice if it finds that the removed class action does not meet the requirements for proceeding on a class basis under Federal Rule of Civil Procedure 23. Plaintiffs could then amend and refile their complaint in State court; however, the refiled case would once again be eligible for removal if original Federal jurisdiction exists.

The act also addresses statute of limitation issues in two ways. *First,* if plaintiffs file a class action in State court and the case is then removed to a Federal court, which dismisses it for failure to meet the requirements of rule 23, the statute of limitations would not run for the period that the dismissed class action was pending in either court, provided the case is refiled in the same State court by at least one of the original named plaintiffs. *Second,* if a removed class action is dismissed by a Federal court for failure to meet the requirements of rule 23, the statute of limitations will not run with regard to any *individual* actions later brought by members of the dismissed class, regardless of where the individual chooses to sue.

REPORT ON ATTORNEYS' FEES

S. 353 would direct the Judicial Conference, with the assistance of the Federal Judicial Center and Administrative Office of the U.S. Courts, to prepare a report on class action settlements to be transmitted to the House and Senate Judiciary Committees. The report will include recommendations on best practices to ensure the fairness of proposed class action settlements for class members, recommendations on best practices to ensure the appropriateness of attorneys' fees and expenses, and a discussion of any actions taken or planned by the Judicial Conference to implement the recommendations in the report.

VII. SECTION-BY-SECTION ANALYSIS AND DISCUSSION OF SUBSTITUTE AMENDMENT

Section 1—Section 1 sets forth the "Class Action Fairness Act of 2000" as the short title of the bill.

Section 2—Section 2 sets forth the notification requirements of class action certifications and settlements. Section 2 of S. 353 creates new 28 U.S.C. 1713, which would combat abusive class action settlements by providing more dynamic protections for plaintiff

class members. This is done in two important ways. First, new 28 U.S.C. 1713 would require that class counsel serve the State attorneys general of every State in which a class member resides and the Attorney General of the United States with notice of a proposed settlement. Second, it mandates that potential plaintiffs be made aware of their rights and obligations as class members in plain, easily understood language.

Abusive class action settlements in which plaintiffs receive promotional coupons or other nominal damages while class counsel receive large fees are all too commonplace. The risk of such abusive practices is particularly pronounced in the class action context because these suits often involve numerous plaintiffs, each of whom has only a small financial stake in the litigation. As a result, few, if any, plaintiffs closely monitor the progress of the case or settlement negotiations, and these cases become "clientless litigation," in which the plaintiff attorneys and the defendants have "powerful financial incentives" to settle the "litigation as early and as cheaply as possible, with the least publicity."[66] These financial incentives create inequitable outcomes. "For class counsel, the rewards are fees disproportionate to the effort they actually invested in the case. * * * For society, however, there are substantial costs: lost opportunities for deterrence (if class counsel settled too quickly and too cheaply), wasted resources (if defendants settled simply to get rid of the lawsuit at an attractive price, rather than because the case was meritorious), and—over the long run—increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers."[67]

S. 353 will address this problem by requiring Attorney General notification of proposed settlements and making it easier for class members to understand what is at stake in a class action.

A. ATTORNEY GENERAL NOTIFICATION

New 28 U.S.C. 1713(a) requires class counsel to provide notice to the State attorneys general of every State in which any class member resides and the Attorney General of the United States. The provision is intended to combat the "clientless litigation" problem by adding a layer of independent oversight to prohibit inequitable settlements. Under section 1713(a), class counsel must provide the notice within 10 days after the proposed settlement is filed in court. Such notice must include, according to 28 U.S.C. 1713(a)(1)–(8): a copy of the complaint; any scheduled judicial hearings; any final judgment or notice of settlement; any proposed or final dismissal; and the names of class members who reside in each State, if feasible. The notice would also include any written judicial decision related to settlement, a final judgment or notice of dismissal. If disagreement arises over the feasibility of providing the names of class members and their proportional share of the proposed settlement under 28 U.S.C. 1713(a)(7)(A), it is the intent of the Committee that class counsel bear the burden of proving that it is not feasible to provide any of this required information.

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[66] Deborah Hensler, et al., "Class Action Dilemmas, Pursuing Public Goals for Private Gain, Executive Summary," 10 (Executive Summary 1999).

[67] Id.

Once the State attorneys general and the Attorney General of the United States have received notice under 28 U.S.C. 1713(a), they would then have at least 120 days to review the proposed settlement and decide whether to object in the interest of the plaintiff class. In addition, section 28 U.S.C. 1713(e)(1) instructs that in cases where a particular State attorney general is not provided notice of the potential settlement, plaintiffs in that State can choose not be bound by that settlement. State attorneys general and the Attorney General of the United States are not required to take any affirmative action once they receive the proposed settlement according to new section 1713(f), nor does this section expand their current authority.

The Committee believes that notifying the State attorneys general and the Attorney General of the United States of proposed class action settlements will provide a check against inequitable settlements in these cases. Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.

B. PLAIN LANGUAGE REQUIREMENT

The second protection against abusive settlements contemplated in new 28 U.S.C. 1713(c)(1)(A)–(B) 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 a 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 class counsel will request), and an explanation of how attorneys' fees will be calculated. The notice must also include any other material information regarding the class action. Such "material matter" would include any other information a reasonable person would want to know before deciding whether to participate in a class action or proposed settlement.

Compliance with the plain, easily understood language requirement and with the Attorney General notification requirement will not protect any party from a legal action under Federal or State law. This is made clear in new 28 U.S.C. 1713(d).

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

During the Subcommittee hearing on S. 353, witnesses discussed the problem of conveying to the potential class member a clear understanding of the rights and obligations which accompany membership in the class. As one witness testified: "The class notices that class members receive frequently are written in small print and legalese. Since those notices typically are telling class members that they are about to give up important legal rights (unless

they take appropriate action), it is imperative that they understand what they are doing and the ramifications of their actions."[68]

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

Section 3—Section 3 amends 28 U.S.C. 1332 to redesignate current subsection 1332(d) as subsection (e) and create a new subsection 1332(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 a class of plaintiffs is a citizen of a different State from any defendant; (b) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state; or (c) any member of a class of plaintiffs is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

Pursuant to new subsection 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 class members ("limited scope" case).

Pursuant to new subsection 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 or value of $2 million (exclusive of interest and costs). The Committee intends this subsection 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 "all matters in controversy" in a purported class action "do not in the aggregate exceed the sum or value of $2,000,000," the court should err in favor of exercising jurisdiction over the case.

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

Consistent with this overriding intent, the exemptions in new subsection 1332(d)(3) should be read narrowly. Under the provision of subsection 1332(d)(3)(A) governing "intrastate" class actions (i.e., class actions in which the "substantial majority" of plaintiff class members and the primary defendants are citizens of the State in which the action was originally filed and the claims asserted there-

[68] See hearings on S. 353, prepared statement of Stephan G. Morrison, at 7.

in are governed by the same State), a purported class action should be deemed to fall outside Federal jurisdiction only if virtually all members of the proposed class are residents of a single State of which all "primary defendants" are also citizens and the claims are governed by that State's law. For example, a case in which a proposed class of 1,000 persons sues a North Carolina citizen corporation presumably would fit the "intrastate" case definition if 997 of those persons (more than 99 percent) were North Carolina citizens and the claims are governed by North Carolina law.

In addition, for purposes of subsection 1332(d)(3)(A) "intrastate" class actions, the only parties that should be considered "primary defendants" are those defendants who are the real "targets" of the lawsuit—i.e., the defendants that would be expected to incur most of the loss if liability is found. For example, if a class action against a company also names as a defendant (in the interest of completeness) an executive of the defendant company, that executive normally should not be deemed a "primary defendant" because, in most instances, the executive would not be the real "target" of the purported class action; rather, his employer company would be the true target of the lawsuit.

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. For example, a dealer, agent or sales representative of a corporate defendant that has been named as a 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, without more, be sufficient to cause a person to be a "primary defendant" under this subsection.

The other two exceptions should also be construed and applied narrowly. Thus, Federal courts should proceed cautiously before declining Federal jurisdiction under the subsection 1332(d)(3)(B) exception for "state action," and only do so when it is clear that the primary defendants are indeed States, State officials, or other governmental entities against whom the "court may be foreclosed from ordering relief." In making such a finding, courts should apply the same guidance regarding the term "primary defendants" discussed above with regard to intrastate actions. Similarly, the subsection 1332(d)(3)(C) exception for "limited scope" cases (actions in which there are fewer than 100 class members) should also be interpreted narrowly. For example, in cases in which it is unclear whether "the number of members of all proposed plaintiff classes in the aggregate is less than 100," a court should err in favor of exercising jurisdiction over the matter.

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 subsection 1332(d)(3)(C) ("limited scope" class actions), that plaintiff should have the burden of demonstrating that "all matters in controversy" do not "in the aggregate exceed the sum or value of $2,000,000, ex-

clusive of interest and costs" or that "the number of all proposed plaintiff classes in the aggregate is less than 100."

New subsection 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 pleadings which bring the case within Federal court jurisdiction.

New subsection 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 subsection 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 conditions of rule 23 of the Federal Rules of Civil Procedure. Notwithstanding this subsection, new subsection 1332(d)(6)(B) clarifies that the action may be amended and refiled in Federal or State court; however, if such an action is refiled in State court, it may be removed if it is an action over which the district courts of the United States have original jurisdiction. The Committee has concluded that the alternative—forbidding re-removal—would be bad policy. That approach would allow counsel effectively to ask a State court to review and overrule the class certification decision of a Federal court, since Federal and State court class certification standards typically do not differ radically. Allowing a State court to certify a case that a Federal court has already found noncertifiable would set a troubling (if not constitutionally suspect) precedent under which State courts would serve as points of appellate review of Federal court decisions. Moreover, since Federal court denials of class certification typically involve explicit or implied determinations that allowing a case to be litigated on a class basis would likely result in the denial of some or all of the parties' due process rights, there should be no room constitutionally for a State court to reach a different result on class certification issues.

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

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

Pursuant to new subsection 1332(d)(7), the act excepts from new subsection 1332(d)(2)'s grant of original jurisdiction those class actions that solely involve claims that relate to matters of corporate governance arising out of State law. This exclusion recognizes the peculiar advantages of the State courts in the adjudication of corporate governance cases. These advantages include judicial expertise, a coherent body of well-developed case law, the ability of State courts to resolve these disputes expeditiously, and the resulting predictability of corporate transactions.

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

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

For purposes of this exemption, the phrase "the internal affairs or governance of a corporation or other form of business enterprise" is intended to refer to the internal affairs doctrine defined by the U.S. Supreme Court as "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders * * *."[69] The phrase "other form of business enterprise" is intended to include forms of business entities other than corporations, including, but not limited to, limited liability companies, limited liability partnerships, business trusts, partnerships and limited partnerships.

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

New subsection 1332(d)(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."[70] This rule "has been frequently criticized because often * * * an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business."[71] Some in-

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

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

[71] See, e.g., 3A J. Moore & J. Lucas, "Moore's Federal Practice," pars. 17.25, 17–209 (1987 rev.) ("Congress should remove the one remaining anomaly and provide that where unincorporated

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surance companies, for example, are "inter-insurance exchanges" or "reciprocal insurance associations." 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.[72] 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 subsection 1332(d)(8) corrects this anomaly.

Section 4—Section 4 establishes the procedures for removal of interstate class actions over which the Federal court is granted original jurisdiction in new section 1332(d). The general removal provisions currently contained in chapter 89 of title 28 would continue to apply to such class actions, except where they are inconsistent with the provisions of the act. For example, 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 of class actions would subvert the intent of the act because it would essentially allow a plaintiff to defeat removal jurisdiction by suing both in-State and out-of-State defendants. Such a restriction on removal of class actions would perpetuate the current "complete diversity" rule for class actions that new section 1332(d) rejects. The act does not, however, disturb the general rule that a case can only be removed to the district court of the United States for the district and division embracing the place where the action is pending.[73] 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.[74]

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

In addition, new subsection 1453(b) provides that removal may occur without the consent of any other party. This revision to the

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associations have entity status under state law, they should be treated as analogous to corporations for purposes of diversity jurisdiction.").

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

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

[74] See *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938).

removal rules will combat collusion between a corporate defendant and a plaintiffs' attorney who may attempt to settle on the cheap in a State court at the expense of the plaintiff class members. Similarly, this will prevent a plaintiffs' attorney from recruiting a "friendly" defendant (a local retailer, for example) who could refuse to join a removal action and thereby thwart the legitimate efforts of the primary corporate defendant to seek removal.

New subsection 1453(c) clarifies that the 1-year limit otherwise imposed on removal of suits filed pursuant to section 1332 has no application to class actions. As such, the act permits a party to remove an action to Federal court more than 1 year after commencement of a suit in State court. This change is intended to prevent plaintiffs' attorneys from the type of gaming that occurs under the current class action system. In the most extreme example, a plaintiffs' attorney could file suit under current law against a friendly defendant, triggering the start of the 1-year limitation after which removal may not be sought under any condition. One year and 1 day after filing suit, the plaintiff's attorney could then serve an amended complaint on an additional defendant, at which time it would be too late for that new defendant to remove the case to Federal court—regardless of whether diversity jurisdiction exists and irrespective of the practical merits of the case. The same unfair result would also occur if plaintiffs' counsel dismisses nondiverse parties or increases the amount of damages being pled after the 1-year deadline. By allowing class actions to be removed at any time when changes are made to the pleadings that bring the case within section 1332(d)'s requirements for Federal jurisdiction, this provision will ensure that such fraudulent pleading practices can no longer be used to thwart Federal jurisdiction.

New subsection 1453(d) states that the requirements of section 1446, setting forth a 30-day filing period for removal notices by defendants, shall apply to plaintiffs who seek to remove a class action under section 1453. In addition, subsection 1453(d) makes an additional change to section 1446(b), which requires that removal occur within 30 days of receipt of "paper" (e.g., a pleading, motion, order, or other paper source) from which it may be ascertained that the case is removable. Under the current statute, a defendant may remove an action beyond the 30-day limit if it can prove that prior to that time it had not received paper from which it could be ascertained that the case was removable. Section 1453(d) extends this provision to class members seeking removal, by allowing them to file removal papers up to 30 days after receiving initial written notice of the class action. The Committee intends that the term "initial written notice" refer to the initial notice of the class action that is disseminated at the direction of the State court before which the action is pending. The Committee further intends that the 30-day period referenced by this section be deemed to run as to each class member on the 13th day after dissemination of notice to the class (as directed by the court) is completed.

In order to be consistent with the exceptions to Federal diversity jurisdiction granted under new section 1332(d), new subsection 1453(e) provides that the class action removal provisions shall not apply to claims involving covered securities or corporate governance litigation. In addition, claims concerning a covered security, as defined in section 16(f)(3) of the Securities Act of 1933 or section

28(f)(5)(E) of the Securities Exchange Act of 1934, are excepted from the class action removal rule as well. These are essentially claims against the officers of a corporation for a precipitous drop in the value of its stock, based on fraud. Because Congress has previously enacted legislation governing the adjudication of these claims,[75] it is the Committee's intent not to disturb the carefully crafted framework for litigating in this context. Thus, claims involving covered securities are excluded from the new section 1332(b) jurisdiction. The parameters of this subsection are intended to be conterminous with new subsection 1332(d)(7).

Section 5—Section 5 directs the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the U.S. Courts, to prepare and transmit to the Committees on the Judiciary of the Senate and House of Representatives a report on class action settlements. The report shall contain recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that these settlements are supposed to benefit. In addition, the report shall contain recommendations on the best practices that courts can use to ensure that fees and expenses awarded to attorneys in connection with a class action settlement appropriately reflect the extent to which counsel obtained full redress for the injuries alleged in the complaint, and the time, expense and risk devoted to the litigation. Finally, the report shall identify the actions that the Judicial Conference has taken and intends to take toward having the Federal judiciary implement the recommendations in the report. It is the Committee's intent that this report be an extension of the efforts that have already been undertaken by a subcommittee of the Advisory Committee on Civil Rules to examine possible amendments to rule 23 of the Federal Rules of Civil Procedure, particularly amendments related to the review of proposed class action settlements.

In addition, section 5 contains a provision stating that nothing in the act shall be construed to alter the authority of the Federal courts to supervise attorneys' fees. It is the Committee's intent not to disrupt the broad discretion judges have to approve or contest attorneys' fees based on fairness determinations, notwithstanding contractual arrangements between attorneys and their clients.

VIII. Critics' Contentions and Rebuttals

Critics' Contention No. 1: S. 353 would transfer nearly every class action from State to Federal court and would add to the increasingly burdensome workload of the Federal courts.

Response: During Committee debate on S. 353, the most frequent concern we heard was that S. 353 would overload the Federal judiciary. This argument, however, ignores the fact that class actions burden our entire national judicial system, which includes both Federal courts and State courts, and not simply Federal courts. In fact, many State courts, where the critics apparently would like to confine all interstate class actions, are just as burdened—if not more so—than the Federal courts, and are less equipped to deal with complex cases like class actions.

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

Many State courts have crowded, crushing dockets. In fact, the civil caseload in State courts has grown much more rapidly than the Federal court civil caseload. Civil filings in State trial courts of general jurisdiction have increased *28 percent* since 1984, as compared to an increase of only *4 percent* in the Federal courts.[76] In most jurisdictions, each State court judge is assigned an average of 1,000 to 2,000 new cases each year.[77] By contrast, each Federal court judge was assigned an average of fewer than 500 new cases last year.[78] Newly released data indicate that there was actually a *3-percent decrease* in the number of cases pending in our Federal district courts nationwide at the end of last year.[79] Moreover, the number of diversity cases filed in Federal court continues to go down markedly. For example, during calendar year 1998, diversity filings fell *6 percent,* and during calendar year 1999, diversity filings fell another *4 percent*.[80] This reduction in new case filings occurs just as the vacancy rate among Federal district court judges (5.8 percent) has been at its lowest level since 1988.[81]

Class action filings in State courts have increased more than three times as fast as they have in Federal courts. According to recent studies, Federal class action filings over the past 10 years have increased by more than 300 percent, while class action filings in State courts have increased by more than 1,000 percent.[82] As the number of class action lawsuits continues to grow, State courts do not have the resources, procedural mechanisms or expertise to handle them effectively. For example, State courts do not possess the numbers of staff (i.e., law clerks, magistrate judges and special masters) available to the Federal courts. Federal court judges are generally able to delegate some aspects of their class action cases (e.g., discovery issues) to magistrate judges or special masters who are not at the disposal of State court judges. Because the Federal judiciary has more personnel and other resources, it is more likely that class actions will be resolved more quickly in Federal court than in State court.

Federal courts are also authorized, through the multidistrict litigation process, to transfer and consolidate similar class actions in different district courts before a single judge.[83] On the other hand, State courts are without such consolidation authority. The current system thus requires State court judges to waste precious energy and resources handling duplicative class actions brought on behalf of the same people on the same issues because State courts cannot consolidate cases across State lines. Moreover, allowing similar class actions to proceed simultaneously in different State courts also promotes abusive practices, collusive activities, and unfair set-

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[76] See B. Ostrom, et al., "Examining the Work of State Courts," at 15 (Court Statistics Project 1998).

[77] See id. at 12–13.

[78] See "Judicial Business," at 23, 25. Indeed, the number is significantly below 500 cases when one takes account of the fact that besides the 646 authorized judgeships, 273 Federal district court judges who have taken "senior status" were active in handling cases last year. Id. at 42.

[79] See "Judicial Business," at 20 (data as of Sept. 30, 1999).

[80] Id. at 26.

[81] For 1995–1999, the source is "Judicial Business," at 42. For 1991–1994, the source is Administrative Office of the U.S. Courts, "Judicial Business of the U.S. Courts," 24 (1994). For 1988–1990, the source is "Annual Report of the Director of the Administrative Office of the U.S. Courts," 42 (1990).

[82] See Analysis: "Class Action Litigation—A Federalist Society Survey," "Class Action Watch," at 5 (vol. 1, No. 1); Deborah R. Hensler, et al., "Class Action Dilemmas: Pursuing Public Goals for Private Gain," 19 (Executive Summary 1999).

[83] U.S.C. 1407.

tlements. The class action system will improve tremendously with the Federal administration of interstate class actions because of the Federal courts' ability to consolidate similar, overlapping cases. Clearly, it is far more efficient for one Federal judge handle a group of identical or parallel purported class actions, than for multiple judges to hear the same case in a multitude of different State courts. S. 353 will therefore save significant State and Federal judicial resources, expedite the resolution of these cases, reduce the ability of attorneys to play games with the system, and result in fairer results for litigants.

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

These benefits aside, the critics' contention that S. 353 would overload the Federal courts is also a gross exaggeration. S. 353 would simply *allow* removal of certain interstate class actions to Federal court—it would not *require* removal. Merely providing class action litigants with an option to have their case heard in Federal court is consistent with the constitutional mandate of diversity jurisdiction. Moreover, removal will not be an option in all class action cases. S. 353 places several significant limitations on the kinds of class actions that can proceed in Federal court, e.g., the $2 million in aggregated claims jurisdictional threshold amount and the requirement that classes include at least 100 members. And if the State courts of a jurisdiction provide an even-handed forum for litigating class actions, defendants or unnamed plaintiffs presumably will not remove class actions to Federal court and will allow them to proceed in State court. Thus, there is no basis for arguing that S. 353 would prompt a tidal wave of class actions that would overwhelm our Federal courts.

Critics who focus on the Federal courts' workload are missing the point—class actions are precisely the kind of cases that *should* be heard in Federal court. Class actions usually involve the most people, most money, and most interstate commerce issues. They also usually involve issues of nationwide implications. Interstate class actions are certainly no less deserving of a Federal forum that the 21,915 cases to recover a few thousand dollars in student loan arrearages, the 18,781 individual product liability actions (typically one-person injury case), the 21,716 Federal personal injury cases (e.g., single person medical malpractice cases), or 23,821 civil habeas corpus cases filed last year in Federal court.[84] Indeed, it is noteworthy that there were eight times as many individual product liability cases filed in Federal court last year (18,781) as there were class actions (2,133).[85] Ultimately, regardless of the impact on the

[84] See "Judicial Business," at 139–41.
[85] Id.

Federal court caseload, large interstate class actions belong in Federal court.

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

Response: At recent congressional hearings on the subject of class actions, witness after witness provided compelling evidence that serious abuses of the class device are primarily occurring in State courts.[86]

Moreover, several studies also indicate that the class action abuse problem, particularly with respect to class settlements, is primarily a State court issue. For example, a detailed Federal Judicial Center study concluded that "[i]n most [class actions handled by Federal courts subject to the study], net monetary distributions to the class exceeded attorneys' fees by substantial margins."[87] In stark contrast, a recent Institute for Civil Justice/RAND study indicated that in State court consumer class action settlements not involving personal injuries, class counsel typically walk off with more money than all of the class members combined.[88] The ICJ/RAND study offered three compelling rationales for allowing more interstate class actions to be heard by Federal courts:

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

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

(3) "if a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in federal court than in a state court."[89]

While some abuses do occur in Federal court, the extent to which they take place in no way even approaches the level of abuse evidencing itself in State court. Moreover, provisions in S. 353, such as those dealing with notification of State attorneys general and the "plain English" requirement will further bolster Federal court safeguards in the proper handling of class action cases.

Critics' Contention No. 3: To date, the only mechanism that has been successful in imposing liability on some industries, such as the tobacco or firearms industries, has been class action lawsuits. Allowing removal of State class actions to Federal court will destroy the impact that class actions are having on these socially irresponsible businesses. Therefore, we should exempt certain industries from the diversity and removal provisions of S. 353.

Response: Opponents of S. 353 would prohibit Federal courts from exercising jurisdiction over those class actions brought against certain industries, including HMO's, tobacco companies, nursing

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[86] See generally hearings on S. 353: "Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary," 105th Cong. (1997). "Hearings on Mass Torts and Class Actions Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary," 105th Cong. (1998): Hearing on H.R. 1875, "The Class Action Jurisdiction Act of 1999 Before the House Committee on the Judiciary," (1999).

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

[88] Deborah R. Hensler, et al., "Class Action Dilemmas: Pursuing Public Goals for Private Gain," 19 (Executive Summary 1999).

[89] Id. at 28.

homes, and firearms manufacturers. In addition, opponents have suggested that claims arising from State consumer protection statutes or State environmental protection laws should be exempt from the bill as well.

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

Moreover, there is no evidence that plaintiffs will be less successful in litigating their class action claims in Federal court.[90] Class

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[90] Indeed, there's no evidence that plaintiffs' counsel believe that they must file in State court in order to succeed. Tobacco class actions prove this point. Of the 56 purported class actions on tobacco issues now pending, 25 are in Federal courts and 31 are in State courts. Moreover, there is no evidence that classes are more likely to be certified in State courts. Both Federal courts and State courts have certified tobacco-related class actions. So far, 24 courts have denied certification of tobacco classes—13 State courts and 11 Federal courts. The State court denials are: In re *Tobacco Cases* II, No. JCCP–4042, slip op. (Md. Ct. App. May 16, 2000); *Reed* v. *Philip Morris, Inc.,* No. 96–5070, slip op. (D.C. Super. Ct. July 23, 1999); *Philip Morris, Inc.* v. *Angeletti,* No. 961450501 CE212596, slip op. (Md. Ct. App. May 16, 2000); *Taylor* v. *American Tobacco Co.,* No. 97715975, slip op. (Mich. Cir. Ct. Jan. 20, 2000); *Constentino* v. *Philip Morris, Inc.,* No. MID–L–5135–97, slip op. (N.J. Super. Ct. Oct. 26, 1998); *Small* v. *Lorilard Tobacco Co.,* 6790 N.Y.S.2d 593 (App. Div. 1998), aff'd, 698 N.Y.S.2d 615 (1999); and *Geiger* v. *American Tobacco Co.,* 696 N.Y.S.2d 615 (1999). At least two Federal courts have certified tobacco-related classes: *Iron Workers Local Union No. 17 Insurance Fund* v. *Philip Morris Inc.,* 182 F.R.D. 523 (N.D. Ohio 1998); *Northwest Laborers-Employers Health & Security Trust Fund* v. *Philip Morris Inc.,* 1997 U.S. Dist. LEXIS 21299 (W.D. Wash. Dec. 24, 1997). In addition, a U.S. magistrate judge recommended certification of a class in *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris, Inc.,* 188 F.R.D. 365 (D. Or. 1998), but that recommendation was never acted upon by the district court judge. Three State courts (two in Florida and one in Louisiana) have certified tobacco-related classes: *R.J. Reynolds Tobacco Co.* v. *Engle,* 672 So.2d 39 (Fla. Ct. App. 1996) (affirming the trial court's certification of tobacco class); *Broin* v. *Philip Morris Cos.,* 641 S.2d 808 (Fla. Ct. App. 1996) (ordering trial court to certify tobacco class); *Scott* v. *American Tobacco Co.,* 725 So.2d 10 (La. Ct. App. 1998) (affirming trial court certification of tobacco class). In short, the scorecard is basically even. Thus, there is no evidence that class members will be treated more fairly in State court.

While critics have pointed to the two Florida tobacco class actions as evidence that State courts will somehow be tougher on the tobacco industry, there is no real support for this contention. In the first tobacco class action to reach conclusion after a class was certified and the matter was tried (*Broin,* a Florida State court case), the matter ultimately settled. But the class members received *no money at all.* Under the terms of the settlement, they obtained only a "right to sue" individually. Meanwhile, the class counsel were awarded *$49 million* (on the basis of a medical research contribution made by defendants). Counsel for one of the class members who protested the settlement reportedly commented: "Its mind-boggling that a court would permit this kind of settlement to go ahead. What is the class getting out of this? Nothing." "The Legal Intelligencer," Sept. 22, 1999, at 4. The second case, *Engle* v. *T.J. Reynolds Tobacco Co.,* received a lot of publicity because the jury awarded a $145 billion verdict to the class of Florida smokers. However, none of the class members has received any of that money, and it will likely take years of appeals and individual trials before any checks are actually distributed to class members. Moreover, if the Florida verdict holds, the sheer size of the verdict likely means that no other plaintiff in the United States will be able to recover for similar allegations. Had the case been adjudicated in Federal court, it would be possible for a judge to coordinate recovery with any other cases brought by other plaintiffs.

Moreover, there is no evidence that tobacco cases would be tried more quickly in State courts. It took 6 years to get the first tobacco class action to trial in State court; the second took more than 4 years. Generally, the average time to trial in Federal court is shorter.

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

actions against unpopular corporate defendants such as the tobacco and firearms industry have successfully proceeded in Federal court, and have resulted in beneficial judgments and settlements for the plaintiff classes. In fact, it is reasonable to expect that class action cases before Federal courts sitting in diversity will have similar outcomes to those in State court since a Federal court would apply the same State substantive law as a State court considering the case.

Critics' Contention No. 4: S. 353 would unfairly tilt the playing field by providing an advantage to defendant corporations at the expense of consumers.

Response: This concern mischaracterizes the nature of the bill. S. 353 would simply allow Federal courts to handle more interstate class actions. It makes no changes in substantive law whatsoever. Critics of S. 353 erroneously argue that the bill would reverse the ordinary presumption that a plaintiff chooses his or her own court. Yet, in this context, there is no such presumption. In fact, the whole purpose of diversity jurisdiction is to preclude any such presumption by allowing State-law based claims to be removed from local courts to Federal courts, so as to ensure that all parties can litigate on a level playing field and thereby protect interstate commerce interests.[91]

Article III of the Constitution ensures that there will be a fair, uniform, and efficient forum (a Federal court) for adjudicating interstate commercial disputes, so as to nurture interstate commerce. Some scholars have persuasively argued that of all the powers exercised under the Constitution, diversity jurisdiction has had the greatest influence in melding the United States into a single nation, by fostering interstate commerce, communication and the uninterrupted flow of capital for investment into various parts of the Union, and sustaining the public credit and the sanctity of private contracts.[92]

S. 353 promotes these important constitutional norms. The statutory "gatekeeper" for Federal diversity jurisdiction—28 U.S.C. 1332—generally allows Federal courts to hear cases that are large (that is, cases with large "amounts in controversy") and that have interstate implications (that is, cases involving citizens from multiple jurisdictions). These requirements were intended to ensure that diversity jurisdiction is preserved for those cases with significant interstate and economic impacts. Class actions would normally satisfy these requirements because they usually involve big dollar amounts and parties from multiple jurisdictions. Yet, because section 1332 was enacted prior to the existence of the modern-day class action, it does not take into account the unique circumstances presented by class actions. Consequently, section 1332, as presently drafted, tends to exclude the overwhelming majority of class actions from Federal courts, while inviting into Federal courts much smaller single-plaintiff cases having few (if any) interstate ramifications. Such a result is inconsistent with the Federal judiciary's proper jurisdictional role. S. 353 would correct this technical problem and thereby promote the underlying goals of diversity jurisdiction.

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[91] See, e.g., *Pease* v. *Peck,* 59 U.S. (18 How.) 518, 520 (1856).

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

As former Clinton administration Acting Solicitor General Walter Dellinger testified before House Judiciary Committee hearings on the comparable jurisdictional provisions in H.R. 1875, if Congress were to now rewrite the Federal diversity jurisdiction statute, interstate class actions undoubtedly would be one of the first categories of cases to be included within the scope of the statute.[93] This makes plain sense insofar as class action lawsuits typically involve more people, more money, and more interstate commerce issues than any other type of case. S. 353 will simply fix the technical problem in section 1332 and judicial interpretation of the diversity requirements that keep most class actions in State court.

Critics' Contention No. 5: S. 353 will limit the capacity to use class actions as private attorneys general actions to deter corporate wrongdoing.

Response: During the Committee debate, some members opposed S. 353 on the ground that it would limit the use of class actions as private attorney general actions—to deter to corporate wrongdoing. As one member stated, the purpose of a class action is to "dissuade. It is the same reason that we have treble damages."[94] In the view of that member, "the most important function that class actions serve is to allow private attorneys general to step forward and hold corporations accountable for decisions that affect the public safety."[95]

The problem with this argument is that for all of the reasons discussed above, S. 353 will not limit the legitimate use of class actions at all. But more fundamentally, there is no historical basis for the assertion that class actions were intended to create this private attorney general device.

Although a few courts have over the years referred to the deterrent effects of class actions, the promulgation history of the current rule 23 of the Federal Rules of Civil Procedure reflects no intent to create a private attorney general device. The two surviving members of the Advisory Committee on Civil Rules that developed the current version of the rule have both testified in recent years that rule 23 was *not* intended to serve that purpose. In testimony before the Advisory Committee on Civil Rules in 1996, the Honorable William T. Coleman, Jr., specifically denounced the proposition that "a purpose of Rule 23 is to hand a private attorney general's badge to any counsel who wants it."[96] He also stated that:

> Back in 1966, that was not the intended purpose of Rule 23(b)(3). If there is interest in deputizing all attorneys everywhere to enforce our laws, that's a matter that should be decided by Congress, not through the class action provisions in the Federal Rules of Civil Procedure. The courts' tolerance for this vigilante-style use of class actions is a root cause of the abuses that must be corrected.[97]

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[93] See hearings on H.R. 1875, statement of Walter E. Dellinger.

[94] See transcript of markup, Senate Judiciary Committee on S. 353, p. 19:2–17 (June 29, 2000) (statement of Joseph R. Biden, Jr., U.S. Senator).

[95] Id.

[96] "Advisory Committee Working Papers," (vol. 4), at 456.

[97] Id.

In congressional testimony several years ago, Mr. John P. Frank, the other surviving Committee member, sounded similar sentiments:

> What I wish to call to your attention is what I think is a serious problem here: that the class action rule, wholly without regard to its original purpose, has become something of a device for social administration, which should never have been the product of the rules at all. These are matters which should be handled by the Congress and by administrative agencies, and not attempted efforts to govern various parts of the economy by lawsuits which give more to the counsel * * * that they do to those who should benefit from them.
>
> I particularly adopt the statement of the chair of the [Advisory Committee on Civil Rules] at the present time, Judge Paul Niemeyer * * * in which he says: "I believe that Rule 23 was never intended to be a rule to enhance enforcement of substantive claims. Such legitimization should, in my judgment, be effected by Congress, and Congress might well conclude * * * that it is too anarchical to authorize private attorneys to self-appoint themselves as enforcers of law without adequate accountability to the lawmakers or the public."[98]

Even if the critics were correct that deterrence was an intended purpose of class actions, that assertion is self-defeating because, in the Committee's view, the concept of class actions serving a "private attorney general" or other enforcement purpose is illegal. If the intended purpose of rule 23 was to empower private attorneys to act as "attorneys general," the rule plainly bestows substantive rights not otherwise available under common or statutory law. Interpreted in this way, the rule runs afoul of the Rules Enabling Act,[99] which forbids Federal courts from adopting "rules of practice and procedure" that may "abridge, enlarge or modify any substantive right." To the extent that class actions are characterized as having a private attorney general purpose, there are strong arguments that rule 23 is simply null and void.[100]

Critics' Contention No. 6: S. 353 will result in delays for injured consumers.

Response: As discussed above, this criticism stems from baseless concerns about the Federal courts' caseload and the possible impact of this legislation on the ability of the Federal courts to resolve

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[98] "Mass Torts and Class Action Lawsuits," Hearing before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 105th Cong., 2d sess. 20–21 (Mar. 5, 1998) (statement of John P. Frank, Esq.).

[99] 28 U.S.C. 2072(b).

[100] The Federal courts have frequently rejected efforts to use the Federal Rules of Civil Procedure to expand substantive rights. See, e.g., *In re Baldwin-United Corp.,* 770 F.2d 328, 335 (2d Cir. 1985) (rejecting arguments that Fed. R. Civ. P. 23 could be used as authorizing issuance of an injunction to protect class members); *Synanon Church* v. *United States,* 557 F. Supp. 1329, 1330 n.2 (D.D.C. 1983) (rejecting argument that Fed. R. Civ., p. 57 creates right to jury trials in declaratory judgment actions). Cf. *Douglas* v. *NCNB Nat'l Bank;* 979 F.2d 1128, 1130 and n.2 (5th Cir. 1992) (declining to apply Fed. R. Civ., p. 13(a) where doing so would "abridge as lender's substantive rights and enlarge the debtor's substantive rights"). Similar views have been expressed by State courts. See, e.g., *Southwestern Refinery Co.* v. *Bernal,* 2000 Tex. LEXIS 50, (Tex. May 11, 2000) ([C]lass actions do not exist in some sort of alternative universe outside our normal jurisprudence. Our procedural rules provide otherwise: the form of an action under the rules must not "enlarge or diminish any substantive rights or obligations of any parties to any civil action.") (citing Tex. R. Civ., p. 815).

these cases in a timely manner. For all of the reasons set forth previously, there is no basis for arguing that S. 353 would overwhelm the Federal courts with class action cases and thereby adversely affect the ability of consumers to find timely redress for their injuries in Federal court.

Opponents of the bill have presented no data whatsoever that judicial overload would occur. When Congress has expanded Federal court jurisdiction in other respects, it normally has not (at least in recent years) had the benefit of any hard data indicating the likely impact on Federal court workload. For example, the Y2K Act (Public Law 106–37) expanded Federal jurisdiction over Y2K class actions in almost precisely the same manner as proposed in S. 353. Congress enacted that change without knowing its likely judicial workload impact. Likewise, the Securities Litigation Reform Act of 1998 (Public Law 105–353) contained provisions moving virtually all securities class actions from State courts into the Federal courts. Once again, Congress enacted that expansion of Federal jurisdiction without knowing the precise effects on Federal court workload. In the past, when the case has been made that Federal court jurisdiction should be expanded, Congress has simply enacted the expansion with the understanding that any resulting judicial workload problems could be addressed later.

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

Critics' Contention No. 7: S. 353 will trample on the rights of States to manage their legal systems, thus undermining the principles of federalism that our system of government is built upon.

Response: While some critics have alleged that this bill will somehow undermine federalism principles, exactly the opposite is true. S. 353 has been carefully crafted to correct a problem in the current system that does not promote traditional concepts of federalism. In fact, it is the *current* system and the wave of State court class actions that has trampled on the rights of States to manage their legal systems by allowing State court judges to interpret and apply the laws of multiple jurisdictions. When State courts preside over class actions involving claims of residents of more than one State, they frequently dictate the substantive laws of other States, sometimes over the protests of those other jurisdictions.[101] When that happens, there is little those other jurisdictions can do, since the judgment of a court in one State is not reviewable by the State court of another jurisdiction.

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

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

overrule other State laws and policies? Why should State courts be setting national policy?

S. 353 simply allows more class action cases filed in State court to be removed to Federal court. S. 353 does not change substantive law—it is, in effect, a procedural provision only. As such, class action decisions rendered in Federal court should be the same as if they were decided in State court—under the *Erie* doctrine, Federal courts must apply State substantive law in diversity cases. Moreover, if Federal court judges are not familiar with State law on a particular issue, they have the authority to ask a State court to "certify" a question of law, e.g., to advise them how a State's laws should be applied in an uncharted situation. This procedure allows the Federal courts to apply State law appropriately and gives States the ability to manage their legal systems without becoming bound by other States' interpretations of their laws.

In short, contrary to critics' contentions, the real harm to federalism is the *status quo*—leaving the bulk of class action cases in State court. Federal courts are the appropriate forum to decide interstate class actions involving large amounts of money, many plaintiffs and interstate commerce disputes, and these matters of interstate comity are more appropriately handled by Federal judges appointed by the President and confirmed by the Senate. S. 353 simply restores this proper balance by resolving an anomaly of diversity jurisdiction. True to the concept of federalism, S. 353 appropriately leaves certain "intrastate" class actions in State court: cases involving small amounts in controversy; cases with a class of 100 plaintiffs or less; cases involving plaintiffs, defendants and governing law all from the same State; cases against States and State officials; and certain securities and corporate governance cases. As such, S. 353 promotes the concept of federalism and protects the ability of States to determine their own laws and policies for their citizens.

Critics' Contention No. 8: S. 353 could deny plaintiff class members any meaningful ability to recover damages for their injuries.

Response: In arguing that S. 353 would hurt consumers, some opponents have gone so far as to list several State court class actions which supposedly have served consumers well, inferring that removal of such cases to Federal court is tantamount to a denial of justice. This argument assumes that the Federal courts are inferior to State courts, and that a Federal court cannot arrive at a just outcome. If the cases cited by S. 353's opponents would not have had the same outcome in Federal court as they did in State court, it is because the Federal courts may have been more careful to avoid the abuses of the system that occur in State courts. The only thing that would be denied when an interstate class action is removed to Federal court is the plaintiffs' lawyers' ability to strike it rich on class actions that should not be certified by any court because they do not meet the requirements of a proper class.

Moreover, the claim that Federal courts will never certify class actions because of their attention to rule 23 class action requirements is completely off-base. While opponents of the bill cite cases that allegedly achieved greater justice in State court than they would have received if they had been removed to Federal court, it is clear that this is pure speculation. In fact, Federal courts have certified hundreds of cases for class treatment in recent years, and

the rules governing the decision of whether cases may proceed as class actions are basically the same in Federal and State courts. Further, under the *Erie* doctrine, Federal courts apply State substantive law in diversity cases. Consequently, a removed class action should have the same law applied to it, regardless of whether it is in Federal or State court.

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

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

> This is what fuels the [State court class action] litigation lottery. If you are the first in line to demand punitive damages, you may receive awards in the billions. Injured parties in later [class actions] are likely to receive less * * *. They may receive nothing if the first award killed the company or the industry. None of this makes much sense. There is no reason why one group of litigants should, solely on the basis of residency in a particular State, receive the lion's share of damages to the deprivation of hundreds of thousands of other injured parties. Moreover, there is no reason why one state should be able to impose this result on other states when a problem and its victims are shared by the nation as a whole.[102]

Of course, this situation would not arise if S. 353 were passed, since all qualifying interstate class actions on a particular subject could be removed to Federal court and consolidated before a single Federal court judge under the multidistrict litigation mechanism described previously. A judge in the multidistrict litigation system would be able to manage the proceeding to ensure that no group of litigants gained advantage over the others by virtue of their residency (or any other irrelevant factor).

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

Finally, a large quantity of class actions in State court, like the *Broin* tobacco case in Florida, results in millions of dollars for plaintiffs' counsel but nothing of any value for plaintiffs. A recent Institute for Civil Justice/RAND study confirmed this result, finding that class counsel in State court consumer class action settlements, typically walk off with more money than all of the class members combined.[103] The ICJ/RAND study provides three compelling rationales for allowing more interstate class actions to be heard by Federal courts:

> (1) "Federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly;"
>
> (2) "state judges may not have adequate resources to oversee and manage class actions with a national scope;" and
>
> (3) "if a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in Federal court than in a state court."[104]

S. 353 would help assure fairer settlements by allowing the Federal courts to review more class action lawsuits, as well as by providing notice to State attorneys general so they can better protect their citizens against unfair settlement agreements.

Critics' Contention No. 9: S. 353 provides that if a Federal district court determines that a class action lawsuit removed to that court does not satisfy applicable prerequisites for certifying a class action, the court shall dismiss the case. The case may be altered and refiled in State court, but if that amended case still meets Federal jurisdictional prerequisites, it may be removed again to Federal court. This results in a "merry-go-round," whereby defendants can endlessly remove the class action to Federal court.

Response: Critics of S. 353's remand provisions would alter the bill so that any time a case brought in or removed to a Federal court is dismissed for failing to meet the requirements of rule 23, a State court could then certify the case and allow it to proceed as a class action under the State's class action law. In short, these critics would guarantee that even though a Federal court has determined that a case cannot be certified as a class action, a State court could essentially consider all class issues anew.

Altering S. 353 in this manner would defeat a primary purpose of the bill—to allow the removal of more interstate class actions to Federal courts, where they are more appropriately heard. The revision suggested by critics would effectively write that change out of the statute. Under the proposed revision, if a Federal district court determines that a removed case should not be afforded class treatment, a State court (upon remand of the case) would be free to "overrule" the Federal court's ruling that class treatment would be inappropriate. Thus, in interstate class actions, *State courts*—not Federal courts—would become the final arbiters of what should proceed as a class action in our judicial system. This would essentially be a declaration that in interstate class actions, the Federal courts are inferior to State courts. This result runs counter to generally accepted concepts of federalism.

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[103] "Class Action Dilemmas," at 23.
[104] Id. at 28.

Furthermore, altering S. 353 in this manner would only aggravate the class action abuse already occurring in State courts. When a Federal district court denies class certification in a case, it is typically because litigating the case on a class basis would likely result in a denial of the purported class members' or the defendants' due process rights or run counter to basic fairness principles. This revision to the bill would invite State courts to overrule such Federal court determinations and, instead, advance class actions which have already been determined to deny due process rights or to be unfair to unnamed class members and/or defendants.

In short, this proposed change to the bill would cause S. 353 to preserve the status quo instead of improving it. In fact, the revision would create even more inefficiencies; even if a defendant were to defeat class certification and win in Federal court, the defendant would have to turn around and mount the fight all over again in State court.

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

Ultimately, concerns that a "merry-go-round" situation will arise because of the way S. 353 is drafted are simply an exaggeration. The Committee strongly believes that no judge—Federal or State—would allow such a situation to take place, and that a court would stop such bad-faith tactics. If this were to actually occur, it is more conceivable that a court would dismiss the complaint with prejudice and sanction the offending attorney.

IX. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 11, 2000.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 353, the Class Action Fairness Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Keith (for

the federal costs) and Patrice Gordon (for the private-sector impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

S. 353—Class Action Fairness Act of 2000

CBO estimates that implementing S. 353 would cost the federal district courts about $5 million a year. The bill would not affect direct spending or receipts, so pay-as-you procedures would not apply. S. 353 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. S. 353 would impose a new private-sector mandate, but CBO estimates that the direct cost of the mandate would fall below the annual threshold established in UMRA ($109 million in 2000, adjusted annually for inflation).

S. 353 would expand the types of class-action lawsuits that would be heard initially in federal district courts. As a result, 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 $17,000. 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. Thus, CBO estimates that implementing S. 353 would affect the courts' workload at a cost of about $5 million annually.

S. 353 also would require the Judicial Conference of the United States, the Federal Judicial Center, and the Administrative Office of the United States Courts to study the impact of the bill on the workload of the federal court system and to report to the Congress no later than one year after the bill's enactment. CBO estimates that this provision would cost less than $500,000 over the 2001–2002 period, subject to the availability of appropriated funds.

CBO also estimates that enacting this bill could increase the need for judges. Because the salaries and benefits of district court judges are considered mandatory, adding more judges would increase direct spending. But S. 353 would not—by itself—affect direct spending because separate legislation would be necessary to increase the number of judges. In any event, CBO expects that enacting the bill would not require any significant increase in the number of federal judges, so that any potential increase in direct spending from subsequent legislation would probably be less than $500,000 a year.

S. 353 would impose a new private-sector mandate on attorneys for the members of the plaintiff class in many class-action suits filed in or "removed" to federal courts. The bill would require class

counsels to make notifications and disclosures to the attorneys general of all states in which a class member resides (and, in certain circumstances, to the Attorney General of the United States) within 10 days after a proposed settlement is filed in court. The bill defines a proposed settlement as a settlement agreement regarding a class action that is subject to court approval and would be binding on the class. The required notices and disclosures would include a copy of the suit, a copy of the proposed settlement, a statement of class-members' rights, and certain other materials. In effect, class counsels would have to provide up to 51 copies of documents and materials related to information that they usually already possess about the case. Further, the provision may allow for the use of the Internet in making such disclosures. Thus, CBO estimates that the costs of complying with this mandate would fall well below the statutory threshold established in UMRA ($109 million in 2000, adjusted annually for inflation).

On August 18, 1999, CBO transmitted a similar cost estimate for H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999, as ordered reported by the House Committee on the Judiciary on August 3, 1999. The bills are similar and the cost estimates are nearly identical.

The CBO staff contacts for this estimate are Lanette J. Keith (for the federal costs), and Patrice Gordon (for the private-sector impact). This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

X. Regulatory Impact Statement

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 353 will not have significant regulatory impact.

XI. ADDITIONAL VIEWS OF SENATOR KOHL

I write separately to emphasize both my support for this proposal and my awareness that it still could benefit from additional modifications.

First, moving cases to Federal court is only one of a number of ways that S. 353 attempts to provide additional safeguards against serious class action abuses. The bill also mandates that class counsel provide State attorneys general and the Attorney General of the United States with notice of a class settlement. It further requires that class notice be provided in plain, easily understood language to ensure that plaintiffs understand their rights and responsibilities in a lawsuit.

To be sure, this bill is not perfect, but it does try to address some very real problems and does so in a way that will correct real injustices. Second, while this measure was clearly improved from introduction to markup, it could still be more balanced. For example, the bill was modified twice to make it more difficult to move some class action cases to Federal court. These changes—increasing the minimal dollar amount necessary to reach Federal court from $75,000 to $2 million and mandating that the class must contain at least 100 class members—were a good faith effort to address the stated concerns by the opponents of this legislation that too many cases would be moved to Federal court. In my opinion, even stronger principle of limitation are needed to determine which cases should—and should not be—shifted to Federal court. Unfortunately, rather than accepting our efforts as an invitation to make more helpful changes to the bill, opponents decided instead to offer "message" amendments that were destined to fail. It is my hope that before this bill becomes law, its opponents will work with us to address their concerns and isolate the problem cases.

Third, when this bill moves forward next Congress, we need to develop an approach to abusive "coupon" cases that is somewhere between our measure as introduced and as unilaterally modified by the full Committee. As introduced, the measure would have tied attorney's fees to the amount of actual recovery in the lawsuit. The motivation behind this provision was straightforward: cases where the attorneys receive several million dollars, yet the plaintiff class as a whole receives virtually worthless "coupons" to be used only in future purchases are a judicial outrage and need to be addressed.

For example, in a case against Bell Atlantic Mobile for deceptive billing practices, the settlement agreement entitled the class members to $15 vouchers redeemable on future purchases while the attorneys would receive $1.25 million.[1] In a case against General Electric Capital Auto Lease for lack of disclosure, the plaintiff at-

[1] "In Class Actions, a Litany of Frustrations," Washington Post, Nov. 14, 1999, A20.

torneys settled the case for coupons good only on the purchase of a new car leased through GE Capital. Plaintiffs were again forced to patronize the party they had just sued if they hoped to realize any damages in their settled case.[2]

In the interests of moving the measure through the Committee expeditiously, however, we dropped this provision entirely and substituted a study of the issue in its place. I am hopeful that we can carefully craft a more fine-tuned provision in the original bill that could address abusive coupon case settlement without destroying the incentives for attorneys to represent classes on a contingency fee basis.

HERB KOHL.

[2] "Coupons Create Cash for Lawyers," Washington Post, Nov. 14, 1999, A20.

XII. MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, BIDEN, FEINGOLD, AND TORRICELLI

We strongly oppose S. 353, the "Class Action Fairness Act of 2000." Although the legislation is described by some of its proponents as a simple procedural fix, it represents a major rewrite of the class action rules that would bar most forms of State class actions. S. 353 is opposed by the Justice Department,[1] both the State[2] and Federal[3] judiciaries, as well as consumer and public interest groups.[4]

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. In doing so, it will make it more difficult to protect our citizens against violations of the consumer health, safety and environmental laws, to name but a few important laws. The legislation goes so far as to prevent State courts from considering class action cases which solely involve violations of State laws, such as State consumer protection laws.

S. 353 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

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[1] See Letter from Robert Raben, Assistant Attorney General, U.S. Department of Justice, to Senator Leahy (June 9, 2000) [hereinafter DOJ views letter] stating that: "In sum, S. 353 would not solve any of the alleged class action abuses that are found in both Federal and State courts or enhance the fairness of class action proceedings. Instead, S. 353 would limit the availability of class actions as a viable remedy for those with bona fide claims who are unable to afford a suit of their own. It would infringe significantly on State courts' ability to offer redress and provide a convenient forum for their citizens. It would upset the careful balance of federalism by displacing State court litigation in class actions. It would expand the already overloaded Federal docket."

[2] See Letter from David A. Brock, president, Conference of Chief Justices (July 19, 1999) [hereinafter Conference of Chief Justices letter]. The Conference of Chief Justices wrote to Congress that this legislation "would unilaterally transfer jurisdiction of a significant category of cases from state to federal courts. So drastic a distortion and disruption of traditional notions of judicial federalism is not justified, absent clear evidence of the inability of the state judicial systems to process and decide class actions cases in a fair and impartial manner." The Conference on Chief Justices letter continued: "Our discussions on this issue within the Conference have failed to identify any systemic problems in state class action procedures. Rather, we have heard only anecdotes of isolated problems that are being addressed on an ongoing basis by state judicial and legislative bodies. We believe strongly that there is no rational basis for so drastic an invasion of state judicial prerogatives."

[3] See Letters from Leonias Ralph Mecham, secretary, Judicial Conference of the United States (July 26, 1999, and Aug. 23, 1999) [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 legislation).

[4] See Letters to Committee Members in opposition to S. 353 from American Cancer Society, American Heart Association, American Lung Association, American Medical Association, Asian-American Legal Defense Fund, Citizens for Corporate Accountability and Individual Rights, Clean Water Action, Coalition to Stop Gun Violence, Consumer Federation of America, Consumers Union, Disability Rights Education Fund, Earthjustice Legal Defense Fund, Friends of the Earth, Handgun Control, Inc., National Consumers League, National Council of La Raza, National Employment Lawyers Association, NOW Legal Defense Fund, Public Citizen, Save Lives, Not Tobacco Coalition, U.S. Public Interest Research Group, and Violence Policy Center.

any defendant.[5] The only exceptions provided in S. 353 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").[6] 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,[7] which has the effect of striking the class action claim.[8]

S. 353 will damage both the Federal and State courts. As a result of Congress' increasing propensity to federalize State crimes and the Senate's unwillingness to confirm judges, the Federal courts are already facing a dangerous workload crisis. By forcing resource intensive class actions into federal court, S. 353 will further aggravate these problems and cause victims to wait in line for years to obtain a trial. Alternatively, to the extent class actions are remanded to state court, the legislation effectively permits only case-by-case adjudications, potentially draining away precious State court resources.

We also object to the fact that the bill is written in a one-sided manner favoring corporate defendants at the expense of harmed victims. As Senator Biden eloquently stated during Committee consideration of the bill, S. 353 will make it "far less likely that class actions will be brought, far less likely that corporations will be deterred from taking action contrary to the public interest, and far less likely that businesses will redress injuries their products have inflicted. Consumers will suffer the consequences."[9]

Indeed, the recent national tire recall was started, in part, from the disclosure of internal corporate documents on consumer complaints of tire defects and design errors that were discovered in litigation against Bridgestone/Firestone, Inc. Plaintiff attorneys turned this information over to the National Highway Traffic Safety Administration, triggering a NHTSA investigation. On August 9, 2000, Bridgestone/Firestone recalled 6.5 million tires after they were linked to 88 deaths, 250 injuries and 1,400 crashes. And just this month, the NHTSA warned that another 1.4 million Firestone

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[5] S. 353, Sec. 3. 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 defendants 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.

[6] S. 353, Sec 3. 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.

[7] S. 353 Sec. 3.

[8] While the class action may be refiled again, any such refiled action may be remanded again if the district court has original jurisdiction.

[9] Written statement of Senator Biden, executive business meeting of the Committee, June 29, 2000.

tires on the road may be defective. It is doubtful that the internal corporate consumer complaint information would have ever seen the light of day absent the civil justice discovery process.[10]

We would also note that before even considering S. 353, the Senate should insist on receiving objective and comprehensive data justifying such a dramatic intrusion into State court prerogatives, since nothing in the way of such information now exists. In short, we agree with the position of National Conference of State Legislatures: "Anecdotal evidence of abuse might highlight a need for reform in a particular jurisdiction, reform that can and has been addressed outside the nation's capitol. Such anecdotes, however, are grossly insufficient reasons for a wholesale federal takeover of class action litigation. Lawsuits based on questions of State law should be decided in State courts by the judges who are best qualified to interpret and apply the laws of that State."[11]

For these and the other reasons set forth herein, we strongly oppose S. 353.

I. 353 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 S. 353 does, will inevitably result in a significant increase in the Federal courts' workload. In its letter to the Judiciary Committee, the Judicial Conference warned that "the effect of the class action provisions of [S. 353] would be to move virtually all class action litigation into the federal courts, thereby offending well-established principles of federalism [and] * * * hold[ing] the potential for increasing significantly the number of [class action] cases currently being litigated in the federal system."[12]

The workload problem in the Federal courts is already at an acute stage. In 1999, there were 71 judicial vacancies, or over 8 percent of the Federal judgeships. At year end, there were 260,318 civil cases pending in Federal courts. On average, Federal district court judges had 377 civil filings backlogged on their dockets—a 7 percent jump since 1995.[13] It is because of these workload problems that Chief Justice Rehnquist took the important step of criticizing Congress for taking actions which have exacerbated the federal judiciary's workload:

> In my annual report for [1998], I criticized the Senate for moving too slowly in the filling of vacancies on the Federal bench. This criticism received considerable public attention. 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. And yet the two are closely related: We need vacancies filled to

[10] See "Anatomy Of A Recall," Time, Sept. 11, 2000. On Sept. 20, 2000, the National Highway Traffic Safety Administration revised its estimates for accidents attributable to recalled Firestone tires to 101 fatalities, 400 injuries and 2,226 consumer complaints.

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

[12] See Judicial Conference letter, supra note 3.

[13] See Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the U.S. Courts (1999).

> deal with the cases arising under existing laws, but if 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.[14]

Judge Ralph K. Winter, Chief Justice of the second circuit, echoed these concerns when he complained, "[t]he political branches have steadily increased our federal question jurisdiction, have maintained an unnecessarily broad definition of diversity jurisdiction, and have then denied us resources minimally proportionate to that jurisdiction * * * The result is that a court with proud traditions of craft in decisionmaking and currency in its docket is now in danger of losing both."[15]

During the markup on S. 353, several members of the Committee expressed their grave concerns about the impact of this legislation on an already overburdened Federal court system. Senator Feinstein, for instance, noted that from 1991–1998, the average weighted caseload per district judge climbed 25 percent.[16] As Senator Feinstein noted, this workload increase will be amplified by federalizing State class actions, which consume five times as much judicial time as an average civil case,[17] ultimately making the caseload unmanageable for the current Federal judiciary. Indeed, the five border courts of Southern California, Arizona, New Mexico, West Texas, and South Texas, which currently handle 26 percent of all Federal criminal filings in the United States, would be particularly hard hit by S. 353.[18] Other Federal courts would be faced with similar workload problems under S. 353.

By federalizing State class actions, S. 353 runs precisely counter to Chief Justice Rehnquist's and Chief Judge Winters' admonition and risks severely aggravating the judicial workload crisis. Indeed, the Judicial Conference concluded that "when the additional, burdensome litigation resulting from [this legislation] is added to the already overcrowded dockets of Federal courts across our country, substantial backlogs and attendant delays can be expected."[19]

B. Impact on the State courts

In addition to overwhelming the Federal courts with new time intensive class actions, the legislation will undermine State courts. This is because in cases where the Federal court chooses not to certify the State class action, S. 353 prohibits the States from using class actions to resolve the underlying State causes of action. It is

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[14] Chief Justice William Rehnquist, An Address to the American Law Institute, "Rehnquist: Is Federalism Dead?" (May 11, 1998), in Legal Times (May 18, 1998). On May 27, 1999, Senator Leahy introduced S. 1145, the Federal Judgeship Act. It would create 69 new judgeships across the country to address the increased caseloads of the Federal judiciary. The bill is based on the recommendations of the Judicial Conference of the United States, the nonpartisan, policymaking arm of the judicial branch. The Committee has not acted on S. 1145.

[15] Annual report to the 2d Circuit Judicial Conference, presented June, 1998.

[16] Transcript of executive business meeting of the Committee, June 22, 2000, statement of Senator Feinstein at 22.

[17] Id at 23.

[18] At the June 29, 2000, executive business meeting of the Committee, Senator Feinstein offered an amendment to S. 353 that would provide 13 new judgeships for the Southwest border courts. Senators Leahy, Kennedy, Biden, Feinstein, Feingold, Torricelli, and Schumer voted for the amendment. All other members of the Committee voted against the amendment, with Senator Abraham passing.

[19] See Judicial Conference letter, supra note 3.

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, thousands upon thousands of new cases may be unleashed on the State courts. It is because of concerns such as these that the Conference of Chief Justices has called S. 353 an "unwarranted incursion on the principles of judicial federalism."[20]

In addition to these potential workload problems, the legislation raises serious constitutional issues. S. 353 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.[21]

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*[22] 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*[23] 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'"[24] and observed that judicial respect for the principal of federalism "is at its apex when we confront a claim that Federal law requires a State to undertake something as fundamental as restructuring the operation of its courts" and "it is a matter for each State to decide how to structure its judicial system."[25]

The Supreme Court's most recent decisions further indicate that S. 353 is an unacceptable infringement upon State sovereignty. In *United States* v. *Morrison,*[26] the court invalidated the Violence Against Women Act, claiming that Congress overstepped its specific constitutional power to regulate interstate commerce. Despite the existence of vast data showing the effects violence against women has on interState commerce, the Court essentially warned

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[20] See Conference of Chief Justices letter, supra note 2.

[21] See id.

[22] 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).

[23] 520 U.S. 911 (1997) (holding that Idaho procedural rules concerning appealability of orders are not preempted by 42 U.S.C. 1983).

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

[25] 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").

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

Congress not to extend its constitutional authority to "completely obliterate the Constitution's distinction between national and local authority." S. 353, however, ignores the Court's admonitions and rejects the Federal system by hindering the States' ability to adjudicate class actions involving important and evolving questions of State law. S. 353 not only obliterates the distinction between national and local authority, it effectively annihilates local authority over State class actions.

Additionally, support for S. 353 is misplaced. Arguments that class-action reform is justified because State courts are "biased" against out-of-State defendants in class action suits are vastly overstated.[27] 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,*[28] 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;[29] (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.[30]

Second, 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 toward limiting Federal diversity jurisdiction.[31] For example, Congress enacted the Federal Courts Improvement Act of 1996,[32] 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

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[27] 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.

[28] 472 U.S. 797 (1985).

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

[30] See id. at 806–810. These findings were reiterated by the Supreme Court in 1995 in *Matshusita Elec. Indust. Co.* v. *Epstein,* 516 U.S. 367 (1995) (holding that State class actions are entitled to full faith and credit so long as, inter alia: the settlement was fair, reasonable, 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).

[31] Ironically, during the 104th Congress the Republican Party was extolling the virtues of State courts in the context of their efforts to limit habeas corpus rights, which permit individuals to challenge unconstitutional State law convictions in Federal court. As Senator Biden stated during Committee consideration of S. 353: "[W]hy have my Republican friends who are such States' righters all of a sudden decided that there is such an egregious practice going on in their own States that their State court judges aren't competent to handle these cases? I don't quite get it. You all think they are competent enough to determine whether someone will be fried. You all think they are competent enough to determine whether or not habeas corpus be extended so that they can make that judgment in the States. You are confident that they can do it on life-and-death matters, but you are not sure they can do it relating to matters that they have been dealing with for 100 or 200 years. I think this is a solution looking for a problem." Transcript of executive business meeting of the Committee, June 29, 2000, statement of Senator Biden at 17.

[32] 28 U.S.C. 1332(a) (West Supp. 1998).

was no longer relevant[33] and that it was important to keep the Federal judiciary's efforts focused on Federal issues.[34]

II. S. 353 WILL HURT CONSUMERS, VICTIMS AND THE ENVIRONMENT

There can be little doubt that S. 353 will have a serious adverse impact on the ability of consumers and victims to obtain compensation in cases involving widespread harm. At a minimum, the legislation will force most State class action claims into Federal courts where it is 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. Fourteen States, representing nearly one-third of the Nation's population,[35] have adopted different criteria for class action rules than rule 23 of the Federal Rules of Civil Procedure.[36] 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 in recent years a series of adverse Federal precedent, such as *Castano* v. *American Tobacco Co.,*[37] *In re Rhone-Poulenc Rorer, Inc.,*[38] *In re American Medical Systems, Inc.,*[39] *Georgine* v. *Amchem Products, Inc.,*[40] *Broussard* v. *Meineke Discount Mufflers,*[41] and *Ortiz* v. *Fibreboard,*[42] have made it more difficult to establish the "predominance requirement" necessary to establish a class action under the Federal rules.

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

[34] See id.

[35] Three States still use their common law rules, rather than statutes, to permit class actions (Mississippi, New Hampshire, and Virginia); four States use Field Code based rules based on the "community of interest" test (California, Nebraska, South Carolina, and Wisconsin); and seven States use class action rules modeled on the original Federal rule 23 (1938) which creates a distinction among class members which depends on the substantive character of the right asserted (Alaska, Georgia, Louisiana, New Mexico, North Carolina, Rhode Island, and West Virginia). See 3 Herbert B. Newberg and Alba Conte, "Newberg on Class Actions," sec. 13.04 (3d ed.1992 and Supp. 1997).

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

[37] 84 F.3d 734 (5th Cir. 1996) (preventing the certification of a nationwide class action brought by cigarette smokers and their families for nicotine addiction where there was found to be too wide a disparity between the various State tort and fraud laws for the class action vehicle to be superior to individual case adjudication).

[38] 51 F. 3d 1293 (7th Cir. 1995), cert denied, 116 S. Ct. 184 (1995) (decertifying, under the *Erie* doctrine, a nationwide negligence class action brought on behalf of hemophiliacs infected with the AIDS virus through use of defendants' blood clotting products because of diversity of State laws).

[39] 75 F.3d 1069 (6th Cir. 1996) (decertifying a proposed plaintiff settlement class comprised of all U.S. residents implanted with defective or malfunctioning inflatable penile prostheses that were manufactured, developed, or sold by defendant company because common questions of law or fact did not predominate the action to such an extent that warranted class certification).

[40] 521 U.S. 591 (1997) (overturning consensual settlement between a class of workers injured by asbestos and a coalition of former asbestos manufacturers because of disparate levels of the class members' knowledge of their injuries and class member's large amount at stake in the litigation).

[41] 155 F.3d 331 (4th Cir. Aug. 19, 1998) (rejecting class certification brought by Meineke franchisees alleging violations of franchise, tort, unfair trade and other laws).

[42] 119 S.Ct. 2295 (1999). The Court found that mandatory limited fund class treatment under rule 23(b)(1)(B) is not appropriate unless the maximum funds available are clearly inadequate to pay all claims.

S. 353 also poses unique risks and obstacles for plaintiffs that they do not face under current law. Under S. 353, 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. 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.

Senator Feingold tried to address this merry-go-around problem with an amendment to S. 353 that would prevented "endless rounds of removals, dismissals, and remands."[43] The Feingold amendment required that class actions removed to Federal court and unable to satisfy the rule 23 class certification requirements be remanded to State court. If the claims before the State court were substantially identical to the original action, the case could not be removed under the amendment. This amendment would have alleviate some of unacceptable delays S. 353 would create for class action litigation. Unfortunately, the majority voted down this amendment to improve the bill.[44]

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[45] are new and undefined phrases with no antecedent in the U.S. Code or the case law. It will take many years and conflicting decisions before these critical terms can begin to be sorted out. Moreover, S. 353 would force Federal courts to interpret State consumer protection laws in almost all class actions involving State statutes relating to consumer fraud, consumer loans, consumer credit sales, deceptive trade practices, unlawful trade practices, or unfair and deceptive practices.[46]

Because of the special legal protections in S. 353, the tobacco and firearms industries may be able to avoid accountability for their products. For example, the bill's minimal diversity provision—which pushes all State-based claims to Federal court where at least one plaintiff and one defendant are from different States—guarantees that tobacco-related cases will end up in Federal court since the major tobacco companies are all headquartered in only one or two States while tobacco victims are nationwide. This removal is a great advantage to the tobacco industry, since Federal courts have been reluctant to certify classes of tobacco victims in class actions suits with emerging causes of action based on State tort law, which

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[43] Transcript of Committee executive business meeting, June 29, 2000, statement of Senator Feingold at 51.

[44] At the June 29, 2000, executive business meeting of the Committee, Senators Leahy, Kennedy, Biden, Feinstein, Feingold, Torricelli, and Schumer voted for the amendment. All other members voted in opposition, with Senator Abraham passing.

[45] S. 353, Sec. 2(b)(2).

[46] At the June 29, 2000 executive business meeting of the Committee, Senator Feingold offered an amendment to exclude from S. 353 these types of cases arising under State consumer protection laws. Unfortunately, the majority defeated this amendment. Senators Leahy, Kennedy, Biden, Feinstein, Feingold, Torricelli, and Schumer voted for the amendment. All other members voted in opposition, with Senator Abraham passing.

is traditionally developed by that State's court system.[47] S. 353 stifles this development, yet offers plaintiffs no protection from a Federal court understandably wary of creating state law.[48]

S. 353 will also hinder the consumer's ability to use class action litigation as a protective measure against the manufacturers of defective firearms. According to the Violence Policy Center and Handgun Control, Inc., class actions are the only method to force manufacturers of defective firearms to make guns safer because firearms are exempt from consumer safety laws.[49] Senators Torricelli and Feinstein recognized this need for local governments and citizens to have access to class action litigation and offered an amendment to carve out firearms-related causes of action from the provisions of S. 353. Unfortunately, the majority defeated this amendment.[50] By removing State class actions to Federal court, S. 353 will delay and restrict the only avenue available for consumers to hold firearms manufacturers accountable for their products.

Protection of the environment may also suffer as a result of S. 353. By removing many important environmental class actions from State to Federal court, S. 353 not only denies State courts the opportunity to interpret their own State's environmental protection laws, it hampers and deters plaintiffs from pursuing important environmental litigation. The well documented backlog in the Federal courts and the need for attorneys to engage in choice of law debates will significantly increase the time and cost of environmental litigation. Ultimately, environmental class actions may not get litigated and the incentive polluters have to keep our environment clean will be reduced.[51]

Under this bill, plaintiffs' attorneys may not be willing to take these high-risk, high-cost, and time-consuming cases, particularly when the judicial remedy sought is injunctive relief. This has the potential to leave our environment and the victims of reckless polluters unprotected by our civil justice system. This bill, intentionally or not, protects polluters and ignores the innocent victims of their negligence.[52]

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 actions.

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[47] See letters in opposition to S. 353 from the American Lung Association and American Medical Association.

[48] At the June 29, 2000, executive business meeting of the Committee, Senator Leahy offered an amendment to S. 353 that would carve out class actions involving claims against the tobacco industry. Senators Leahy, Kennedy, Biden, Feinstein, Feingold, Torricelli, and Schumer voted for the amendment. All other members voted in opposition, with Senator Abraham passing.

[49] Letter from the Violence Policy Center and Handgun Control, Inc. to Committee members.

[50] At the June 27, 2000 executive business meeting of the Committee, Senators Leahy, Kennedy, Biden, Feinstein, Feingold, Torricelli, and Schumer voted for the Torricelli-Feinstein amendment. All other members voted in opposition to the amendment, with Senator Abraham passing.

[51] At the June 29, 2000, executive business meeting of the Committee, Senator Leahy offered an amendment to S. 353 that would carve out claims arising under State environmental protection laws, including any claim under common law for injury to human health or the environment. Unfortunately, the majority defeated this amendment. Senators Leahy, Kennedy, Biden, Feinstein, Feingold, Torricelli, and Schumer voted for the amendment. All other members of the Committee voted against the amendment, with Senator Abraham passing.

[52] See letters in opposition to S. 353 from Friends of the Earth, Clean Water Action, Earthjustice Legal Defense Fund, and U.S. Public Interest Research Group.

III. S. 353 FAILS TO ADDRESS DEFENDANT AND OTHER ABUSES IN CLASS ACTION CASES

Rather than responding in an even-handed manner to the various concerns raised at the hearings by plaintiffs and defendants alike, S. 353 solely benefits defendants. S. 353 does nothing to deal with the problem of poorly written class action notices which cannot be understood, and it does nothing to deal with collusive settlements which protect defendants from future liability and coupon settlements which provide no tangible benefits to plaintiffs. Unfortunately, S. 353 completely ignores this problem, since changing the forum will not in any way improve the treatment of out-of-State or out-of-district class members.

Serious concerns have also been raised concerning abusive settlements. 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* [53] involved a class action in Federal court 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.[54] These cases reflect specific problems with individual judges rather than systemic problems with the States' handling of class actions. Any serious effort to reform class actions should address these issues, whether they arise at the federal or state level.[55]

CONCLUSION

S. 353 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. This legislation would seriously undermine the delicate balance between our Federal and State courts. Therefore, we urge the rejection of S. 353.

PATRICK LEAHY.
EDWARD KENNEDY.
JOSEPH BIDEN, Jr.
RUSSELL FEINGOLD.
ROBERT TORRICELLI.

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[53] 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).

[54] See also *Matsushita Elec. Indust. Co.* v. *Epstein,* 516 U.S. 367 (1995); *Grimes* v. *Vitalink Communications Corp,* 17 F.3d 1553, 1563–64 (3d Cir.), *cert denied*, 115 S. Ct. 480 (1994) (holding that a State court has the power to allow parties to comprehensive class action settlement to release exclusive Federal securities claims). But see *Nat'l Super Spuds* v. *New York Mercantile Exchange* 660 F.2d 9, 17–18 (2d Cir. 1981) (rejecting potato futures class action settlement in which parties sought to release claims for which they were not authorized to represent class members).

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

XIII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 353, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matters is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART I—ORGANIZATION OF COURTS

PART IV—JURISDICTION AND VENUE

CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.
1330. Actions against foreign states.
1331. Federal question.
1332. Diversity of citizenship; amount in controversy; costs.

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

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

* * * * * * *

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

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

shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

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

(d)(1) In this subsection, the terms "class", "class action", and "class certification order" have the meanings given such terms under section 1711.

(2) The district courts shall have original jurisdiction of any civil action where 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 to 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 members of all proposed plaintiff classes in the aggregate is less than 100.

(4) In any class action, the claims of the individual members of any class 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.

(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 conditions 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, but any such filed action may be removed 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 subsection 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 subsection 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 solely involving a claim that relates to—

(A) 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

(B) 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.

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

Sec.

§ 1446. Procedure for removal

(a) A defendant * * *

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

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

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§ 1452. Removal of claims related to bankruptcy cases

(a) A party * * *

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

§ 1453. Removal of class actions

(a) In this section, the terms "class", "class action", and "class member" have the meanings given such terms under section 1711.

(b) 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) This section shall apply to any class action before or after the entry of any order certifying a class.

(d) 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) This section shall not apply to any class action solely involving—

(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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PART V—PROCEDURE

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CHAPTER 114—CLASS ACTIONS

§ 1711. Definitions

In this chapter the term—

(1) "class" means a group of persons that comprise parties to a civil action brought by 1 or more representative persons;

(2) "class action" means a civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State statutes or rules of procedure authorizing an action to be brought by 1 or more representative persons on behalf of a class;

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

(4) "class member" means a person that falls within the definition of the class;

(5) "class counsel" means the attorneys representing the class in a class action;

(6) "plaintiff class action" means a class action in which class members are plaintiffs; and

(7) "proposed settlement" means a settlement agreement regarding a class action that is subject to court approval and would be binding on the class.

§ 1712. Application

This chapter shall apply to all plaintiff class actions filed in or removed to Federal court, except any such class action solely involving—

(1) claims 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) claims that relate 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) claims that relate 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).

§ 1713. Notification of class action certifications and settlements

(a) Not later than 10 days after a proposed settlement in a class action is filed in court, class counsel shall serve the State attorney general of each State in which a class member resides and the Attorney General of the United States as if such attorneys general and the Department of Justice were parties in the class action with—

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

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

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

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

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

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

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

(6) any final judgment or notice of dismissal;

(7)(A) if feasible the names of class members who reside in each State attorney general's respective State and the estimated proportionate claim of such members to the entire settlement; or

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

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

(b) A hearing to consider final approval of a proposed settlement may not be held earlier than 120 days after the date on which the State attorneys general and the Attorney General of the United States are served notice under subsection (a).

(c) Any court with jurisdiction over a plaintiff class action shall require that—

(1) any written notice provided to the class through the mail or publication in printed media contain a short summary written in plain, easily understood language, describing—

(A) the subject matter of the class action;

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

(C) 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

(D) any other material matter; and

(2) any notice provided through television or radio to inform the class members of the right of each member to be excluded from a class action or a proposed settlement, if such right exists, shall, in plain, easily understood language—

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

(B) explain that the failure of a person falling within the definition of the class to exercise such person's right to be excluded from a class action will result in the person's inclusion in the class action.

(d) Compliance with this section shall not provide immunity to any party from any legal action under Federal or State law, including actions for malpractice or fraud.

(e)(1) A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member resides in a State where the State attorney general has not been provided notice and materials under subsection (a).

(2) The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

(f) Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, State attorneys general or the Attorney General of the United States.

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