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INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999

SEPTEMBER 14, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING AND ADDITIONAL DISSENTING VIEWS

[To accompany H.R. 1875]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1875) to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE AND REFERENCE.

(a) SHORT TITLE.—This Act may be cited as the "Interstate Class Action Jurisdiction Act of 1999".

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

SEC. 2. FINDINGS.

The Congress finds that—

(1) as recently noted by the United States Court of Appeals for the Third Circuit, interstate class actions are "the paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, invite discrimination by a local State, and tend to attract bias against business enterprises";

(2) most such cases, however, fall outside the scope of current Federal diversity jurisdiction statutes;

(3) that exclusion is an unintended technicality, inasmuch as those statutes were enacted by Congress before the rise of the modern class action and therefore without recognition that interstate class actions typically are substantial controversies of the type for which diversity jurisdiction was designed;

(4) Congress is constitutionally empowered to amend the current Federal diversity jurisdiction statutes to permit most interstate class actions to be brought in or removed to Federal district courts; and

(5) in order to ensure that interstate class actions are adjudicated in a fair, consistent, and efficient manner and to correct the unintended, technical exclusion of such cases from the scope of Federal diversity jurisdiction, it is appropriate for Congress to amend the Federal diversity jurisdiction and related statutes to allow more interstate class actions to be brought in or removed to Federal court.

SEC. 3. JURISDICTION OF DISTRICT COURTS.

(a) EXPANSION OF FEDERAL JURISDICTION.—Section 1332 is amended by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively, and by inserting after subsection (a) the following:

"(b)(1) The district courts shall have original jurisdiction of any civil action which is brought as a class action and in which—

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

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

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

As used in this paragraph, the term 'foreign state' has the meaning given that term in section 1603(a).

"(2)(A) The district courts shall not exercise jurisdiction over a civil action described in paragraph (1) if the action is—

"(i) an intrastate case,

"(ii) a limited scope case, or

"(iii) a State action case.

"(B) For purposes of subparagraph (A)—

"(i) the term 'intrastate case' means a class action in which the record indicates that—

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

"(II) the substantial majority of the members of all proposed plaintiff classes, and the primary defendants, are citizens of the State in which the action was originally filed;

"(ii) the term 'limited scope case' means a class action in which the record indicates that all matters in controversy asserted by all members of all proposed plaintiff classes do not in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs, or a class action in which the number of members of all proposed plaintiff classes in the aggregate is less than 100; and

"(iii) the term 'State action case' means a class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

"(3) Paragraph (1) shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.

"(4) Paragraph (1) 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 that 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).".

(b) CONFORMING AMENDMENT.—Section 1332(c) (as redesignated by this section) is amended by inserting after "Federal courts" the following: "pursuant to subsection (a) of this section".

(c) DETERMINATION OF DIVERSITY.—Section 1332, as amended by this section, is further amended by adding at the end the following:

"(f) For purposes of subsection (b), a member of a proposed class shall be deemed to be a citizen of a State different from a defendant corporation only if that member is a citizen of a State different from all States of which the defendant corporation is deemed a citizen.".

SEC. 4. REMOVAL OF CLASS ACTIONS.

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

"§ 1453. Removal of class actions

"(a) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, but 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 of the action for which removal is sought, without the consent of all members of such class.

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

"(c) PROCEDURE FOR REMOVAL.—The provisions of section 1446(a) relating to a defendant removing a case shall apply to a plaintiff removing a case under this section. With respect to 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 who is not a named or representative class member of the action for which removal is sought files notice of removal no later than 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the court's direction.

"(d) EXCEPTIONS.—

"(1) COVERED SECURITIES.—This section shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.

"(2) INTERNAL GOVERNANCE OF BUSINESS ENTITIES.—This section 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 that 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).".

(b) REMOVAL LIMITATIONS.—Section 1446(b) is amended in the second sentence—

(1) by inserting ", by exercising due diligence," after "ascertained"; and

(2) by inserting "(a)" after "section 1332".

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

"1453. Removal of class actions.".

(d) APPLICATION OF SUBSTANTIVE STATE LAW.—Nothing in this section or the amendments made by this section shall alter the substantive law applicable to an action to which the amendments made by section 3 of this Act apply.

(e) PROCEDURE AFTER REMOVAL.—Section 1447 is amended by adding at the end the following new subsection:

"(f) If, after removal, the court determines that no aspect of an action that is subject to its jurisdiction solely under the provisions of section 1332(b) may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, it shall dismiss the action. An action dismissed pursuant to this subsection may be amended and filed again in a State court, but any such refiled action may be removed again if it is an action of which the district courts of the United States have original jurisdiction. In any action that is dismissed pursuant to this subsection and that is refiled by any of the 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 pursuant to this subsection that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed class action was pending.".

SEC. 5. APPLICABILITY.

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

SEC. 6. GAO STUDY.

The Comptroller General of the United States shall, by not later than 1 year after the date of the enactment of this Act, conduct a study of the impact of the amendments made by this Act on the workload of the Federal courts and report to the Congress on the results of the study.

PURPOSE AND SUMMARY

H.R. 1875 is intended to correct a technical flaw in the current Federal diversity-of-citizenship jurisdiction statute (28 U.S.C. § 1332)—the tendency of that statute to prevent interstate class actions from being adjudicated in Federal courts. These types of cases deserve Federal court access because they typically affect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit. The bill amends section 1332 to expand Federal court diversity jurisdiction over such cases, and modifies existing removal statutes to ensure that 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.

BACKGROUND AND NEED FOR THE LEGISLATION

The class action device is a necessary and important part of our legal system. It promotes efficiency by allowing plaintiffs with similar claims to adjudicate their cases in one proceeding; it also leads to the adjudication of homogeneous groups of smaller claims alleging harms to a large number of people, which would otherwise go unaddressed because the cost to individuals of suing would far exceed any possible benefit to the individual. However, in recent years class actions have been used with an increasing frequency

and in ways that do not promote the interests they were intended to serve.

Class action certification standards

Class actions were initially created in State courts of law and equity, and in 1849 became statutory with the advent of the Field Code, which several States adopted.[1] In 1938, a Federal class action rule was first enacted in the form of Federal Rule of Civil Procedure 23.[2] Rule 23 was substantially amended in 1966, and granted courts more flexibility in certifying class actions.[3]

The Field Code, the original Federal Rule 23 and amended Federal Rule 23 remain the three models for present-day State class action rules: 38 States have adopted amended Federal Rule 23 (sometimes with minor modifications); five still use rules modeled on the original Federal Rule 23;[4] and four still use Field Code-based class rules.[5] Three States still permit class actions at common law and have no formal class rules.[6]

Federal Diversity Jurisdiction

Article III of the Constitution empowers Congress to establish Federal jurisdiction over diversity cases—cases "between citizens of different States."[7] The grant of diversity jurisdiction was premised on concerns that State courts might discriminate against out-of-State defendants, particularly out-of-State *corporate* defendants.[8] It was feared that such discrimination would hinder the development and maintenance of effective interstate commerce. Since 1806, with some exceptions, the Federal courts have followed the rule of *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806), which states

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[1] The Field Code required numerous parties and a common interest in law or fact. It reads, in part: "[W]hen the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." See Newberg on Class Actions 3d Sec. 13–14 to 13–17 (1997).

[2] The original Rule 23 recognized three types of class actions: the "true" class action involving joint rights in which a class decision was res judicata; the hybrid category involving several rights relating to specific property; and the "spurious" class action involving several rights affected by common questions, as to which the result was res judicata only as to the parties actually joined. Testimony of John P. Frank, Senate Committee on the Judiciary, May 4, 1999.

[3] Current Rule 23 allows a matter to be brought as a class action in Federal court if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, one of the following must be shown: (1) the prosecution of separate actions by or against individual members of the class would create a risk of either inconsistent or varying adjudications which would establish incompatible standards of conduct for the party opposing the class, or 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 interests; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

[4] Alaska, Georgia, New Mexico, North Carolina, and Rhode Island.

[5] California, Nebraska, South Carolina, and Wisconsin.

[6] Mississippi, New Hampshire, and Virginia.

[7] Article III, section 2, states that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to controversies . . . between citizens of different States. . . ."

[8] See, e.g., *Pease* v. *Peck*, 59 U.S.(18 How.) 518, 520 (1856) ("The theory upon which jurisdiction in 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."); *Bank of United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

that Federal jurisdiction lies only where all plaintiffs are citizens of States different than all defendants. This is known as the "complete diversity" rule.[9] In a class action, only the citizenship of the named plaintiffs is considered for determining diversity, which means that Federal diversity jurisdiction will not exist if the named plaintiff is a citizen of the same State as the defendant, regardless of the citizenship of the rest of the class. See *Snyder* v. *Harris*, 394 U.S. 332 (1969). Congress has also historically imposed a monetary threshold—now $75,000—for Federal diversity claims. See 28 U.S.C. § 1332(a). However, the amount in controversy requirement normally is satisfied in a class action only if each of the class members individually seeks damages in excess of the statutory minimum. See *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973).[10]

Standards for Removal of Cases from State Courts

The general removal statute provides, *inter alia*, that any civil action brought in a *State* court of which U.S. district courts have original jurisdiction, may be removed by the defendant(s) to the appropriate Federal court. See 28 U.S.C. § 1441(a). Removal is based on the same general assumption as is diversity jurisdiction that an out-of-State defendant may become a victim of local prejudice in State court.[11]

A defendant must file for removal to Federal court within 30 days after receipt of a copy of the initial pleading (or service of summons if a pleading has been filed in court and is not required to be served on the defendant). See 28 U.S.C. § 1446(b). An exception exists beyond the 30-day deadline when the case stated by the initial pleading is not removable. If so, a notice of removal must be filed within 30 days of receipt by the defendant of "a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case [is removable]." In no event may a case where Federal jurisdiction is based on diversity be removed more than one year from commencement of the action. *Id.*

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[9] The *Strawbridge* decision construes the language of the 1789 Judiciary Act, not the limits of Article III diversity jurisdiction. The Supreme Court has regularly recognized that the decision to require complete diversity, and to set a minimum amount in controversy, are political decisions not mandated by the Constitution. See, e.g., *Newman-Green, Inc.* v. *Alfonzo-Larrian*, 490 U.S. 826, 829 n.1 (1989). It is therefore the prerogative of the Congress to broaden the scope of diversity jurisdiction to any extent it sees fit, as long as any two adverse parties to a lawsuit are citizens of different States. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530–31 (1967).

[10] Federal appellate courts are divided about *Zahn's* breadth and current vitality. For example, appellate courts do not agree about the extent to which punitive damages and other sorts of relief sought by all putative class members may be aggregated in order to satisfy the $75,000 jurisdictional amount requirement. Compare *Allen* v. *R. & H. Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995) (where multiple plaintiffs file a joint claim for punitive damages, the total sum claimed should be attributed to each individual plaintiff in determining whether each has satisfied the jurisdictional amount requirement); *Tapscott* v. *MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996) (same) with *Gilman* v. *BHC Securities, Inc.*, 104 F.3d 1418, 1428–1432 (2d Cir. 1997). Even more fundamentally, several Federal courts have ruled that Congress overruled *Zahn* by enacting the Judicial Improvements Act of 1990. See In re Abbott Laboratories, Inc., 51 F.3d 524, 527–29 (5th Cir. 1995); *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F.3d 928, 932 (7th Cir. 1996). Other Federal appellate courts have disagreed with these holdings. See *Leonhardt* v. *Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998); *Meritcare Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F.3d 214, 220–22 (3d Cir. 1999). The enactment of this bill will resolve these serious divisions among our Federal appellate courts about the state of the law in this arena and eliminate any ambiguities about congressional intent regarding the scope of Federal diversity jurisdiction over interstate class actions.

[11] See David P. Currie, Federal Jurisdiction at 140 (3rd ed. 1990).

Implications of jurisdictional requirements on interstate class actions

These jurisdictional statutes were originally enacted years ago, well before the modern class action arose. Their application in the class action context leads to perverse results. For example, under current law a citizen of one State may bring a diversity action in Federal court alleging a simple $75,001 slip-and-fall claim against a party from another State. But if a class of 25 million product owners living in all 50 States brings claims collectively worth $15 billion against the manufacturer, the lawsuit usually must be heard in State court, because each class plaintiff's claim does not satisfy the jurisdictional amount requirement and there is not complete diversity of citizenship. As several witnesses noted during the Committee's hearings on this legislation, if Congress were to enact an entirely new Federal diversity jurisdiction statute and consider anew which kinds of cases most warrant access to Federal courts, there would be little legitimate debate that interstate class actions would be at or near the top of the list. Those cases typically put the most money in controversy, involve the most people, and have the most interstate commerce ramifications. In short, they are the types of cases that most clearly fit the historic rationale for Federal diversity jurisdiction. Thus, it is an extreme anomaly that current law essentially excludes these cases from our Federal courts while allowing access to others.

These current rules can be used to game the system and keep interstate class actions out of Federal court. The Committee heard that attorneys often name irrelevant parties to class actions filed in State court in an effort to "destroy diversity" and keep the case from qualifying for Federal diversity jurisdiction. For example, a common practice by plaintiffs' attorneys is to recruit a plaintiff from the same State in which a corporate defendant is headquartered to serve as a named representative member of the class (even though the bulk of class members are from another State), thereby eliminating diversity between the litigants. Similarly, if in-State plaintiffs are listed on the pleadings, plaintiff attorneys will often sue a local manager, agent, or retailer of an out-of-State corporation to avoid complete diversity. Further, counsel make other statements about the case to keep the defendant from removing the case to Federal court (*e.g.*, "plaintiffs seek only a very small amount of money in this case "). After one year, however, the attorneys recant those statements or drop diverse parties, since at that point, current statutes bar removal of the case to Federal court.

The consequence of these jurisdictional limitations is not merely to eliminate the Federal forum for adjudication of interstate class actions. Because the alternative Federal forum is not available, considerable abuse of the class action device is occurring in many State courts. Some State courts are not properly supervising class settlements. The result is that class counsel become the primary beneficiaries of those settlements; the class members (the persons on whose behalf the actions were brought) get little or nothing—or in some cases, even worse. For example, the record contains testimony about one case in which class members had money deducted from their mortgage accounts in order to pay several million

dollars to the class counsel.[12] In short, the lawsuit that was supposed to vindicate the class members' rights resulted in their *losing* money. To make matters worse, when one class member tried to complain, the class counsel sued her for $25 million.[13]

Although class certification standards do not differ radically among Federal and State courts, some State courts have shown very lax attitudes toward class certification. The record indicates that some State court judges have certified classes before the defendant was even served with the complaint and given an opportunity to defend itself. Other State court judges simply do not rigorously apply the appropriate class certification prerequisites, such that they will afford class treatment to virtually any kind of case, even though doing so will trample the due process rights of the unnamed class members and/or defendants. Indeed, the record contains examples of cases in which Federal courts denied class certification based on due process concerns, but State courts subsequently certified classes anyway.[14]

Some State courts fail to recognize the power of the class device and the need to carefully control its usage. One witness at a Committee hearing noted that where class actions are not properly controlled by the courts handling them (as is often the case with State courts), there can be "the perverse result that companies that have committed no wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages." [15] And as another witness noted, "where businesses may be legitimately at fault, injured consumers receive little, while the plaintiffs' attorneys are enriched."

Because of the way in which they have overreached in the use of the class device, some State courts have effectively made themselves the arbiters of the laws of other States, raising serious federalism concerns. To facilitate the certification of nationwide or multi-State classes, some State courts have declared the laws of their forum to apply to all claims in the action, even where that home State law is inconsistent with the laws of other jurisdictions that should be applied.[16] Some years ago, the U.S. Supreme Court has declared this practice to constitute a denial of due process,[17] but it continues. In other nationwide or multi-State class actions,

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[12] Prepared Statement of Ralph G. Wellington, Esq., Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, "Mass Torts and Class Action Lawsuits" (March 9, 1998).

[13] Oral Statement of Sen. Herb Kohl, S. 353: "*The Class Action Fairness Act of 1999*," S. Hrg. No. J–106–22 (May 4, 1999).

[14] Prepared Statement of John W. Martin, Jr., Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, "Mass Torts and Class Action Lawsuits" (March 9, 1998).

[15] Prepared Statement of John L. McGoldrick, Esq., Senior Vice President and General Counsel, Bristol-Myers Squibb Company, Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, "Mass Torts and Class Action Lawsuits" (March 9, 1998).

[16] See the examples in the Prepared Statement of Hon. Walter E. Dellinger, III, Esq., Hearing before the House Comm. on the Judiciary, "H.R. 1875: The Interstate Class Action Jurisdiction Act of 1999" (July 21, 1999).

[17] *Shutts* v. *Phillips Petroleum Co.*, 472 U.S. 797 (1985).

a single State court decides the law of many other jurisdictions, effectively telling other States what their laws are with no input from the judiciaries of those other jurisdictions. Again, this practice means that a State court, which has no accountability to the residents of any other State, is dictating applicable laws to out-of-State residents.

Some State courts have effectively federalized procedural class action law as well. As Congressman James Moran testified at one Committee hearing, "[o]pportunistic lawyers have identified those States and particular judges where the class action device can be exploited." Essentially, there is a race to the bottom—class action lawyers find the State courts with the most lax attitude toward class actions and file their cases there. As a result, certain State courts hear a highly disproportionate amount of nationwide or multi-State class actions and thereby effectively dictate Federal class action policy (even though they have no charter to do so).

The current concentration of class actions in State courts is resulting in enormous waste and is putting class members' interests at risk. For example, with increasing frequency, counsel are filing overlapping or "copycat" class actions—cases that assert basically the same claims on behalf of basically the same class members. When such "copycat" cases are filed in various Federal courts, they may be consolidated before a single Federal judge through the multidistrict litigation provisions of 28 U.S.C. § 1407, thereby assuring consistent treatment of legal issues and uniform management of the cases. But when "copycat" class actions are filed in multiple State courts in multiple jurisdictions, they must be litigated separately—there is no consolidation mechanism. As a result, State courts and the counsel involved "compete" to control the cases, often to the detriment of the unnamed class members and defendants.[18] Counsel also use these "copycat" cases to "forum shop," presenting the same class certification and other issues to different courts, always trying to obtain better results than they achieved in another "copycat" case.

The lax attitudes of some State courts and those courts' ineffectiveness in managing class litigation has, not surprisingly, resulted in dramatic increases in the number of purported class actions being filed in State courts, according to data supplied to the Committee.[19] And also not surprisingly, the record suggests that many of those numerous new cases are of questionable merit. In interviews conducted for a study on class actions by the RAND Corporation's Institute for Civil Justice, many attorneys (including some plaintiffs' counsel) observed that "too many non-meritorious [class

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

[19] See 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); Deborah Hensler, et al. (Institute for Civil Justice), Preliminary Results of the RAND Study of Class Action Litigation, at 15 ("ICJ Report") (observing that the "doubling or tripling of the number of putative class actions" has been "concentrated in the state courts").

action lawsuits] are [being] filed and certified" for class treatment.[20]

Certification of interstate class actions under these circumstances is inconsistent with the constitutional theory of providing Federal diversity jurisdiction where there is the potential for discrimination against an out-of-State defendant. Yet, without the ability to remove these cases to Federal court, a defendant has no realistic opportunity to challenge the propriety of class certification. In many instances, the mere fact that a class is certified will determine the outcome of the case. Because the cases are brought on behalf of thousands (and sometimes millions) of claimants, the potential exposure for a defendant is enormous. As noted above, plaintiffs' counsel can use this potential exposure to coerce settlements that offer minimal benefits to the class members, but which result in hefty attorneys' fees. When a class action is heard in Federal court, an interlocutory appeal may be taken to challenge an order granting or denying class certification. See Fed.R.Civ.P. 23(f). This is not the case in many State courts; in those jurisdictions, a defendant who believes that class certification was improper in a case may not challenge the certification until having fully litigated the class action on its merits. When faced with the option of settling a case soon after certification or litigating a case to its conclusion, many times the economics of the situation leads defendants no logical choice but to settle non-meritorious claims.

The issues presented by the application of the current Federal jurisdiction rules in the class action context have been increasingly identified and criticized by the courts. For example, in *Davis* v. *Cannon Chevrolet-Olds, Inc.*, 1999 U.S. App. LEXIS 17040 (11th Cir. July 26, 1999), the Eleventh Circuit reluctantly remanded a large interstate class action in which counsel sued General Motors Acceptance Corp., alleging on behalf of a proposed nationwide class of thousands of vehicle owners that GMAC conspired to conceal the fact that when GM dealers sell extended vehicle warranties, they get part of the profit. The court concluded that since counsel had expressly limited each class member's damages demand to less than the $75,000 jurisdictional amount prerequisite, there was no basis for Federal diversity jurisdiction over the case. In so ruling, however, the appellate court noted that, as observed by the leading Federal civil procedure treatise (Wright & Miller), "[t]he traditional principles [regarding class action jurisdiction] have evolved haphazardly and with little reasoning" and "serve no apparent policy." The court therefore offered the following "apologia:"

> We acknowledge that this case and its kin present an anomaly in our law. 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. GMAC is an out-of-State corporate defendant facing a multimillion-dollar judgment—possibly tens or hundreds of millions, once the plaintiffs have waited out the one-year removal window and amend their complaint to seek punitive damages explicitly—in a State court system that has on occasion produced gigantic awards against out-of-State cor-

[20] *Id.*

> porate defendants. One would think that this case is exactly what those who espouse the historical justification for section 1332 would have had in mind, and that this fact would somehow color the statute's interpretation. *Id.* at *14–*15 (citations omitted).

Judge John Nangle, who chairs the Judicial Panel on Multidistrict Litigation, concurred, echoing criticisms about the way current jurisdictional statutes are applied to class actions:

> The case at hand is but one example of a growing trend in class action litigation in this country. Plaintiffs' attorneys are increasingly filing nationwide class actions in various State courts, carefully crafting language in the petitions or complaints in order to avoid the amount in controversy requirement of the Federal courts. Existing Federal precedent . . . mandates that this practice be permitted, although most of these cases in actuality will be disposed of through "coupon" or "paper" settlements. Actual monetary compensation rarely reaches the class members. Concurrently, and perhaps coincidentally, such settlements are 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 case law does not accommodate the reality of modern class action litigation and settlements. *Id.* at *18–*19 (citations omitted).

Within the past year, another Federal appellate court highlighted this problem. In an opinion by Judge Anthony Scirica (who chairs the Judicial Conference's Standing Committee on Rules and Procedure), the U.S. Court of Appeals for the Third Circuit observed that although "national (interstate) class actions are the paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local State, and tend to guard against any bias against interstate enterprises. . . . Yet . . . at least under the current jurisdictional statutes, such class actions may be beyond the reach of the Federal courts." *In re Prudential Ins. Co. America Sales Practice Litig.*, 148 F.3d 283, 305 (3d Cir. 1998).

Effect of H.R. 1875 on Existing Law

H.R. 1875 would amend the diversity jurisdiction and removal statutes applicable to class actions where there is a substantial risk of discrimination against out-of-State defendants. It amends 28 U.S.C. § 1332 to grant original jurisdiction in the Federal courts to hear interstate class actions where any member of the proposed class is a citizen of a State different from any defendant. (A change from "complete diversity" to "minimal diversity.") However, to ensure that cases that are truly local in nature are not swept into the Federal courts, the bill would exempt from its reach (1) *intrastate cases*—cases in which a "substantial majority" of the class members and defendants are citizens of the same State and the claims will be governed primarily by that State's law; (2) *limited scope cases*—cases involving fewer than 100 class members or where the aggregate amount in controversy is less than $1 million; and (3) *State action cases*—cases where the primary defendants are States or

State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

H.R. 1875 would also establish new rules governing the removal of class actions filed in State court. Existing removal procedures would apply, with four new features: (1) Unnamed class members (plaintiffs) would be allowed to remove to Federal court class actions in which their claims are being asserted. Under current rules, only defendants are allowed to remove. (2) Parties could remove without the consent of any other party. Current removal rules—which apply only to defendants—require the consent of all defendants. (3) Removal to Federal court would be available to any defendant, regardless of whether any defendant is a citizen of the State in which the action was brought. (4) The current bar to removal of class actions after one year would be eliminated, although the requirement that removal occur within 30 days of notice of grounds for removal would be retained.

Under H.R. 1875, if a removed class action is found not to meet the requirements for proceeding on a class basis, the Federal court would dismiss the action without prejudice. Plaintiffs would then be permitted to refile their claims in State court, presumably in a form amended either to fall within one of the types of class actions over which the district court is not to exercise jurisdiction, or one which could be maintained as a class action under Federal Rule 23. The refiled case would once again be eligible for removal if original Federal jurisdiction exists. The statute of limitations on individual class members' claims in such a dismissed class action would not run during the period the action was pending in Federal court, nor would that of claims in new class actions filed by the same named plaintiffs in the same State venue.

HEARINGS

The Committee held a hearing on H.R. 1875 on July 21, 1999. Testimony was received from eight witnesses, including a representative of the Department of Justice. In addition, the Subcommittee on Courts and Intellectual Property held an oversight hearing on the subject of mass torts and class actions on March 5, 1998, and a legislative hearing on legislation similar to H.R. 1875 (H.R. 3789, 105th Congress), on June 18, 1998.

COMMITTEE CONSIDERATION

On July 27 and August 3, 1999, the Committee met in open session and ordered favorably reported the bill H.R. 1875, with an amendment, by a recorded vote of 15 to 12, a quorum being present.

VOTE OF THE COMMITTEE

The following roll call votes occurred during Committee deliberation on H.R. 1875:

An amendment by Mr. Watt to the Goodlatte/Boucher amendment in the nature of a substitute to H.R. 1875 to eliminate all new removal authority for interstate class actions. The Watt amendment was defeated by a roll call vote of 11 to 15.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)			
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter			
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	11	15	

An amendment by Mr. Conyers, Mr. Berman, and Mr. Meehan to the Goodlatte/Boucher amendment in the nature of a substitute to H.R. 1875 to remand actions not certified as a class by a Federal court to State court, allow the State court to certify them, and prohibit removal to Federal court. The amendment was defeated by a roll call vote of 14 to 15.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)			
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	14	15	

An amendment by Mr. Watt to the Goodlatte/Boucher amendment in the nature of a substitute to H.R. 1875 to require removal to occur within the time provided by State law. The Watt amendment was defeated by a roll call vote of 5 to 12.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum		X	
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot			
Mr. Barr			
Mr. Jenkins			
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank			
Mr. Berman			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman			
Ms. Baldwin			
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	5	12	

An amendment by Ms. Jackson Lee to the Goodlatte/Boucher amendment in the nature of a substitute to H.R. 1875 to strike the text of the bill and instead authorize a study of class action cases to be conducted within 12 months after the date of enactment. The Jackson Lee amendment was defeated by a roll call vote of 8 to 14.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum		X	
Mr. Gekas			
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins			
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers			
Mr. Frank			
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	8	14	

An amendment by Mr. Nadler to the Goodlatte/Boucher amendment in the nature of a substitute to H.R. 1875 to carve out cases involving harm caused by a firearm or ammunition. The Nadler amendment was defeated by a roll call vote of 6 to 16.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins			
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers			
Mr. Frank			
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	6	16	

An amendment by Mr. Nadler to the Goodlatte/Boucher amendment in the nature of a substitute to H.R. 1875 to carve out cases involving health care providers. The Nadler amendment was defeated by a roll call vote of 7 to 16.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins			
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono		X	
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers			
Mr. Frank			
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	7	16	

An amendment by Ms. Waters to the Goodlatte/Boucher amendment in the nature of a substitute to H.R. 1875 to delay the effective date of the bill until the Judicial Conference certifies in writing to Congress that vacancies of Federal judgeships have fallen to less than 3 percent. The Waters amendment was defeated by a roll call vote of 10 to 13.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas			
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr			

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Jenkins			
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers			
Mr. Frank			
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	10	13	

Motion to report H.R. 1875 as amended by the amendment in the nature of a substitute, as amended. By a roll call vote of 15 yeas to 12 nays, the motion to report favorably was agreed to.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas			
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly	X		
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr			
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease			
Mr. Cannon	X		
Mr. Rogan	X		
Mr. Graham	X		
Ms. Bono	X		
Mr. Bachus	X		
Mr. Scarborough			
Mr. Vitter	X		
Mr. Conyers		X	
Mr. Frank			
Mr. Berman		X	
Mr. Boucher	X		

ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler		X	
Mr. Rothman		X	
Ms. Baldwin		X	
Mr. Weiner			
Mr. Hyde, Chairman	X		
Total	15	12	

COMMITTEE OVERSIGHT FINDINGS

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

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

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

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1875, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 18, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman, who can be reached at 226–2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

H.R. 1875—Interstate Class Action Jurisdiction Act of 1999.

H.R. 1875 would expand the types of class-action lawsuits that would be heard initially in Federal district court. As a result, most class-action lawsuits would be heard in Federal district court rather than State court, and the bill would impose additional costs on the U.S. 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, on average, about $17,000. This estimate includes discretionary costs for salaries and benefits for clerks, rent, utilities, and associated overhead expenses, and excludes the costs for the salaries and benefits of judges. Thus, CBO estimates that enacting H.R. 1875 could affect the courts' workload at a cost of about $5 million annually.

H.R. 1875 also would require the General Accounting Office 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 2000–2001 period, subject to the availability of appropriated funds.

CBO also estimates that enacting this bill could increase the need for additional judges. Because the salaries and benefits of district court judges are considered mandatory, adding more judges would increase direct spending. But H.R. 1875 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.

Because H.R. 1875 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to this bill. H.R. 1875 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments.

The CBO staff contact for this estimate is Susanne S. Mehlman, who can be reached at 226–2860. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

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

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1—Section 1 sets forth the short title of the bill—the "Interstate Class Action Jurisdiction Act of 1999"—and specifies that any reference to an amendment or repeal of existing law shall be a reference to a portion of Title 28 of the United States Code.

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

Section 3—Section 3 amends 28 U.S.C. § 1332 to create a new subsection 1332(b), granting original jurisdiction in the Federal courts over class action lawsuits in which (a) any member of the plaintiff class is a citizen of a State different than any defendant; (b) any member of the plaintiff class is a foreign state and any defendant is a citizen of a State; or (c) any member of the plaintiff class is a citizen of a State and any defendant is a citizen or subject of a foreign state. For purposes of this new section, the term "foreign state" is defined as in 28 U.S.C. § 1603(a).

Pursuant to new subsection 1332(b)(2)(A), the district courts are directed not to exercise this jurisdiction if the action is an intrastate case, a limited scope case, or a State action case. An intrastate case is defined as a class action in which the record indicates that the claims will be governed primarily by the law of the State in which it was originally filed, and the substantial majority of the plaintiff class members and the primary defendants are all citizens of that same State. A limited scope case is defined as a class action involving fewer than 100 class members or where the aggregate amount in controversy is less than $1 million (exclusive of interest and costs). A State action case is defined as a class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

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

Consistent with this overriding intent, the provisions of the new subsection 1332(b)(2)(A) should be read narrowly. A purported class action should be deemed an "intrastate case" that falls outside Federal jurisdiction only if virtually all members of all proposed classes are residents of a single State of which all "primary defendants" are also citizens. For example, a case in which a proposed class of 1000 persons sues a North Carolina citizen corporation presumably would fit the "intrastate case" definition if 997 of those persons were North Carolina citizens. (Of course, under the "intrastate case" definition, North Carolina law would have to govern virtually all claims and issues in the case as well.)

For purposes of the "intrastate case" carve out, the only parties that should be considered "primary defendants" are those who are the real "targets" of the suit; that is, the parties that would be expected to incur most of the loss if liability is found. For example, an executive of a corporate defendant who, in the interest of completeness, is named as a co-defendant in a class action against his

employer normally should not be deemed a "primary defendant." In most instances, the executive would not be the real "target" of the purported class action; his employer company would be. Moreover, no defendant should be considered a "primary defendant" for purposes of this analysis unless it is the subject of legitimate claims by *all* class members. To illustrate, if named as a defendant, a dealer, agent, or sales representative of a corporate defendant should not be deemed a "*primary* defendant" unless that dealer, agent, or sales representative is alleged to have actually participated in the purported wrongdoing with respect to all class members (*e.g.*, the defendant is alleged to have sold a purportedly defective product to all class members). Normally, 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."

Similarly, the "limited scope case" definition also should be interpreted narrowly. For example, if a court is uncertain as to whether "all matters in controversy" in a purported class action "do not in the aggregate exceed the sum or value of $1,000,000," the court should err in favor of exercising jurisdiction over the matter. The same is true in cases in which it is unclear whether "the number of members of all proposed plaintiff classes in the aggregate is less than 100." Further, Federal courts should be cautious to decline Federal jurisdiction under the "State action case" definition only where it is relatively clear that "States, State officials, or other governmental entities" are "primary defendants" against whom the "court may be foreclosed from ordering relief."

As to each of these definitions, it is the Committee's intention that the party *opposing* Federal jurisdiction shall have the burden of demonstrating the applicability of a carve out. For example, if a plaintiff seeks to have a purported class action remanded for lack of Federal diversity jurisdiction under the "limited scope case" provision, that plaintiff should have the burden of demonstrating that "all matters in controversy" do not "in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs" or that "the number of all proposed plaintiff classes in the aggregate is less than 100."

The act provides two exceptions to the grant of original jurisdiction over cases described in new subsection 1332(b). The first excepts from its reach any claims concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 or section 28(f)(5)(E) of the Securities Exchange Act of 1934. These claims are essentially claims against the officers of a corporation for a precipitous drop in the value of its stock, based on fraud. The Committee recognizes that Congress has previously enacted legislation governing the adjudication of these claims. See P.L. 104–67, the "Private Securities Litigation Reform Act of 1995," and P.L. 105–353, the "Securities Litigation Uniform Standards Act of 1998." So as not to disturb the carefully crafted framework for litigating in this context, claims involving covered securities are not included in the new section 1332(b) jurisdiction.

The second exception to the new section 1332(b) jurisdiction is for class actions solely involving claims that relate to matters of corporate governance arising out of State law. This exclusion recog-

nizes the peculiar advantages of the State courts in the adjudication of corporate governance cases, such as 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.

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

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

For purposes of this exception, the phrase "the internal affairs or governance of a corporation or other form of business enterprise" is intended to refer to the internal affairs doctrine which the United States Supreme Court has defined as "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders. . . ." *Edgar* v. *Mite Corp.*, 457 U.S. 624, 645 (1982). See also *Ellis* v. *Mutual Life Ins. Co.*, 187 So. 434 (Ala. 1939); *McDermott* v. *Lewis*, 531 A.2d 206, 214–15 (Del. 1987); *Draper* v. *Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 865–66 (Del. 1993); *NAACP* v. *Golding*, 679 A.2d 554, 559 (Ct. App. Md. 1996); *Hart* v. *General Motors Corporation*, 517 N.Y.S.2d 490, 493 (App. Div. 1987); *Amberjack, Ltd., Inc.* v. *Thompson*, 1997 WL 613676 (Tenn. App. 1997). The phrase "other form of business enterprise" in intended to include forms of business entities other than corporations, including, but not limited to, limited liability companies, limited liability partnerships, business trusts, partnerships and limited partnerships.

The exception to section 1332(b) jurisdiction created by the Act is also intended to cover disputes over the meaning of the terms of a security, which is generally spelled out in some formative document of the business enterprise, such as a certificate of incorporation or a certificate of designations. The reference to the Securities Act of 1933 contained in new section 1332(b)(4)(B) is for definitional purposes only. Since the law contains an already well-defined concept of a security, this provision simply imports the definition contained in the Securities Act.

Section 3(c) of the Act creates a rule of construction for determining under new section 1332(b) whether diversity of citizenship exists as to a corporate defendant. Current section 1332(c) provides that for purposes of diversity jurisdiction, a corporation is deemed to be a citizen of any State in which it is incorporated and of the State where it has its principal place of business. Thus, in many instances, the corporation is a citizen of more than one State. When applying new subsection (b), a plaintiff class member will be deemed a citizen of a State different from a defendant corporation

only if that member is a citizen of a State different from *all* States of which the defendant corporation is deemed a citizen.

Section 4—Section 4 of the Act governs the procedures for removal from State court of interstate class actions over which the Federal court is granted original jurisdiction by section 3. The general removal provisions currently contained in Chapter 89 of Title 28 would continue to apply to such class actions, except where 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 jurisdiction would subvert the intent of the Act by allowing a plaintiff to defeat removal jurisdiction by suing both in-State and out-of-State defendants. This would essentially perpetuate the current "complete diversity" rule in class actions that the new section 1332(b) rejects. The Act does not, however, disturb the general rule that a case may only be removed to the district court of the United States for the district and division embracing the place where the action is pending. See 28 U.S.C. § 1441(a).

New section 1453(a)(2) would permit removal by any plaintiff class member who is not a named or representative class member of the action for which removal is sought. Generally, removal by the plaintiff is not permissible, under the theory that as the instigator of the suit the plaintiff had the choice of forum from the outset. When a class action is filed, however, only the named plaintiffs and their counsel have control over the choice of forum; the vast majority of the real parties in interest—the unnamed class members on whose behalf the action is brought and the defendants—have no voice in that decision. This provision thus extends to those unnamed class members the same flexibility to choose the forum as offered to the defendant, by specifying that the provisions of section 1446(a) governing the removal of a case by a defendant shall apply equally to those plaintiffs. Also, by operation of new section 1453(a), removal may occur without the consent of any other party. This revision will combat collusiveness between a corporate defendant and a plaintiffs' attorney who may attempt to settle on the cheap in a State court at the expense of the plaintiff class members. Similarly, it will prevent a plaintiffs' attorney from recruiting a "friendly" defendant (a local retailer, for example) who has no interest in joining a removal action and may therefore thwart the legitimate efforts of the primary corporate defendant in seeking removal.

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

Section 4(b) amends current section 1446(b) to clarify that the one-year limit otherwise imposed on removal of suits filed pursuant to section 1332 has no application to class actions; that is, the bill permits a defendant to remove to Federal court more than one year after commencement of a suit in State court. This change to

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

Section 4(b) 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 corporate defendant may remove 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 4(b) strengthens this provision by requiring the party attempting to remove to Federal court to use "due diligence" when ascertaining whether the papers indicate that the case is removable. This will, among other things, prevent a disgruntled unnamed plaintiff from removing at the eleventh hour and interrupting a trial or undoing a legitimate (non-collusive) settlement.

Section 4(d) of the Act makes clear that nothing in the removal section of the bill changes the application of the *Erie* Doctrine to actions arising under diversity jurisdiction; that is, the standard rule in which a Federal court applies the substantive law dictated by applicable choice-of-law principles still holds. See *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

Section 4(e) amends 28 U.S.C. § 1447 to create a subsection (f) detailing the procedures governing cases removed to Federal court on the sole basis of section 1332(b) diversity jurisdiction. If the Federal court to which a case is removed determines that the case cannot be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedures, it is to dismiss the action. The action may be amended and refiled in Federal or State court, but if filed in a new State court it would be removable again if it falls within the original jurisdiction of the Federal court. 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. Federal and State court class certification standards typically do not differ radically. Thus, this approach would set a troubling (if not constitutionally suspect) precedent for allowing State courts to serve as points of appellate review of Federal court decisions. Further, 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 parties' due process rights, there should be no room

constitutionally for a State court to reach a different result on class certification issues. If a dismissed case is refiled by any of the same 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 an individual action is filed asserting claims that were asserted in a class action dismissed under this section, the statute of limitations will be deemed to have been tolled during the pendency of the dismissed class action, regardless of where it is filed.

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

Section 6. Mr. Delahunt offered an amendment, which the Committee approved by voice vote, to authorize the Comptroller General of the United States to conduct a study of the impact of the Act on the workload of the Federal courts. The Comptroller must submit his or her findings to Congress no later than one year after the date of enactment of the legislation.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

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CHAPTER 85—DISTRICT COURTS; JURISDICTION

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

(a) * * *

(b)(1) The district courts shall have original jurisdiction of any civil action which is brought as a class action and in which—

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

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

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

As used in this paragraph, the term "foreign state" has the meaning given that term in section 1603(a).

(2)(A) The district courts shall not exercise jurisdiction over a civil action described in paragraph (1) if the action is—

(i) an intrastate case,

(ii) a limited scope case, or

(iii) a State action case.

(B) For purposes of subparagraph (A)—

(i) the term "intrastate case" means a class action in which the record indicates that—

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

(II) the substantial majority of the members of all proposed plaintiff classes, and the primary defendants, are citizens of the State in which the action was originally filed;

(ii) the term "limited scope case" means a class action in which the record indicates that all matters in controversy asserted by all members of all proposed plaintiff classes do not in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs, or a class action in which the number of members of all proposed plaintiff classes in the aggregate is less than 100; and

(iii) the term "State action case" means a class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

(3) Paragraph (1) shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.

(4) Paragraph (1) 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 that 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).

[(b)**]** *(c)* Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts *pursuant to subsection (a) of this section* is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

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

(f) For purposes of subsection (b), a member of a proposed class shall be deemed to be a citizen of a State different from a defendant corporation only if that member is a citizen of a State different from all States of which the defendant corporation is deemed a citizen.

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

Sec.
1441. Actions removable generally

* * * * * * *
1453. Removal of class actions.

* * * * * * *

§ 1446. Procedure for removal

(a) * * *

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

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after 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*, by exercising due diligence,* 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.

§ 1447. Procedure after removal generally

(a) * * *

* * * * * * *

(f) If, after removal, the court determines that no aspect of an action that is subject to its jurisdiction solely under the provisions of section 1332(b) may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, it shall dismiss the action. An action dismissed pursuant to this subsection may be amended and filed again in a State court, but any such refiled action may be removed again if it is an action of which the district courts of the United States have original jurisdiction. In any action that is dismissed pursuant to this subsection and that is refiled by any of the 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 pursuant to this subsection that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed class action was pending.

* * * * * * *

§ 1453. Removal of class actions

(a) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, but 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 of the action for which removal is sought, without the consent of all members of such class.

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

(c) PROCEDURE FOR REMOVAL.—The provisions of section 1446(a) relating to a defendant removing a case shall apply to a plaintiff removing a case under this section. With respect to 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 who is not a named or representative class member of the action for which removal is sought files notice of removal no later than 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the court's direction.

(d) EXCEPTIONS.—

(1) COVERED SECURITIES.—This section shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.

(2) INTERNAL GOVERNANCE OF BUSINESS ENTITIES.—This section 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 that 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).

DISSENTING VIEWS

We strongly oppose H.R. 1875, the "Class Action Jurisdiction Act of 1998." Although the legislation is described by its proponents as a simple procedural fix, in actuality it represents a major rewrite of the class action rules that would bar most forms of State class actions. H.R. 1875 is opposed by the Justice Department,[1] both the State[2] and Federal[3] judiciaries, as well as consumer and public interest groups, including Public Citizen.[4]

By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation. This legislation will undercut that important principle by making it far more burdensome, expensive, and time-consuming for groups of injured persons to obtain access to justice. 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 involve solely violations of State laws, such as State consumer protection laws.

H.R. 1875 provides for the removal of State class action claims to Federal court in cases involving violations of State law where any member of the plaintiff class is a citizen of a different State than any defendant.[5] The only exceptions provided in H.R. 1875 are that Federal courts are directed to abstain from hearing a class

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[1] See *Hearing on H.R. 1875 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Eleanor D. Acheson, Assistant Attorney General, United States Department of Justice) [hereinafter Acheson testimony] (stating that "H.R. 1875 is ill-suited to serve its sponsors' purposes—solving problems with State court class action procedures. Instead, H.R. 1875's federalization of class actions would deny State residents a State forum . . . and overburden the Federal judiciary with class actions dealing solely with issues of State law. Because we disagree with a measure having these effects, the Department of Justice strongly opposes H.R. 1875.").

[2] See Letter from David A. Brock, President, Conference of Chief Justices (July 19, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter Conference of Chief Justices letter] (stating that "H.R. 1875, in its present form, is an unwarranted incursion on the principles of judicial federalism.").

[3] See Letters from Leonias Ralph Mecham, Secretary, Judicial Conference of the United States (July 26, 1999 & August 23, 1999) (letters on file with the minority staff of the House Judiciary Committee) [hereinafter Judicial Conference letter] (stating that on July 23, 1999, the Executive Committee of the Conference voted to express its opposition to the class action provisions in H.R. 1875).

[4] See *Hearing on H.R. 1875 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Brian Wolfman, Staff Attorney, Public Citizen) [hereinafter Wolfman testimony] (stating "H.R. 1875 is an unwise and ill-considered incursion by the Federal Government on the jurisdiction of the State courts. It works a radical transformation of judicial authority between the State and Federal judiciaries that is not justified by any alleged 'crisis' in State-court class action litigation.").

[5] H.R. 1875, § 3(b)(1). 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.

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 $1,000,000 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]

H.R. 1875 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, H.R. 1875 will further aggravate these problems and cause victims to wait in line for as much as three years or more to obtain a trial. Alternatively, to the extent class actions are remanded to State court, the legislation effectively only permits case-by-case adjudications, potentially draining away precious State court resources.

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. At previous hearings on this matter, the Committee received complaints that class action notices can be incomprehensible and that defendants offer "sweetheart" deals which payoff one class in order to eradicate future claims which were not even before the court. Yet H.R. 1875 does nothing to deal with these concerns.

We would also note that before even considering H.R. 1875, Congress 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.[9] The results of a pending study by the Rand Institute is expected by the end of this year. Contrary to assertions by some proponents, a report by the Federal Judiciary Mass Torts Working Group did not

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[6] H.R. 1875, § 3(b)(2). The legislation also excludes securities-related and corporate governance class actions from coverage and makes a number of other procedural changes, such as easing the procedural requirements for removing a class action to Federal court (*i.e.*, permitting removal to be sought by any plaintiff or defendant and eliminating the one-year deadline for filing removal actions) and tolling the statute of limitation periods for dismissed class actions.

[7] H.R. 1875 §§ 4(e).

[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] The most comprehensive study completed was the 1994/95 Judicial Center review of class actions which rebutted claims that class actions constituted frivolous "strike" suits and that attorneys were unreasonably benefitting from class action cases. See Willging, *et al.*, Empirical Study of Class Actions in Four Federal District Courts—Final Report to the Advisory Committee on Civil Rules (Federal Judicial Center 1996). Another study made a single recommendation regarding interlocutory appeals which has already taken effect. See Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Compiled by the Judicial Conference Advisory Committee on Civil Rules (recommending the allowance of interlocutory appeals of class certifications). The study made no recommendation regarding federalizing class actions. The other studies cited by H.R. 1875's supporters are incomplete and inconclusive. The so-called "Stateside" study cited by John Hendricks (on behalf of the Chamber of Commerce) and John Martin (on behalf of Ford) in their testimony during the 105th Congress only covers six Alabama's counties, and the problems found in the study have already been resolved by the Alabama Supreme Court (see *infra* note 67).

address the issues raised by this legislation, nor did it suggest any solutions to problems in mass tort litigation.[10]

For these and the other reasons set forth herein, we dissent from H.R. 1875.

I. H.R. 1875 Will Damage the Federal and State Court Systems

A. Impact on Federal Courts

Expanding Federal class action jurisdiction to include most State class actions, as H.R. 1875 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 [H.R. 1875] 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." [11]

The workload problem in the Federal courts is already at an acute stage. In 1998, 69 judicial vacancies existed, or approximately 8 percent of the Federal judicial positions. At year end, on average, Federal district court judges had some 400 civil filings backlogged on its docket.[12] It is because of these and other workload problems that Chief Justice Rehnquist took the important step of criticizing Congress for taking actions which have exacerbated the courts' workload problem:

> In my annual report for last year, 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 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.[13]

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 propor-

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[10] See Judicial Conference letters, *supra* note 3. In its letters to the Judiciary Committee expressing concern with H.R. 1875, the Judicial Conference suggested that further deliberate study of the complicated issues raised by class actions and mass tort litigation was needed. Although the Committee accepted an amendment offered by Representatives Waters and Delahunt authorizing a GAO study on the legislation's impact on the workload of the Federal courts, we were disappointed that the Committee rejected, on a largely partisan vote, an amendment by Representative Jackson-Lee which would have substituted the current language in H.R. 1875 with an in depth study of the current use of class actions.

[11] See August 23, 1999 Judicial Conference letter, *supra* note 3.

[12] See Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the United States Courts (1998).

[13] Chief Justice William Rehnquist, An Address to the American Law Institute, *Rehnquist: Is Federalism Dead?* (May 11, 1998), in *Legal Times* (May 18, 1998).

tionate to that jurisdiction . . . The result is that a court with proud traditions of craft in decision-making and currency in its docket is now in danger of losing both."[14] By federalizing State class actions, H.R. 1875 runs precisely counter to Chief Justice Rehnquist's and Chief Judge Winters' admonition and risks severely aggravating the judicial workload crisis.

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, H.R. 1875 prohibits the States from using class actions to resolve the underlying State causes of action. It is important to recall the context in which this legislation arises—a class action has been filed in State court involving numerous State law claims, each of which if filed separately would not be subject to Federal jurisdiction (either because the parties are not considered to be diverse or the amount in controversy for each claim does not exceed $75,000). When these individual cases are returned to the State courts upon remand, 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 H.R. 1875 an "unwarranted incursion on the principles of judicial federalism."[15]

In addition to these potential workload problems, the legislation raises serious constitutional issues. H.R. 1875 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.[16]

In this regard, the courts have previously found that efforts by Congress to dictate such State court procedures implicate important Tenth Amendment federalism issues and should be avoided. For example, in *Felder* v. *Casey*[17] 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*[18] 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'"[19] 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

[14] Annual report to the 2nd Circuit Judicial Conference, presented June, 1998.
[15] See Conference of Chief Justices letter, *supra* note 2.
[16] See *id.*
[17] 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).
[18] 520 U.S. 911 (1997) (holding that Idaho procedural rules concerning appealability of orders are not preempted by 42 U.S.C. § 1983).
[19] *Id.* at 919 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).

courts" and "it is a matter for each State to decide how to structure its judicial system."[20]

These same constitutional concerns were highlighted by Professor Laurence Tribe in his testimony regarding the constitutionality of a proposed Federal class action rule applicable to State courts included in tobacco legislation proposed during the 105th Congress. He observed, "[f]or Congress directly to regulate the procedures used by State courts in adjudicating State-law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism."[21]

Arguments that H.R. 1875 is nonetheless justified because State courts are "biased" against out-of-State defendants in class action suits are vastly overstated.[22] 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*,[23] 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;[24] (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.[25]

Secondly, it is important to note that as fears of local court prejudice have subsided and concerns about diverting Federal courts from their core responsibilities increased, the policy trend in recent years has been towards *limiting* Federal diversity jurisdiction.[26]

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[20] *Id.* at 922. See also *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954) for the proposition that Federal law should not alter the operation of the State courts); *New York* v. *United States*, 505 U.S. 144, 161 (1992) (stating that a law may be struck down on federalism grounds if it "commandeer[s] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program"); *Printz* v. *United States*, 117 S.Ct. 2365 (1997) (invalidating portions of the Brady Handgun Violence Protection Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

[21] *The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School).

[22] 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.

[23] 472 U.S. 797 (1985).

[24] 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)).

[25] 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).

[26] 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. At that time Chairman Hyde stated:

> I simply say the State judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest

Continued

For example, Congress enacted the Federal Courts Improvement Act of 1996,[27] which *increased* the amount in controversy requirement needed to remove a diversity case to Federal court from $50,000 to $75,000. This statutory change was based on the Judicial Conference's determination that fear of local prejudice by State courts was no longer relevant[28] and that it was important to keep the Federal judiciary's efforts focused on Federal issues.[29] The American Law Institute has also recently found "there is no longer the kind of prejudice against citizens of other States that motivated the creation of diversity jurisdiction,"[30] and a Federal Courts Study Committee report concluded that local bias "is no longer a major threat to litigation fairness" particularly when compared to other types of prejudice that litigants may face, such as on account of religion, race or economic status.[31] Indeed, in 1978, the House twice passed legislation that would have completely abolished general diversity jurisdiction.[32]

Thirdly, as the legislation is currently written, it assumes a defendant will be automatically subject to prejudice in any State where the corporation is not formally incorporated (typically Delaware) or maintains its principal place of business. In so doing, H.R. 1875 ignores the fact that many large businesses have a substantial commercial presence in more than one State, through factories, business facilities or employees. For example, if General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees, it does not seem reasonable to expect the defendants to face any great risk of bias.[33] Similarly, if the Disney Corporation, one of Florida's largest employers, were to face a class action brought by a class of plaintiffs in a Florida court, it would make little sense to involve the Federal courts of concern of local prejudice.[34] Yet

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> . . . when the judge raises his hand, State court or Federal court, they swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, *ipso facto*, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

142 Cong. Rec. H3604. (daily ed. April 18, 1996).

[27] 28 U.S.C. § 1332(a) (West Supp. 1998).

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

[29] See *id.*

[30] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 101, 106 (1996).

[31] See Federal Courts Study Committee, Report of the Federal Courts Study Committee 40 (April 2, 1990). See also, Ball, *Revision of Federal Diversity Jurisdiction*, 28 Ill. L. Rev. 356 (1988); Bork, *Dealing with the Overload in Article III Courts*, 1976, 70 F.R.D. 231, 236–237 (1976); Butler & Eure, *Diversity in the Court System: Let's Abolish It*, 11 Va.B.J. 4, (1995); Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 Brookings Rev. 34 (1992); Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 1–49 (1968); Feinberg, *Is Diversity Jurisdiction An Idea Whose Time Has Passed?*, N. Y. St. B. J. 14 (1989); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Corn. L. Q. 499 (1928); Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. Pa. L. Rev. 1097 (1931); Haynsworth, Book Review, 87 Harv. L. Rev. 1082, 1089–1091 (1974); Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. Rev. 347 (1978); Jackson, *The Supreme Court in the American System of Government*, 38 (1955); Sheran & Isaacman, *State Cases Belong In State Courts*, 12 Creighton L. Rev. 1 (1978).

[32] See 124 Cong. Rec. 5008 (1978); 124 Cong. Rec. 33, 546 (1978). The legislation was not considered in the Senate.

[33] General Motors and Ford both have their principal place of business in Michigan and are incorporated in Delaware.

[34] Disney's corporate headquarters are located in Burbank, California, and it is incorporated in Delaware.

under H.R. 1875, both of these hypothetical cases would be subject to removal to Federal court.

II. H.R. 1875 Will Weaken Enforcement of Laws Concerning Consumer Health and Safety, the Environment, and Civil Rights

There can be little doubt that H.R. 1875 will have a serious adverse impact on the ability of consumers and other harmed individuals to obtain compensation in cases involving widespread harm. At a minimum, the legislation will force most State class action claims into Federal courts where it is likely to be far more expensive for plaintiffs to litigate cases and where defendants could force plaintiffs to travel long distances to attend proceedings.

It is also likely to be far more difficult and time consuming to certify a class action in Federal court. 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] and *Broussard* v.

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[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 § 13.04 (3d ed.1992 & 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.

After meeting the above prerequisites, the class action will not be certified unless it fits into one of three categories. Under 23(b)(1), a class action will be allowed if individual lawsuits by or against the members of the class would create the risk of inconsistent decisions, or the impairment of the interests of members of the class who are not a party to the suit. Rule 23(b)(2) certifies class actions for civil rights cases where the entire class is being discriminated against and an injunction or declaratory relief is sought. Under 23(b)(3), a class action will be certified if the common questions of fact and law to members of the class predominate over any questions that affect only individual members, and a class action suit is the superior model for fair and efficient adjudication. This is the most popular method of certification because the requirements imposed are the least restrictive.

[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 members' large amount at stake in the litigation).

Meineke Discount Mufflers,[41] have made it more difficult to establish the "predominance requirement" necessary to establish a class action under the Federal rules. Just this June, in *Ortiz* v. *Fibreboard*,[42] the Supreme Court again invalidated a so-called "limited fund" asbestos settlement agreement on technical grounds.[43]

Further, as noted above, H.R. 1875 will result in substantial delay before civil class action claimants are able to obtain a trial date in Federal court. Given the current backlog in the Federal courts[44] and the fact that the Federal courts are obligated to resolve criminal matters on an expedited basis before civil matters,[45] even where plaintiffs are able to successfully certify a class action in Federal court, it is likely to take longer to obtain a trial on the merits than it would in State court.

H.R. 1875 also poses unique risks and obstacles for plaintiffs that they do not face under current law. Under H.R. 1875, 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.[46] 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.

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[47] are new and undefined phrases with no antecedent in the United States Code or the case law. It will take many years and conflicting decisions before these critical terms can begin to be sorted out. Moreover, since H.R. 1875 fails to provide for any interlocutory appeal, it will be impossible for litigants to obtain any meaningful guidance from the Federal appellate courts regarding these terms.

The net result is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the State or Federal level. The types of cases affected by this legislation range from consumer fraud and health and safety to environmental and civil rights actions. The following are examples of important class actions previously brought at the State level, but which could have been forced into Federal

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[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).

[43] 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.

[44] See *supra* note 13 through 15 and accompanying text.

[45] Speedy Trial Act of 1974, 18 U.S.C. § 3161–3174 (1994).

[46] In this regard, it is unfortunate the Majority rejected an amendment offered by Representatives Conyers, Berman and Meehan which would have largely eliminated the federalism problem by amending the bill to simply allow the Federal courts the first opportunity of certifying a class action, but not to deny State court jurisdiction over the class action if the court determined it did not meet Federal requirements. This would have responded to the most serious complaint leveled by corporate defendants, that class actions encourage a race to the court house by permitting the Federal courts to use their powers to consolidate class actions into a single forum in the appropriate circumstances.

[47] H.R. 1875, § 2(b)(2).

court under H.R. 1875, where the actions may be delayed or rejected:

- Foodmaker Inc., a Delaware corporation and the parent company of Jack-in-the-Box restaurants, agreed to pay $14 million in a State class-action settlement involving a violation of Washington's negligence law. The class included 500 people, mostly children and Washington residents, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli 0157:H7 bacteria. The victims suffered from a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died.[48]
- Equitable Life Assurance Company, an Iowa corporation, agreed to a $20 million settlement of two class-action lawsuits involving 130,000 persons filed in Pennsylvania and Arizona State courts. The class action alleged that Equitable misled consumers, in violation of State insurance fraud law, when trying to sell "vanishing premium" life insurance policies in the 1980s. Equitable sold the policies when interest rates were high, informing potential customers that after a few years, once the interest generated by their premiums was sufficiently high, their premium obligations would be terminated. However, when interest rates dropped, customers ended up having to continue to pay the premium in full.[49]
- On July 26, 1993, a California plant operated by General Chemical, a Delaware corporation with offices in New Jersey, erupted leading to a hazardous pollution cloud when a valve malfunctioned during the unloading of a railroad tank car filled with Oleum, a sulfuric acid compound. The cloud settled directly over North Richmond, California, a heavily-populated community, resulting in over 24,000 residents needing medical attention. General Chemical entered into a settlement for violation of California negligence law with 60,000 North Richmond residents who were injured or sought treatment for the effects of the cloud, or were forced to evacuate their homes. Individual plaintiffs received up to $3,500 in compensation.[50]
- On April 21 of this year, Nationwide entered into a State class action settlement concerning a redlining discrimination claim with the Toledo, Ohio Fair Housing Center. The lawsuit had been brought in Ohio State court by residents living in Toledo's predominately black neighborhoods, and charged that Nationwide redlined African-American neighborhoods by discouraging homeowners in minority neighborhoods from buying insurance and by denying coverage to houses under a certain value or a certain age. As a result of the settlement, Nationwide agreed to modify its underwriting criteria, increase its agency presence, step up its marketing in Toledo's black neighborhoods. Nationwide also agreed to place up to

[48] The settlement was approved on 25 September 1996 in King County, Washington Superior Court. "Last Jack in the Box Suit Settled," *Seattle Times*, October 30, 1997 at B3.

[49] See David Elbert, "Lawsuits to Cost Equitable $20 Mill," *Des Moines Register*, July 19, 1997 at 12 and "Cost of Settling Lawsuits Pulls Equitable Earnings Down," *Des Moines Register*, August 6, 1997 at 10.

[50] See Mealey's Litigation Reports: *Toxic Torts, $180 Million Settlement of Toxic Cloud Claims Wins Judges* O.K., November 17, 1995 at 8.

$2 million in an interest-bearing account to provide compensation to qualified class members, and agreed to deposit $500,000 with a bank willing to offer low-interest loans to residents buying homes in Toledo's black neighborhoods.[51]

III. H.R. 1875 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, H.R. 1875 solely benefits defendants. H.R. 1875 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.

Numerous concerns were voiced at the hearings that class action notices can be incomprehensible to potential plaintiffs with opt-out rights. In previous testimony, Public Citizen observed that the notice in the John Hancock deceptive sales practice class action[59] was "impenetrable [and] would make it much less likely that deserving claimants would, in fact, pursue their claims for redress."[60] Similarly, class action expert Ralph Wellington testified that "class notices should be written in plain language. It is possible to tell how much money class counsel will receive, and where that money will come from."[61] Unfortunately, H.R. 1875 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.[62]

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*[63] involved a class action case which as filed was based only on misrepresentations to customers regarding future premiums, but as settled, released defendants from all claims concerning abusive sales practices.[64] These cases reflect specific problems with individual judges rather than systemic problems with the States' handling of class actions, and

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[51] See *Toledo Fair Hous. Ctr.* v. *Nationwide Mut. Ins. Co.*, No CI93–1685, Ohio Comm. Pls, Lucas County; see also "Nationwide and Ohio Fairhousing Announce Attempt to Settle Class Action," *Mealey's Insurance Law Weekly*, April 27, 1998 at 3.

[59] *Oversight Hearing on Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary*, 105th Cong. (1998) (statement of Brian Wolfman, Staff Attorney, Public Citizen).

[60] *Id.*

[61] *Id.* (statement of Ralph Wellington).

[62] See Acheson testimony, *supra* note 1, at 6. A related case was settled in early 1998 after two years of litigation in State court between Nationwide and the Lexington, Kentucky Fair Housing Council. See *Lexington Fair Hous. Council, Inc.* v. *Nationwide Mut. Ins. Co.*, No. 96–365, E.D. Ky, Lexington Div.

[63] 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).

[64] 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).

any serious effort to reform class actions should address these issues, whether they arise at the Federal or State level.[65]

CONCLUSION

H.R. 1875 will remove class actions involving State law issues from State courts—the forum most convenient for victims of wrongdoing to litigate and most familiar with the substantive law involved—to the Federal courts—where the class is less likely to be certified and the case will take longer to resolve. In our view, this incursion into State court prerogatives is no less dangerous to the public than many of the radical forms of "tort reform" and "court stripping" legislation previously rejected by the Congress and the Administration.

Contrary to supporters' assertions, H.R. 1875 will not serve to prevent State courts from unfairly certifying class actions without granting defendants an opportunity to respond. This is already barred by the Constitution,[66] and the few State court trial court decisions to the contrary have been overturned.[67] H.R. 1875 also cannot be seen as merely prohibiting nationwide class actions filed in State court. The legislation goes much further and bars State class actions filed solely on behalf of residents of a single State, which solely involve matters of that State's law, so long as one plaintiff resides in a different State than one defendant—an extreme and distorted definition of diversity which does not apply in any other legal proceeding.

This legislation would seriously undermine the delicate balance between our Federal and State courts. At the same time it would threaten to overwhelm Federal courts by causing the removal of resource intensive State class action cases to Federal district courts, it also will increase the burdens on State courts as class actions rejected by Federal courts metamorphasize into numerous additional individual State actions. We urge H.R. 1875's rejection.

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HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MARTIN T. MEEHAN.
ROBERT WEXLER.
TAMMY BALDWIN.
BARNEY FRANK.
ROBERT C. SCOTT.
ZOE LOFGREN.
MAXINE WATERS.

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[65] 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).

[66] See *supra* notes 24–26 and accompanying text.

[67] See Ex Parte State Mut. Ins. Co., 715 So.2d 207 (Ala. 1997); Ex Parte Am. Bankers Life Assurance Co. of Florida, 715 So.2d 207 (Ala. 1997) (holding that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied).

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ADDITIONAL DISSENTING VIEWS

In addition to the general policy concerns we have with H.R. 1875, as reflected in the dissenting views signed by the other Members of the Minority, we also oppose this legislation because of the specific adverse impact it would have on the ability of injured persons to obtain redress for harms caused by the tobacco industry, the gun industry, and the managed care industry. All three of these industries are in the initial stages of being brought to justice pursuant to a series of State class action suits, which would become far more difficult, if not impossible, to bring under H.R. 1875. In addition, all three industries face serious legislative challenges at the Federal and State level, and we believe it is inappropriate for Congress to provide them with unilateral new legal entitlements in the class action area.

Unfortunately, when Democrats offered three separate amendments which would have carved out the tobacco, gun, and managed care industries from the legal protections provided under H.R. 1875, each was rejected by the Republican Majority. Although the Majority claimed it was inequitable to carve out any particular industry from the scope of the bill, there is ample precedent for excluding particular industry segments from liability legislation,[1] and there is no reason not to permit comparable exclusions in this legislation. For these and the other reasons set forth herein, we offer these additional dissenting views.

I. Impact on the Tobacco Industry

H.R. 1875 would allow tobacco companies to remove State class actions involving State causes of action to Federal court. In fact, since the major tobacco companies are all domiciled in States where class actions are *not* being brought, "minimal diversity" as defined by this bill will always exist between the plaintiffs and the tobacco companies. H.R. 1875, therefore, effectively grants the tobacco industry a free pass to Federal court where it will be much more difficult for plaintiffs to prevail in class action cases. This is why it is strongly opposed by over 70 consumer and public health

[1] Examples of other Republican-supported carve-outs include: (1) H.R. 1875, itself, which carves out an exception for lawsuits brought under the Securities Act of 1933 and 1934 and claims relating to internal governance of business entities (see H.R. 1875, § 4); (2) the Y2K bill recently signed by the President excludes any losses for personal injury or death from the bill's provisions and excludes large businesses from the punitive damage caps (see Pub. L. 106–32); (3) "The Biomaterials Access Assurance Act of 1998," which carves out exceptions for breast implant lawsuits and lawsuits by health care providers (see Pub. L. 105–230, § 3); (4) the 104th Congress' conference report on H.R. 956, the "Common Sense Product Liability Legal Reform Act of 1996," which carves out an exception from the bill's provisions for lawsuits for "commercial losses" (see H.R. Conf. Rep. No. 481, 104th Cong., 2d Sess. 3, 6 (1996), § 101); and (5) the most recent product liability bill brought to the floor by the Senate Republican leadership, which contains specific exemptions for tobacco lawsuits, negligence actions involving firearms or ammunition, and negligent entrustment actions (see §§ 101 & 102 of S. 2236 as introduced by Senator Gorton on June 26, 1998, and brought to the Senate floor on June 25, 1998, and on July 9, 1998 where the Senate failed to invoke cloture).

groups including the Tobacco Products Liability Project,[2] the Coalition for Workers Health Care Funds,[3] and Save Lives, Not Tobacco (a coalition which includes the American Lung Association and the American Medical Woman's Association).[4] We believe there is no justification in offering additional legal protections for an industry which has been shown to market addictive and lethal products and which has been shown to intentionally market these products to minors.

According to Save Lives, Not Tobacco, "by permitting the transfer from State courts to Federal courts, this legislation will cause interminable delay for class action cases against the tobacco industry, both increasing the costs of suing the industry and delaying justice. [The bill] would make it much harder for injured consumers to take on the tobacco industry in court."[5] Furthermore, it allows the tobacco industry "backdoor" immunity from State class actions.[6] Similarly, one of the nation's foremost tobacco liability experts, Professor Richard Daynard has testified, "[F]ederal courts are hostile to tobacco class actions and have never permitted any to proceed" and H.R. 1875 "would have the practical effect of ending most class actions against the tobacco companies."[7]

Had this bill previously been enacted into law it would have threatened all of the key tobacco class action suits already brought or being considered. Among other things, the bill would have undermined classes of plaintiffs in *Engle* v. *R.J. Reynolds Tobacco Co.*,[8] a successful class action filed on behalf of Florida citizens who have become wrongfully addicted to tobacco, and *Broin* v. *Phillip Morris*[9] which considered the claims of some 60,000 flight attendants harmed by second hand smoke. In addition, the bill would have impacted additional class actions filed on behalf of individuals currently pending in State courts for smoking-related claims[10] and could have affected additional State class actions being brought on behalf of multi- employer Health and Welfare funds, which provide medical care for approximately 30 million workers, retirees, and their families.[11]

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[2] See *Hearing on H.R. 1875 Before the House Comm. on the Judiciary*, 106th Cong. (1999) (statement by Richard A. Daynard, Professor of Law and Chairman, Tobacco Products Liability Project, Northeastern University Law School) [hereinafter Daynard testimony].

[3] See Letter from David Mallino, Legislative Director, Coalition for Workers Health Care Funds, to John Conyers, Ranking Member, House Judiciary Committee (July 22, 1999) (on file with minority staff of House Judiciary Committee). The coalition represents 2500 multi-employer health and welfare funds, which are non-profit trust funds established jointly by labor and management to provide medical care to approximately 30 million workers, retirees, and their families.

[4] See Letter from Cassandra Weich, American Lung Association; Tom Bantle, Public Citizen; William Godshall, Smoke-Free Pennsylvania; Co-Chairs of Save Lives, Not Tobacco to House Judiciary Committee Members (July 22, 1999) (on file with minority staff of House Judiciary Committee).

[5] *Id.*

[6] See *id.*

[7] Daynard testimony, *supra* note 2.

[8] 672 So. 2d 39 (Fla. 3d. Dist. Ct. App. 1996).

[9] 641 So.2d 888 (Fla. 3d Dist. Ct. App. 1994).

[10] A number of smaller class actions were filed subsequent to the Fifth Circuit's failure to certify a nationwide class of smokers for addiction and other claims in *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Additionally, other non-*Castano* class actions involving tobacco liability are also pending in State courts.

[11] While defendants in many of these instances sought to remove the cases to Federal court under Federal question jurisdiction based on ERISA, the majority of Federal courts rejected this claim, and have remanded the cases to State courts. In the districts which held for the defendants, plaintiffs have appealed the decision. Numerous additional health and welfare actions are expected to be filed in the future against the tobacco industry.

To the extent there is any single event which has brought the tobacco industry to the negotiating table with policy makers, it is their fear of private liability in general and class actions in particular. That is why the tobacco industry sought a complete ban on class actions in the now aborted settlement presented to Congress two years ago by the tobacco industry and various State attorneys general.[12] By severely limiting State class actions, H.R. 1875 would provide the tobacco industry indirectly what Congress was unwilling to give them directly—protection from liability.

II. Impact on Gun Liability

We also oppose H.R. 1875 because it benefits companies marketing gun products which are dangerous and defective and have no reasonable use as self defense. It is for these reasons that the bill is strongly opposed by groups such as Handgun Control,[13] the Coalition to Stop Gun Violence,[14] and the Violence Policy Center, which has written, "citizen lawsuits—including class actions—serve as the only safety 'regulation' of the firearms industry . . . lawsuits are the only method to force manufacturers of defectively manufactured or designed firearms to make their guns safer."[15] Increasingly, the value of that mechanism will depend upon the openness of our class action rules.

The victims of gun violence are beginning to sue gun manufacturers for their injuries. They are particularly interested in pursuing manufacturers whose guns are clearly ill-suited for hunting or self defense. In addition, over 20 American cities as well as the NAACP have filed lawsuits against gun manufacturers to hold them accountable for the millions of dollars that the public sector must spend coping with the consequences of gun violence. At the same time, several of these lawsuits raise important class action issues. For example, a liability action is pending in Illinois brought by the families of three young children who were killed by juveniles illegally carrying handguns alleged to be marketed to gang members, and the plaintiffs are trying to recast this case as a class action.[16]

We should not handicap these important civil suits before they have even begun. Gun plaintiffs, like tobacco plaintiffs, prefer to sue gun manufacturers as part of a class action, because suing as single plaintiffs is often prohibitively expensive. In addition, gun plaintiffs prefer to sue in State courts, because Federal courts are far less likely to extend the forum State's laws to cover the plaintiffs' claims. Handgun Control explains that "Federal courts tend to

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[12] See Proposed Tobacco Industry Settlement, 12.3 TPLR 3.203 (June 20, 1997). In a recent editorial, the NEW YORK TIMES agreed that class actions were important to controlling the tobacco companies: "The industry is eager to ban class-action lawsuits because of the threat they pose to its reprehensible behavior. But shielding the industry from future class-actions would practically invite more abuses." "No Immunity for Tobacco," N.Y. TIMES, February 24, 1998, at A20.

[13] See Letter from Robert J. Walker, President, Handgun Control, to John Conyers, Ranking Member, House Judiciary Committee (July 19, 1999) [hereinafter Walker letter] (on file with minority staff of House Judiciary Committee).

[14] See Letter from Michael K. Beard, President, Coalition to Stop Gun Violence, to John Conyers, Ranking Member, House Judiciary Committee (July 27, 1999) (on file with minority staff of House Judiciary Committee).

[15] See Letter from M. Kristen Rand, Director of Federal Policy, Violence Policy Center, to John Conyers, Ranking Member, House Judiciary Committee (July 27, 1999) (on file with minority staff of House Judiciary Committee).

[16] See *Young* v. *Bryco Arms*, No. 98106684 (Cook Co. Ill. Cir. Ct. 1998).

be very reluctant to extend State law or apply it to new situations. With gun litigation, however, many cases require courts to extend the laws, or to apply established law to a new situation." [17]

III. Impact on Managed Care Liability

Finally, H.R. 1875 would undermine a series of recent class action suits against health maintenance organizations resulting from their alleged fraud, overbilling and failure to provide coverage. It is for these reasons H.R. 1875 is opposed by AIDS Action Council, Families USA, and the Center on Disability and Health.[18] Under current law, class action claims against managed care must often distinguish between ERISA and non-ERISA patients. Non-ERISA patients have a full range of remedies available to them under State law. On the other hand, ERISA patients have a very limited set of remedies—the cost of the benefit denied, which in most cases is woefully inadequate.

The current managed care reform debate in Congress includes the elimination of the ERISA preemption which would allow patients who receive their health care from their employer to hold their HMO accountable if it denies care. Congress should not move in the opposite direction by enacting legislation such as H.R. 1875 which would deny more patients access to justice in State court. The following are just two examples of class actions in State courts which could be preempted and possibly terminated by Federal courts under the legislation:

- On June 23, 1997, Harold Katlin filed a class action in Pennsylvania State court against his psychiatrist, David Tremoglie, and Keystone Health Plan East Inc., his HMO, alleging that the psychiatrist had treated hundreds of patients without a medical license.[19] The case was filed on behalf of himself and all other patients treated by Tremoglie at the Bustleton Guidance Center. The suit alleges that the class was treated by an unlicenced and fraudulent psychiatrist who unlawfully prescribed powerful medications not suitable for their illness and that the HMO failed to verify that Tremoglie was a licensed psychiatrist, failed to supervise him, and referred patients to him.[20] On June 29, 1999, a Pennsylvania State court granted class certification.[21]
- Anna Kaplan, a New York patient who was charged by a North Shore University Hospital for portions of a bill for covered services left unpaid by Oxford, her HMO, sought class-action status in a lawsuit against both Oxford and North Shore. The class included all Oxford members who were re-

[17] Walker letter, *supra* note 13.

[18] See Letter from AIDS Action Council, Families USA, the Center on Disability and Health, and eight other public health advocacy groups (July 9, 1999) (on file with the minority staff of the House Judiciary Committee) (stating that "H.R. 1875 would undermine the few grounds on which patient and consumer State class actions have been filed successfully—fraud, overbilling, and medical malpractice.")

[19] *Kaitlin* v. *Tremoglie, et al.*, No. 002703 (Pa. Comm. Pls., Philadelphia Co. 1997).

[20] One of the female patients in the class was treated by the psychiatrist for depression. While under the influence of medication, the psychiatrist allegedly took her out for drinks and dinner and had sex with her. After this patient terminated the contract, the psychiatrist allegedly harassed her and threatened to harm her and her children if she reported him.

[21] See Mealey's Litigation Reports: Pennsylvania Court Certifies Class Action Against Keystone for Unlicensed Physician, July 14, 1999 at 1.

ferred to North Shore by Oxford for covered services, but whose bills had not been paid or had only been partially paid by Oxford. Oxford had allegedly failed to pay North Shore for covered services totaling $10 million. In Kaplan's case, when North Shore failed to receive the full amount of the bill from Oxford, the hospital began to bill Kaplan directly for the unpaid amount. Oxford personnel had reportedly privately admitted to Kaplan that she should have no liability for the bill, and North Shore personnel had also apparently admitted privately that they were billing Oxford plan members to pressure Oxford to pay for claims. Kaplan claimed her credit has been ruined by her unpaid bill and she has been harassed by a collection agency. A settlement was reached on September 30, 1997, and the parties agreed that the action would be certified as a class action for purposes of the settlement.[22]

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[22] See Mealey's Litigation Reports: *New York Class Action Over Direct Billing to Members After Oxford Failed to Pay Settles*, November 20, 1997 at 1.