

CLASS ACTION JURISDICTION ACT OF 1998

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SEPTEMBER 10, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3789]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3789) to amend title 28, United States Code, to enlarge Federal Court jurisdiction over purported 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 “Class Action Jurisdiction Act of 1998”.

(b) **REFERENCE.**—Whenever in this Act an amendment or repeal is expressed in terms of 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. 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, regardless of the sum or value of the matter in controversy therein, 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 or a citizen or subject of 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) In a civil action described in paragraph (1) in which—

“(i) the substantial majority of the members of all proposed plaintiff classes are citizens of a single State of which the primary defendants are also citizens, and

“(ii) the claims asserted will be governed primarily by the laws of that State,

the district court should abstain from hearing such action.

“(B) In a civil action described in paragraph (1) in which—

“(i) all matters in controversy asserted by the individual members of all proposed plaintiff classes in the aggregate do not exceed the sum or value of \$1,000,000, exclusive of interest and costs,

“(ii) the number of members of all proposed plaintiff classes in the aggregate is less than 100, or

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

the district court may, in its discretion, abstain from hearing such action.

“(3)(A) Paragraph (1) and section 1453 shall not apply to any class action that is brought under the Securities Act of 1933.

“(B) Paragraph (1) and section 1453 shall not apply to a class action described in subparagraph (C) that is based upon the statutory or common law of the State in which the issuer concerned is incorporated (in the case of a corporation) or organized (in the case of any other entity).

“(C) A class action is described in this subparagraph if it involves—

“(i) the purchase or sale of securities by an issuer or an affiliate of an issuer exclusively from or to holders of equity securities of the issuer; or

“(ii) any recommendation, position, or other communication with respect to the sale of securities of an issuer that—

“(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

“(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters’ or appraisal rights.

“(D) As used in this paragraph, the terms ‘issuer’, ‘security’, and ‘equity security’ have the meanings given those terms in section 3 of the Securities Exchange Act of 1934.”

(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. 3. 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, 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 within 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the district court’s direction in accordance with Rule 23(c)(2) of the Federal Rules of Civil Procedure.”.

(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 2 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, the court shall strike the class allegations from the action and remand the action to the State court. Upon remand of the action, the period of limitations for any claim that was asserted in the action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.”.

### SEC. 4. 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. 5. 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

House Resolution 3789 responds to a serious flaw in the Judicial Code recently highlighted by the U.S. Court of Appeals for the Third Circuit: Although “national (interstate) class actions are [arguably] 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] enterprise[s],” most such “class actions [are] beyond the reach of the federal courts . . . under the current jurisdictional statutes.”<sup>1</sup> Frequently, these interstate class actions are heard by state courts that are not applying rigorous standards necessary to avoid abuses, that are ill-equipped to address laws and claimants from outside their home states, and that are powerless to consolidate overlapping, “competing” class-action proceedings filed in different jurisdictions.

House Resolution 3789 addresses these problems by expanding the original jurisdiction of U.S. District courts over most class actions in which minimal diversity exists among the parties. Federal removal statutes are also amended pursuant to the bill in furtherance of this goal.

## BACKGROUND AND NEED FOR LEGISLATION

## RULE 23

Rule 23 of the Federal Rules of Civil Procedure prescribes the conditions by which class action suits may be brought. Paragraph (a) enumerates the prerequisites for a class action. They are:

1. the class is so numerous that joinder of all members is impracticable;
2. there are questions of law or fact common to the class;
3. the claims or defenses of the representative parties are typical of those of the class; and
4. the representative parties will fairly and adequately protect the interests of the class.

Paragraph (b) establishes three disjunctive terms by which class actions may be maintained. First, 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.<sup>2</sup>

Second, 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.<sup>3</sup>

And third, the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the con-

<sup>1</sup>*In re Prudential Ins. Co. America Sales Practice Litig.*, 1998 WL 40956, \*16 (3rd Cir. July 23, 1998) (Scirica, J.).

<sup>2</sup>Fed. R. Civ. P. 23(b)(1).

<sup>3</sup>Fed. R. Civ. P. 23(b)(2).

trover. Matters pertinent to such a finding include: the interests of members of the class individually controlling separate actions; the nature and extent of any litigation already commenced by or against the class; the desirability or undesirability of concentrating litigation in the particular forum; and the difficulties likely to be encountered in the management of a class action.<sup>4</sup>

Again, in addition to the prerequisites mentioned in Paragraph (a), a class action may be maintained if any of the three conditions, *supra*, are satisfied.

Courts are given wide discretion pursuant to Paragraph (c) in certifying classes, and whether actions may be maintained. Any order related to this authority may be conditional, and may also be amended or altered before a decision on the merits.

The most relevant component of Paragraph (c) is the notice requirement for actions brought under Paragraph (b)(3). Briefly, members of the relevant class are to be given the best notice practicable under the circumstances, and they are automatically included as members of the class and are bound by any judgment *unless they request exclusion from the class*.

Paragraph (d) details various orders a court may issue governing class actions, and Paragraph (e) states that a class action shall not be dismissed or compromised without the approval of the court.

#### DIVERSITY JURISDICTION

The federal diversity statute mandates, *inter alia*, that U.S. district courts shall have original jurisdiction of all civil actions in which the matter in controversy exceeds \$75,000 and is between citizens of different states.<sup>5</sup> Unless specified to the contrary by statute, diversity of citizenship exists only when it is complete; that is, when each plaintiff is a citizen of a state different from that of each defendant.<sup>6</sup>

#### REMOVAL

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.<sup>7</sup> Removal is based on the general assumption that an out-of-state defendant may become a victim of local prejudice in state court.<sup>8</sup>

In addition, 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).<sup>9</sup> 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 diver-

<sup>4</sup>Fed. R. Civ. P. 23(b)(3).

<sup>5</sup>28 U.S.C. § 1332(a)(1).

<sup>6</sup>*Strawbridge v. Curtis*, 3 Cranch 267 (1806); *see also* Charles Alan Wright, *Law of Federal Courts* 94–96 (3rd ed. 1976).

<sup>7</sup>28 U.S.C. § 1441(a).

<sup>8</sup>*See* David P. Currie, *Federal Jurisdiction* at 140 (3rd ed. 1990).

<sup>9</sup>28 U.S.C. § 1446(b).

sity (i.e., § 1332) case be removed more than one year from commencement of the action.<sup>10</sup>

#### ISSUES AND PROBLEMS IN THE CURRENT CLASS-ACTION ENVIRONMENT

Class-action litigation in the United States has engendered much criticism in recent years. Scholars, judges, attorneys, and litigants in increasing numbers argue that the current system invites frivolity or collusion in the settlement of suits.<sup>11</sup>

Frivolous litigation is self-explanatory; a suit which is essentially meritless is nonetheless filed, usually in state court, for the purpose of extracting a nuisance settlement from a deep-pocket defendant. Critics of class-action litigation have noted that class actions can become blackmail devices—a means for extracting payments from a corporate defendant as to claims that have little merit. The enormous power of the class-action device is readily apparent: An attorney can identify a theoretical claim, and by styling the suit as a class action, can assert that he or she is suing on behalf of millions of people, even though none of them solicited such assistance. Under this scenario, small individual claims which are aggregated will create a class action seeking hundreds of millions of dollars in relief. Class actions of this financial magnitude—including meritless ones—often compel a defendant to settle. Few corporations are willing to assume even a slight risk of losing a hundred-million-dollar-plus verdict if a settlement of lesser, finite exposure is available.<sup>12</sup> For that reason, the key question in a class action is whether a court will afford a case class treatment. Accordingly, many federal courts have begun to realize that the mere issuance of an order certifying a case for class treatment “often, perhaps typically, inflict[s] irreparable injury on the defendants.”<sup>13</sup>

As a testament to the prevalence of baseless filings, these critics cite the practice of some plaintiff attorneys who have no client at the time they conceive a suit. Instead, these attorneys review the *Federal Register*, agency dockets, newspapers, and the Internet searching for information about government investigations of consumer products. Once a product has been identified that “fits” a legal theory of liability, the attorneys will attempt to recruit (frequently by financial inducement) a coworker, friend, or relative to serve as a named plaintiff in a suit.<sup>14</sup> Against this background, it is not surprising that there has been an explosion in class-action filings in the recent past. The Advisory Committee on Civil Rules of the Federal Judicial Conference has observed that, during the past three years, class-action filings aimed at U.S. companies have

<sup>10</sup> *Id.*

<sup>11</sup> *Mass Torts and Class Action Suits, 1998: Oversight Hearing Before the Subcomm. on Courts and Intellectual Property of the House Committee on the Judiciary*, 105th Cong., 2nd Sess. 1–13 (1998) (written statement of John Frank).

<sup>12</sup> *Class Action Lawsuits: Examining Victim Compensation and Attorneys’ Fees, 1997: Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary*, 105th Cong., 1st Sess. 2 (1997) (written statement of Professor John C. Coffee, Jr., Columbia University School of Law).

<sup>13</sup> *In re Rhone-Poulenc Rorer, Inc.*, 51 F. 3d 1293, 1295 (7th Cir. 1995).

<sup>14</sup> Lewis Goldfarb, *Selling Res Judicata: Class Action Abuse and How to Fix It*, *The Metropolitan Corporate Counsel*, Oct. 1997, at 1; Dick Thornburgh, *Enough of Class-Action Abuse*, *Washington Times*, Oct. 30, 1997, at A21.

increased by 300% to 1,000% (per company).<sup>15</sup> Testimony and other data presented to the Subcommittee on Courts and Intellectual Property and the Committee confirm that a great majority of these cases has been concentrated in state courts.

A collusive class action is designed to enrich counsel, and may be divided into two categories: one which is “frivolous,” meaning counsel has no intention of acquiring any significant benefits for the class, irrespective of whether the class is genuinely entitled to compensation; and the other which is “non-frivolous,” meaning counsel compromises potentially valid rights by settling on the cheap in exchange for substantial attorneys’ fees. Attorneys who indulge in collusive litigation generally employ one of four settlement models<sup>16</sup>:

1. *Discount Coupon Settlements.* Instead of paying cash to the plaintiff class members, the defendants issue them discount coupons. This produces a number of problems. Because courts today normally award a plaintiff attorney fees equal to approximately one-third the settlement, the impact of inflating the value of the settlement is to inflate the value of the fee award. The plaintiffs’ attorney is overcompensated as a result, since coupons are frequently not exercised by many class members who do not wish to buy another version of a defective product, or because the coupons have no transferability, or because the coupons may be so modest in amount as to constitute nothing more than a marketing campaign.

2. *Reversionary Settlements.* Also known as the “claims made” settlement, this technique consists in the defendant “temporarily” placing a settlement amount in a trust fund for the class, but with the proviso that any amount not claimed by eligible class members reverts to the defendant. Under these terms the defendant has every incentive to require elaborate documentation to prove the class member’s eligibility, since few members will wade through a thicket of paperwork to receive a nominal sum from a settlement which, in the aggregate, may be substantial. The plaintiff’s attorneys are also served by this arrangement because their fee will typically be based on the size of the original trust fund prior to any reversion to the defendants.

3. *Future Claims Settlements.* In the mass tort context, a defendant may expose an unknown (but potentially enormous) number of class members to a dangerous product. Typically, the latency period is long, which means that many plaintiffs will not know at the time of settlement whether they will actually become ill or, if they do, how debilitated they may become. Plaintiffs’ counsel negotiate more lucrative payments for claimants (i.e., persons who are not ill now but may become ill in the future), arguably because the possibility exists that some or all persons in the latter category may never become ill. Usually, a defendant is willing to enter into a class settlement only if it can buy peace as to all claims arising out of the matter

<sup>15</sup>Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1, at ix-x (memorandum to members of the Standing Committee on Rules and Procedure and the Advisory Committee on Federal Rules from Judge Paul V. Niemeyer).

<sup>16</sup>Coffee *supra* note 12, at 3–5.

at issue. Otherwise, it makes more sense from the defendant's perspective to litigate the current claims individually on their merits and wait for future claimants to file their claims if and when they arise. The massive number of claims in some situations cause litigants (and even the courts involved) to work hard toward settlement. The problems occur when courts do not adequately scrutinize a proposed settlement to ensure that justice is being done as to all who have a claim or may have a claim in the future.

4. *Races to Judgment and "Reverse Auction" Settlements.* Competitive class actions can be filed in state and federal court by different teams of plaintiffs' attorneys. In these cases, the first team of plaintiffs' attorneys to settle "wins," because the other action will normally be precluded under principles of full faith and credit and collateral estoppel or *res judicata*. Hence, defendants can exploit this situation by forcing the two teams of competing plaintiffs' attorneys to bid against each other. Worse yet, the plaintiffs' team in state court often cannot litigate the stronger legal claims that are litigable only in federal court (because state courts usually lack subject matter jurisdiction over such federal claims). In these cases, the state plaintiffs can only settle—and not litigate—and the evidence suggests that they will settle cheaply to win the race to settlement with the federal court plaintiffs.

The federal judiciary applies Rule 23 rigorously in making class certification decisions.<sup>17</sup> Plaintiffs' attorneys have countered by shifting their filings to state courts. Many state general assemblies have adopted rough equivalents of Rule 23. Critics maintain that certain state judges, motivated by a politically-active plaintiff's bar and employing lax standards for certification (sometimes done *ex parte*), make it even more difficult for defendants to respond to frivolous suits.

In addition, out-of-state defendants are frustrated with their inability to remove cases to federal court where certification is less likely to occur. A common practice by plaintiffs' attorneys in state class actions 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; in other words, the recruited plaintiff's name would be contained in the pleadings, thereby eliminating diversity between the litigants (courts look to the pleadings to determine jurisdiction, not to the identity of the putative unnamed class)<sup>18</sup>. 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.

#### JUDICIAL CONFERENCE PROPOSED AMENDMENTS TO RULE 23

By letter of June 16, 1997, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States notified Representative Henry Hyde, Chairman of the Committee on the Judiciary, that it had completed its evaluation of certain proposed amendments to Rule 23. The most noteworthy Committee

<sup>17</sup> See *Amchem v. Windsor*, 117 S. Ct. 2231 (1997).

<sup>18</sup> *Snyder v. Harris*, 394 U.S. 332 (1969); See also *Wright*, *supra*, at 117.

recommendation was the creation of a new Paragraph (f), which would permit the appeal of a U.S. district court order certifying a class within 10 days of certification. This recommendation tracks that of Section Three of H.R. 1252, *id.* The Supreme Court approved the recommendation, and Chief Justice Rehnquist forwarded the proposal to Congress pursuant to the Rules Enabling Act on April 24, 1998. In the absence of congressional intervention to the contrary, the revision will take effect on December 1.

Other recommendations involved minor changes, rejections of other proposals, or admonitions to conduct further study.

In a related matter, Chief Justice Rehnquist has approved the establishment of an informal working group consisting of liaisons from the relevant committees of the Judicial Conference to conduct further study of mass-tort litigation.

#### HEARINGS

The Committee's Subcommittee on Court and Intellectual Property held an oversight hearing on the subject of mass torts and class actions on March 5, 1998. Testimony was received from nine witnesses of varied legal backgrounds. The Subcommittee also held a legislative hearing on H.R. 3789 on June 18, 1998, at which testimony was received from five witnesses representing three organizations.

#### COMMITTEE CONSIDERATION

On June 24, 1998, the Subcommittee on Courts and Intellectual Property met in open session and ordered reported the bill H.R. 3789, as amended, by voice vote, a quorum being present. On August 5, 1998, the Committee met in open session and ordered reported favorably the bill H.R. 3789 with an amendment by a recorded vote of 17 to 12, a quorum being present.

#### VOTE OF THE COMMITTEE

The following roll calls occurred during Committee deliberations on H.R. 3789 (August 5, 1998):

An amendment by Ms. Jackson Lee to create a tobacco "carve-out" to the bill (i.e., the non-application of the revisions to the federal diversity and removal statutes for actions based on harm caused by tobacco products). The Jackson Lee amendment was defeated by a roll-call vote of 3-16.

AYES  
Ms. Jackson Lee  
Ms. Lofgren  
Mr. Rothman

NAYS  
Mr. Coble  
Mr. Smith  
Mr. Canady  
Mr. Inglis  
Mr. Buyer  
Mr. Bryant  
Mr. Chabot  
Mr. Barr  
Mr. Jenkins  
Mr. Hutchinson  
Mr. Rogan

Mr. Graham  
 Ms. Bono  
 Mr. Scott  
 Mr. Watt  
 Mr. Hyde

An amendment by Mr. Watt to strike the removal provisions from the bill. The amendment was defeated by a roll-call vote of 5–15.

AYES	NAYS
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Smith
Ms. Lofgren	Mr. Canady
Mr. Rothman	Mr. Inglis
	Mr. Buyer
	Mr. Bryant
	Mr. Chabot
	Mr. Barr
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Rogan
	Mr. Graham
	Ms. Bono
	Mr. Hyde

The motion to report favorably H.R. 3789, the “Class Action Jurisdiction Act of 1998,” as amended by the amendment in the nature of a substitute. The motion approved by a roll-call vote of 17–12.

AYES	NAYS
Mr. Sensenbrenner	Mr. Conyers
Mr. McCollum	Mr. Frank
Mr. Gekas	Mr. Schumer
Mr. Coble	Mr. Berman
Mr. Smith	Mr. Boucher
Mr. Gallegly	Mr. Nadler
Mr. Canady	Mr. Scott
Mr. Inglis	Mr. Watt
Mr. Goodlatte	Ms. Lofgren
Mr. Buyer	Ms. Jackson Lee
Mr. Chabot	Mr. Meehan
Mr. Jenkins	Mr. Rothman
Mr. Pease	
Mr. Cannon	
Mr. Rogan	
Mr. Graham	
Ms. Bono	

#### COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI 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 Rep-

representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee set forth, with respect to the bill, H.R. 3789, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, September 9, 1998.*

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. 3789, the Class Action Jurisdiction Act of 1998.

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,

JUNE E. O'NEILL, *Director.*

Enclosure.

cc: Hon. John Conyers, Jr.,  
Ranking Minority Member.

*H.R. 3789—Class Action Jurisdiction Act of 1998*

H.R. 3789 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 \$7,000. This estimate includes costs for salaries and benefits for clerks, rent, utilities, and associated overhead expenses. By comparison, the average cost for all civil cases heard in federal courts is about \$4,000 per case. (The 94 federal district

courts currently handle about 270,000 cases each year.) Thus, CBO estimates that enacting H.R. 3789 would have only a small effect on the courts' workload, at a cost of less than \$5 million annually.

H.R. 3789 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 1999–2000 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. 3789 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. 3789 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to this bill. H.R. 3789 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 rule XI, clause 2(1)(4) 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

*Summary.* Minimalist in approach, H.R. 3789 grants federal courts jurisdiction over class actions in which there exists “partial diversity” between plaintiffs (including all unnamed members of any plaintiff class) and defendants. This expanded jurisdiction would not extend to disputes which are not interstate in nature—for the most part, those in which a class of citizens in one state sue one or more defendants that are citizens of that same state. House Resolution 3789 also explicitly grants a federal court discretion not to hear several narrow categories of class actions. The bill further establishes the statutory mechanism for removing to federal court any purported class action that fits the additional grant of federal diversity jurisdiction. With few exceptions, the removal procedures for such cases would be the same as they presently are for cases removed on diversity jurisdiction grounds.

*Sec. One. Title.* Section One contains the short title of the bill, the “Class Action Jurisdiction Act of 1998.”

*Sec. Two. Amendments to the Jurisdiction of U.S. District Courts.* Section Two amends 28 U.S.C. § 1332 by conferring original juris-

diction over class action suits on the U.S. District Courts under any of the following conditions: (1) *when minimal diversity jurisdiction exists (i.e., any one member of a proposed plaintiff class and any one defendant are citizens of different States)*; (2) when any member of a proposed plaintiff class is a foreign state or citizen of a foreign state and any defendant is a citizen of a State; or (3) when any member of a proposed plaintiff class is a citizen of a State and any defendant is a citizen of a foreign state.

At the same time, the amendments *en bloc* adopted by the Subcommittee specify that nothing shall prevent a U.S. District judge from exercising discretion to abstain from hearing cases in which:

1. all proposed plaintiff class members are seeking, in the aggregate, less than one-million dollars in damages;
2. the number of all proposed plaintiff class members is fewer than 100; or
3. the primary defendants are states, state officials, or other governmental entities against whom a U.S. District court may be foreclosed from ordering relief pursuant to the Eleventh Amendment.<sup>19</sup>

In addition, the Subcommittee amendments *en bloc* contained a fourth category of criteria which, if relevant, would also permit a U.S. District judge, in his or her discretion, to abstain from hearing a removed case. An amendment offered by Mr. Frank, which the Committee adopted, revised the application of this category in a slight but important manner.

By way of background, during the June 18 legislative hearing on the bill, Subcommittee members expressed concern that some state-filed actions which technically fulfilled the minimal diversity requirements of H.R. 3789 were nonetheless so local in nature as to constitute state actions. To illustrate: a class action is brought under North Carolina law on behalf of 997 North Carolina depositors and three Floridians who have been defrauded by a local North Carolina bank. But for the three Floridians, the case could be maintained in a North Carolina court under that state's law. Wishing to accommodate plaintiff classes in such circumstances, the Subcommittee, as part of its amendments *en bloc*, decided to allow a U.S. District judge, *in his or her discretion*, to abstain from hearing a case in which a substantial majority of all proposed plaintiff classes and the primary defendants are citizens of the same state, and the claims asserted in the action will be governed primarily by the laws of that state.

In contrast to the other three categories of cases in which a judge may exercise discretion in making a decision to abstain, the Frank amendment which the Committee adopted would *require* the judge to abstain from hearing such a "fourth-category" case.

Section Two also clarifies that, for the purposes of determining diversity jurisdiction, a 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. This provision was added pursuant to the amendments *en bloc*, and is designed to close a loop-

<sup>19</sup>U.S. CONST. amend. XI ("The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.")

hole that, practically speaking, would otherwise enable corporate defendants to remove to federal court under almost any set of factual circumstances. The reason: a corporation is deemed to be a citizen of any state in which it is incorporated, in addition to the state which is its principal place of business.<sup>20</sup> As a result, by way of illustration, a defendant incorporated in Delaware but with its principal place of business in Michigan is sued by a plaintiff class in Michigan. In the absence of further clarification, the corporate defendant could argue that it is a citizen of Delaware, thereby creating diversity jurisdiction and a pretext for removing to federal court.

Finally, the Committee adopted an amendment to Section Two offered by Mr. Coble which specifies that the provisions of H.R. 3789 shall not apply to so-called “corporate governance” claims that are the subject of securities legislation passed by the Senate<sup>21</sup> and the House Committee on Commerce<sup>22</sup> in the 105th Congress. More generally, the Senate and Commerce bills are intended to reform the process by which “stock-drop” suits are brought; that is, litigation by shareholders against the officers of a corporation for a precipitous drop in the value of its stock, based on fraud. A non-controversial feature of the Senate and Commerce legislation is a carve-out or exemption for corporate governance claims arising out of state law. In contrast to stock-drop litigation, these suits are based on such conduct as misrepresentations contained in proxy solicitations. The Securities and Exchange Commission, along with the proponents and opponents of the Senate and Commerce bills, believe that corporate governance claims are better adjudicated under state law in state courts, especially the Delaware Chancery Court which has acquired expertise in this area. The language in the Coble amendment simply preserves this carve-out in H.R. 3789.

Overall, Section Two is intended to expand substantially federal court jurisdiction over class actions. For that reason, the provisions should be read expansively; that is, they should be read as articulating a strong preference that any interstate class action be heard in federal court if so desired by any plaintiff or defendant to the litigation.

Consistent with this approach, the provisions requiring a federal court to abstain from exercising its jurisdiction should be read narrowly. A class action should be deemed a case in which a federal court should abstain from exercising its jurisdiction only if it resembles the hypothetical described *supra*—a case in which virtually all of the members of the proposed class are residents of a single state and have common citizenship with all of the primary defendants. For purposes of this provision, 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 the corporation should not be deemed a “primary defendant.” Moreover, no defendant should be considered a “primary defendant” for purposes of this

<sup>20</sup> 28 U.S.C. § 1332(c)(1).

<sup>21</sup> S. 1260, 105th Cong., 1st Sess. (1997).

<sup>22</sup> H.R. 1689, 105th Cong., 1st Sess. (1997).

analysis unless it is the subject of legitimate claims by all class members. To illustrate, if named as a defendant, an authorized 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).

Similarly, the provisions giving a federal court discretion not to hear class actions fitting certain criteria should be interpreted narrowly. For example, if a court is uncertain as to whether “all matters in controversy” in a class action “do not exceed the sum or value of \$1,000,000,” the court should err on the side of exercising its jurisdiction. The same is true of cases in which it is unclear whether the members of all proposed classes total fewer than 100. By the same token, courts should abstain where “States, State officials, or other governmental entities” are “primary defendants” and there is a significant risk that the court “may be foreclosed from ordering relief” pursuant to Eleventh Amendment constraints.

The Committee notes that this provision authorizing federal jurisdiction over putative class actions where only partial diversity exists is wholly consistent with Article III of the U.S. Constitution. The U.S. Supreme Court has observed that “in a variety of contexts,” [federal courts] have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.<sup>23</sup> *Sec. Three. Amendments to the Federal Removal Statutes.* Section Three amends 28 U.S.C. § 1441 by ensuring that any class action brought in state court may be removed to U.S. District court provided the requirements of § 1332(b), *id.*, are met. This section also specifies that a state-filed class action may be removed by any defendant to that action, irrespective of the wishes of other defendants. This provision is needed to 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.

The section clarifies that a one-year limit otherwise imposed on removal of suits filed pursuant to § 1332 has no application to class actions; i.e., the bill permits a defendant to remove to federal court more than one year after commencement of a suit in state court. Again, this change to present law was added to prevent gaming of the current class-action system by a plaintiffs’ attorney. For example, under current law<sup>24</sup> a plaintiffs’ attorney files suit, and the one-year limit after which no removal may be sought under any condition commences. On the 366th day from filing suit, the plaintiff’s attorney serves the corporate defendant. It is now too late for

<sup>23</sup> *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 10 n. 3 (1951); *Wichita R.R. & Light Co. v. Public Util. Commn.*, 260 U.S. 48 (1922); *Barney v. Latham*, 103 U.S. 205, 213 (1881)). The Supreme Court has reiterated this view on several occasions post-*State Farm*: See, e.g., *Newman-Green, Inc. v. Alfonzo-Larrian*, 490 U.S. 826 (1989) (“The complete diversity requirement is based on the diversity statute, not Article III . . . .”); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978) (“It is settled that complete diversity is not a constitutional requirement.”).

<sup>24</sup> *Supra* note 9.

the corporate defendant to remove, irrespective of the practical merits of the case.

Section Three makes additional changes to the removal statute as it applies to class actions. As noted, *supra*, § 1446(b) prohibits a defendant from removing to federal court under any conditions beyond one year from the date an action is filed. Within the one-year cap, however, a defendant is required to remove 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. This means that under the current statute a corporate defendant may remove beyond the 30-day limit if it can prove that it did not receive paper from which it could be ascertained that the case is removable.

Section Three changes this provision in two ways. First, it enables an unnamed plaintiff to remove to federal court. This revision will combat collusiveness between a corporate defendant and a plaintiffs’ attorney who settle on the cheap in state court at the expense of the plaintiff class members. Second, it requires the party removing to federal court (the defendant or an unnamed plaintiff) to exercise “due diligence” when removing beyond the 30-day limit. This will prevent a disgruntled unnamed plaintiff from removing at the eleventh hour and interrupting a trial or undoing a legitimate (non-collusive) settlement.

Further, Section Three makes clear that nothing in the removal section of the bill changes the application of the so-called *Erie Doctrine*<sup>25</sup> 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.

Finally, the section specifies that if “no aspect” of an action removed to federal court may be maintained under Rule 23, the U.S. District court must strike the class allegations from the action and remand it to state court. Thus, if “any aspect” of an action (e.g., a small sub-class) may be maintained under Rule 23, the federal court should retain jurisdiction over the entire action, including those elements that qualify for class treatment. In this regard, it should be noted that before a matter is remanded to state court, class representatives should be encouraged to follow-up proposals for class certification which they may wish to proffer. In other words, if an initial class certification is denied in all respects, the federal court is not required to remand the case at that point if the class representatives wish to seek reconsideration of the denial or to propose alternative (e.g., narrower) classes.

Further, nothing in this provision (including the requirement that class allegations be stricken) is intended to preclude class representatives from amending their complaint after remand to state court to include new class allegations. Still, any such allegations may render the action subject to “re-removal” if the applicable criteria of H.R. 3789 are met.

Importantly, Section Three states that the period of limitations for any claim remanded to state court on behalf of any member, named or unnamed, of any proposed class shall be tolled to the full extent provided under federal law. The purpose of this provision is

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<sup>25</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

to ensure that the *American Pipe*<sup>26</sup> equitable tolling doctrine fully applies after a case is remanded to state court, but only to the extent presently provided under federal law.

*Sec. Four. Applicability.* Section Four applies the terms of the bill to actions filed on or after the date of enactment.

*Sec. Five. GAO Study.* Mr. Delahunt offered an amendment, which the Committee approved by voice vote, to create a new Section Five of the bill. This section authorizes the Comptroller General of the United States to conduct a study of the impact of H.R. 3789 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.

#### AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF LEGISLATIVE AFFAIRS,  
*July 27, 1998, Washington, DC.*

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

DEAR MR. CHAIRMAN: This letter presents the views of the Justice Department on H.R. 3789, the "Class Action Jurisdiction Act of 1998," as amended. The Department continues to strongly oppose this bill.

We previously provided our views on the bill as introduced in a letter to Chairman Coble, dated June 18, 1998. In that letter, we focused on our underlying concerns that the legislation would supplant State court remedies and could require a substantial increase in Federal judicial resources. We also noted several specific concerns about the bill. While the changes to the bill made by the Subcommittee on Courts and Intellectual Property have improved the bill to some degree and do respond to some of our concerns, the basic thrust of the bill has not changed and we remain opposed to it.

We do appreciate that the Subcommittee's revised bill does address some of the specific concerns raised in our earlier letter. For example, no longer would the bill be retroactive in its effect and the claims of individual named plaintiffs would be tolled while removal proceedings were ongoing. The amended bill also provides some limitations on the class actions which could be removed to Federal court.

However, we maintain that the bill, even as amended, very likely would have the effect of transferring a significant number of class actions into Federal court and "federalizing" class action standards. Class action remedies should be available in both State and Federal courts. While the proponents of the bill presented information that they argue provides a basis for removing class action litigation from State courts at least in certain circumstances, we do not believe that there is adequate justification in this context for infringing on State courts' ability to offer redress to their citizens. To the

<sup>26</sup>*American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974).

extent that concerns exist about the fairness of procedures in particular States, those concerns are best addressed at the State level.<sup>1</sup>

Although section 2(b)(2) of the revised bill provides some discretion for individual Federal judges to abstain from accepting a case for Federal adjudication, the discretion appears to be quite narrowly drawn. For example, a judge could abstain from taking Federal jurisdiction if the class were smaller than 100 members or the aggregate value were less than \$1 million. These are very low thresholds. It is not likely that this revised provision would significantly limit the number of cases seeking removal to Federal court.

Moreover, under section 3(f), cases remanded to State court for failure to satisfy the Federal class action standards of Rule 23 would have their class allegations struck. While at least some individual claims would survive (because of the tolling language), the class action nature of the case in State court would be eliminated, even if such a class could have been certified under applicable State standards. This would have the dual result of federalizing class action standards while potentially eliminating a viable remedy for individuals suffering injuries who could not afford to bring suit on their own.

We believe that the responsibility for handling class action litigation generally should continue to be shared between the State and Federal systems and we continue to oppose this bill.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of further assistance in evaluating these or related proposals. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

L. ANTHONY SUTIN,  
*Acting Assistant Attorney General.*

cc: Hon. John Conyers, Jr.,  
Ranking Minority Member.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 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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<sup>1</sup>Moreover, the extent of the problems raised by proponents remains unclear. Many of the stated concerns appear to derive from only a few States and some of those concerns may have been addressed recently by individual States. For example, the Alabama Supreme Court has recently clarified the procedures required to properly certify a class action in that State.

**PART IV—JURISDICTION AND VENUE**

\* \* \* \* \*

**CHAPTER 85—DISTRICT COURTS; JURISDICTION**

\* \* \* \* \*

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

(a) \* \* \*

(b)(1) *The district courts shall have original jurisdiction of any civil action, regardless of the sum or value of the matter in controversy therein, 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 or a citizen or subject of 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) *In a civil action described in paragraph (1) in which—*

*(i) the substantial majority of the members of all proposed plaintiff classes are citizens of a single State of which the primary defendants are also citizens, and*

*(ii) the claims asserted will be governed primarily by the laws of that State,*

*the district court should abstain from hearing such action.*

(B) *In a civil action described in paragraph (1) in which—*

*(i) all matters in controversy asserted by the individual members of all proposed plaintiff classes in the aggregate do not exceed the sum or value of \$1,000,000, exclusive of interest and costs,*

*(ii) the number of members of all proposed plaintiff classes in the aggregate is less than 100, or*

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

*the district court may, in its discretion, abstain from hearing such action.*

(3)(A) *Paragraph (1) and section 1453 shall not apply to any class action that is brought under the Securities Act of 1933.*

(B) *Paragraph (1) and section 1453 shall not apply to a class action described in subparagraph (C) that is based upon the statutory or common law of the State in which the issuer concerned is incorporated (in the case of a corporation) or organized (in the case of any other entity).*

(C) *A class action is described in this subparagraph if it involves—*

*(i) the purchase or sale of securities by an issuer or an affiliate of an issuer exclusively from or to holders of equity securities of the issuer; or*

(ii) any recommendation, position, or other communication with respect to the sale of securities of an issuer that—

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(D) As used in this paragraph, the terms "issuer", "security", and "equity security" have the meanings given those terms in section 3 of the Securities Exchange Act of 1934.

[(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 removably 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, the court shall strike the class allegations from the action and remand the action to the State court. Upon remand of the action, the period of limitations for any claim that was asserted in the action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.*

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**§ 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, 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 within 30 days after

*receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the district court's direction in accordance with Rule 23(c)(2) of the Federal Rules of Civil Procedure.*

\* \* \* \* \*

DISSENTING VIEWS TO H.R. 3789, CLASS ACTION JURISDICTION ACT OF 1998

We strongly oppose H.R. 3789, 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. 3789 is opposed by the Justice Department<sup>1</sup> and consumer and public interest groups, including Public Citizen,<sup>2</sup> the Alliance for Justice and Consumer Federation of America.<sup>3</sup> The legislation is also opposed by the Association of Trial Lawyers of America.<sup>4</sup>

By providing plaintiffs access to the courts in cases where a defendant may have gained a substantial benefit through small injuries to a large number of persons, class action procedures offer 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 injured persons to obtain access to justice in the state courts. 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. 3789 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,<sup>5</sup> and eliminates the \$75,000 per claim amount in

<sup>1</sup>See Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to the Honorable Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property, House Judiciary Committee 1 (June 18, 1998) (on file with the minority staff of the House Judiciary Committee) ("there is no compelling justification for supplanting State court rules in this area. We do not believe State courts should lose their opportunity to address class actions according to the needs of their citizens.") and Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to the Honorable Henry J. Hyde, Chairman, House Judiciary Committee (July 27, 1998) (on file with the minority staff of the House Judiciary Committee).

<sup>2</sup>Hearing on H.R. 3789 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 at 1) ("H.R. 3789 is an unwise and ill-considered broadside incursion by the federal government on the jurisdiction of the state courts. It constitutes 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.").

<sup>3</sup>Letter from Nan Aron, President, Alliance for Justice, to Members of the House Judiciary Committee 1 (July 14, 1998) (on file with the minority staff of the House Judiciary Committee) ("This bill would virtually eliminate plaintiffs' rights to bring class action litigation in state courts . . .").

<sup>4</sup>Hearing on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1998) (statement of Richard H. Middleton, Jr. on behalf of ATLA at 1).

<sup>5</sup>H.R. 3789, § 2(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 *Staubridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Snyder v. Harris*, 394 U.S. 332 (1969), the Supreme Court held that

controversy requirement ordinarily needed to permit removal to federal court.<sup>6</sup> The only exceptions provided in H.R. 3789 are that federal courts are directed that they (1) “should” abstain from hearing a class action where the “substantial majority” of the plaintiffs are citizens of a state in which the “primary defendants” are also citizens and the claims will be governed “primarily” by the laws of that state; and (2) “may” in their “discretion” abstain where the aggregate amount in controversy is less than \$1 million, there are fewer than 100 class members, or the “primary” defendants are states or state officials.<sup>7</sup> H.R. 3789 also mandates in any case where a federal court fails to certify a class action that the court “strike the class action allegations” before remanding the case to state court.<sup>8</sup>

Before even considering H.R. 3789, Congress should insist on receiving objective and comprehensive data justifying such a dramatic intrusion into state court prerogatives. Although nothing in the way of such information now exists,<sup>9</sup> major studies by the Federal Judiciary Mass Torts Working Group and by the National Association of State Chief Justices are expected to be completed by early next year. Congress should await the results of these studies before acting.

H.R. 3789 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, the bill 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 only permits case-by-case adjudications, potentially draining away precious state court resources as well.

We also object to the fact that the bill is written in a one-sided manner favoring defendants. At the hearings 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

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the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.

<sup>6</sup>In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court held that “amount in controversy” requirement is satisfied only if each member of the class is seeking damages in excess of the statutory minimum. *But see* In re Abbott Labs. 51 F.3d 524 (5th Cir. 1995) (*Zahn* overruled by supplemental jurisdiction statute, 28 U.S.C. § 1367).

<sup>7</sup>H.R. 3789, § 2(b)(2).

<sup>8</sup>*Id.* § 3(e). H.R. 3789 also makes a number of changes to ease the procedural requirements for removing a class action to federal court, such as permitting removal to be sought by any defendant or plaintiff and eliminating the one-year deadline for filing removal motions. *Id.* § 3.

<sup>9</sup>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. 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. 3789’s supporters are incomplete and inconclusive. The much touted Rand study will not be final until 1999 and 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 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 9).

court. Yet H.R. 3789 does nothing to deal with these concerns. Although some of the more egregious provisions in the original legislation have been modified through the markup process, the bill continues to benefit one class of litigants—corporate defendants. For these and the other reasons set forth herein, we dissent from H.R. 3789.

### *1. H.R. 3789 Will Damage the Federal and State Court Systems*

#### *Impact on Federal Courts*

Expanding federal class action jurisdiction to include most state class actions,<sup>10</sup> as H.R. 3789 does, will inevitably result in a significant increase in the federal courts' workload. As the Justice Department observed, "[c]lass action cases are among the most resource-intensive litigation before the judiciary [and enactment of H.R. 3789] could move most of this litigation into the Federal judicial system. Addressing the resulting caseload could require substantial additional Federal resources."<sup>11</sup>

In actuality, the workload problem in the federal courts is already at an acute stage. For example, in 1997, the federal courts faced the following:

22,603 civil cases were pending for 3 years or more.

75 judicial vacancies existed, or approximately 10% of the federal judicial positions.

On average, federal district court judges had 420 civil filings pending, the highest level in 10 years.<sup>12</sup>

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.<sup>13</sup>

Judge Ralph K. Winter, Chief Justice of the Second Circuit, echoed these concerns when he complained, "[t]he political

<sup>10</sup>H.R. 3789 does so because virtually every significant class action include class members who may have relocated to another state. As a result, potential federal jurisdiction would lie in every such class action.

<sup>11</sup>See Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to the Honorable Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property, House Judiciary Committee 1 (June 18, 1998) (on file with the minority staff of the House Judiciary Committee).

<sup>12</sup>See Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the United States Courts (1997).

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

branches have steadily increased our federal question jurisdiction, have maintained an unnecessarily broad definition of diversity jurisdiction, and have then denied us resources minimally proportionate to that jurisdiction . . . The result is that a court with proud traditions of craft in decision-making and currency in its docket is now in danger of losing both.”<sup>14</sup> H.R. 3789, by federalizing state class actions, runs precisely counter to Chief Justice Rehnquist’s and Chief Judge Winters’ admonition and risks severely aggravating the judicial workload crisis.

Although H.R. 3789 includes a study of the legislation’s impact on the workload of the federal courts,<sup>15</sup> this provision by itself will not alleviate the case load problem. Unfortunately, the Majority rejected another amendment offered by Rep. Delahunt (D-MA) which would have delayed the legislation’s effective date until the judicial vacancy rate was below 3%.<sup>16</sup> This would have at least insured that judges were in place to handle the increased work necessitated by H.R. 3789.

#### *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. 3789 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, potential new cases may be unleashed.

In addition to these potential workload problems, the legislation raises serious constitutional issues. H.R. 3789 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. The courts have previously indicated 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*<sup>17</sup> 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*<sup>18</sup> 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

<sup>14</sup> Annual report to the 2nd Circuit Judicial Conference, presented June, 1998.

<sup>15</sup> H.R. 3789, § 5. This provision was added pursuant to an amendment offered by Rep. Delahunt.

<sup>16</sup> Rejected by voice vote.

<sup>17</sup> 487 U.S. 131, 138 (1988) (Wisconsin notice-of-claim statute found to be preempted by 42 U.S.C. § 1983, which holds anyone acting under color of law liable for violating constitutional rights of others).

<sup>18</sup> 520 U.S. 911; 117 S. Ct. 1800; 1997 U.S. LEXIS 3547 (1997) (Idaho procedural rules concerning appealability of orders held not to be preempted by 42 U.S.C. § 1983).

law takes State courts as it finds them”<sup>19</sup> and observed that judicial respect for the principal of federalism “is at its apex when we confront a claim that Federal law requires a State to undertake something as fundamental as restructuring the operation of its courts” and “it is a matter for each State to decide how to structure its judicial system.”<sup>20</sup>

These same constitutional questions were highlighted by Professor Laurence Tribe in his recent testimony regarding the constitutionality of a proposed class action ban included in pending tobacco legislation, when he stated, “[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.”<sup>21</sup> Public Citizen voiced similar concerns in the context of H.R. 3789: “Apart from embodying a massive affront to the sovereignty and independence of the state court system, any such intrusion by Congress to a state would raise a serious constitutional problem in its own right, since the historic understanding is that Congress has no right to dictate procedural rules to the states to govern adjudication of state law claims.”<sup>22</sup>

Arguments that H.R. 3789 is nonetheless justified because state courts are “biased” against out of state defendants in class action suits are vastly overstated.<sup>23</sup> First off, 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*,<sup>24</sup> 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;<sup>25</sup> (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.<sup>26</sup>

<sup>19</sup>1997 U.S. LEXIS 3547, \*15 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).

<sup>20</sup>*Id.* at \*21. 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) (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).

<sup>21</sup>*The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School).

<sup>22</sup>*Hearing on H.R. 3789 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 at 12).

<sup>23</sup>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.

<sup>24</sup>472 U.S. 797 (1985).

<sup>25</sup>The notice must be the “best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–315 (1950)).

<sup>26</sup>*Id.* at 806–810. These findings were reiterated by the Supreme Court in 1995 in *Matshusita Elec. Indust. Co. v. Epstein*, 516 U.S. 367 (1995) (state class actions entitled to full faith and

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.<sup>27</sup> For example, less than two years ago Congress enacted the Federal Courts Improvement Act of 1996,<sup>28</sup> 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<sup>29</sup> and that it was important to keep the federal judiciary's efforts focused on federal issues.<sup>30</sup> In this same regard, the American Law Institute has found "there is no longer the kind of prejudice against citizens of other states that motivated the creation of diversity jurisdiction,"<sup>31</sup> and a recent 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.<sup>32</sup> Indeed, in 1978, the House twice passed legislation that would have abolished general diversity jurisdiction.<sup>33</sup>

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. 3789 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

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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).

<sup>27</sup> Ironically, last Congress the Republican Party was extolling the virtues of state courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional state law convictions in federal court. At that time Chairman Hyde stated:

I simply say the state judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest . . . when the judge raises his hand, State court or Federal court, they swear to defend 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).

<sup>28</sup> 28 U.S.C. § 1332(a) (West Supp. 1998).

<sup>29</sup> The Judicial Conference of the United States, Long Range Plan for the Federal Courts, Recommendation 7 at 30 (1995).

<sup>30</sup> *Id.*

<sup>31</sup> American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 101, 106 (1969).

<sup>32</sup> 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).

<sup>33</sup> See 124 Cong. Rec. 5008 (1978); 124 Cong. Rec. 33, 546 (1978). The legislation was not considered in the Senate.

does not seem reasonable to expect the defendants to face any great risk of bias.<sup>34</sup> Similarly, if the Disney Corporation,<sup>35</sup> 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. Yet under H.R. 3789, both of these hypothetical cases would be subject to removal to federal court.

2. *H.R. 3789 Will Weaken Enforcement of Laws Concerning Consumer Health and Safety, the Environment, and Civil Rights*

There can be little doubt that H.R. 3789 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 some 29% of the nation's population,<sup>36</sup> have adopted different criteria for class action rules than Rule 23 of the federal rules of civil procedure.<sup>37</sup> 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.*,<sup>38</sup> *In re Rhone-*

<sup>34</sup>General Motors and Ford both have their principal place of business in Michigan and are incorporated in Delaware.

<sup>35</sup>Disney's corporate headquarters are located in Burbank, California, and it is incorporated in Delaware.

<sup>36</sup>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).

<sup>37</sup>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.

<sup>38</sup>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).

*Poulenc Rorer, Inc.*,<sup>39</sup> *American Medical Systems, Inc.*,<sup>40</sup> *Georgine v. Amchem Products, Inc.*,<sup>41</sup> and *Broussard v. Meineke Discount Mufflers*<sup>42</sup> have made it more difficult to establish the predominance requirement of rule 23(b)(3) necessary to establish a class action under the federal rules. This is why class action expert Beverly Moore, the Editor of Class Action Reports, warned, “H.R. 3789 is nothing more than a forum shopping device for class action defendants, whereby they seek to remove cases . . . [to] federal judges who can be expected to deny class certification.”<sup>43</sup>

Further, as noted above, H.R. 3789 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<sup>44</sup> and the fact that the federal courts are obligated to resolve criminal matters on an expedited basis before civil matters,<sup>45</sup> even where plaintiffs are able to successfully certify a class action in federal court, it will take longer to obtain a trial on the merits than it would in state court.

H.R. 3789 also poses unique risks and obstacles for plaintiffs that they do not face under current law. Because the federal courts are required to strike the class allegations in cases they choose not to certify, plaintiffs are likely to be foreclosed from forming a reconstituted class in state court upon remand which conforms to the legislation’s requirements.<sup>46</sup> Even if a class could somehow be reconstituted or economically viable individual or aggregate actions could be maintained in court, under H.R. 3789 they could run afoul of state statute of limitations requirements. This is because the legislation only provides that upon remand the statute of limitations is to be tolled to the extent provided under *federal* law<sup>47</sup>—it offers no specific protection against state statutes of limitation expiring. Even in those few cases where federal causes of action may be implicated, the bill’s language is of no benefit with regard to a reconstituted class action because federal law only provides for tolling of statutes of limitation upon remand for *individual* actions, not *class* actions.<sup>48</sup>

<sup>39</sup> 51 F. 3d 1293 (7th Cir. 1995), *cert denied*, 116 S. Ct. 184 (1995) (decertifying, under the Erie Doctrine, a nationwide class action in negligence brought on behalf of hemophiliacs infected with the AIDS virus through use of defendants’ blood clotting products because of diversity of state laws).

<sup>40</sup> 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).

<sup>41</sup> 117 S.Ct. 2231 (1997) (overturning consensual settlement between a class of workers injured by asbestos and a coalition of former asbestos manufacturers because of disparate levels of the class members’ knowledge of their injuries and class member’s large amount at stake in the litigation).

<sup>42</sup> 1998 WL 512926 (4th Cir. Aug. 19, 1998) (rejecting class certification brought by Meineke franchisees alleging violations of franchise, tort, unfair trade and other laws).

<sup>43</sup> Statement of Beverly C. Moore, Jr., Editor, Class Action Reports, In Opposition to H.R. 3789 at 3–4.

<sup>44</sup> See *supra* note 12 and accompanying text.

<sup>45</sup> Speedy Trial Act of 1974, 18 U.S.C. § 3161–3174 (1994).

<sup>46</sup> For example, if certification had been denied by the federal court because a particular conflict among the class members made it impossible to meet the “adequate representation” requirement of Federal Rule of Civil Procedure 23(a)(4), the plaintiffs in the remanded action would likely be prohibited from narrowing the class in an effort to resolve that conflict.

<sup>47</sup> H.R. 3879, § 3 (e).

<sup>48</sup> Although the so-called *American Pipe* rule (See *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)) tolls the statute of limitations for newly filed individual claims of putative members of a proposed class action

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<sup>49</sup> 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. Further definitional problems lie in the bill’s open-ended requirements that federal courts “should” and “may” abstain from specified state class actions.<sup>50</sup> Moreover, since H.R. 3789 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 vagueness problems will be particularly acute for plaintiffs—if they guess incorrectly regarding the meaning of a particular phrase, their class action could be permanently preempted and barred by the statute of limitations. However, if a defendant guesses wrong and jurisdiction does not lie in the federal courts, the defendant will be no worse off they are under present law, and will have benefitted from the additional time delays caused by the failed removal motion.

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 following is an illustrative list of important class actions previously brought at the state level, but which could be forced into federal court under H.R. 3789, where the actions may be delayed or rejected:

*Protections Against Consumer Fraud and Violations of Health and Safety Laws*

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.<sup>51</sup>

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 try-

that ultimately failed to secure certification in federal court, American Pipe does not permit tolling where, after a first denial of class certification, the members of the proposed class file a subsequent class action. See *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (“In sum, we hold that the tolling doctrine enunciated in *American Pipe* does not apply to permit a plaintiff to file a subsequent class action following a definitive determination of the inappropriateness of class certification.”); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) (“The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of the previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class.”). See also *Robbin v. Flour Corporation*, 835 F.2d 213, 214 (9th Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994).

<sup>49</sup>H.R. 3789, § 2(b)(2).

<sup>50</sup>*Id.*

<sup>51</sup>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.

ing 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.<sup>52</sup>

Bristol-Meyers-Squibb, Abbot Laboratories, and Abbot’s subsidiary Johnson & Company agreed to a \$230 million settlement of twenty state class-action suits involving some 1 million injured consumers alleging infant formula price fixing in violation of the various states’ antitrust laws. The companies, headquartered in New York and Illinois, illegally colluded and fixed prices in various regions of the country, causing a great discrepancy in prices. For example, in Salt Lake, a one-month supply of formula cost approximately \$18, while the same formula cost \$75 in other states. The class actions brought an end to the price-fixing scheme, which lowered the price of baby formula in all regions of the country.<sup>53</sup>

Dairyland Insurance Company, a Wisconsin corporation, is facing a West Virginia class action filed by well over 100 persons, mostly West Virginia residents. The action alleges that Dairyland improperly canceled auto insurance policies without giving drivers the required 30-day notice and by sending out an ineffective form which did not provide an unequivocal notice of cancellation in violation of the West Virginia Unfair Claims Settlement Practices Act. Plaintiffs are seeking declaratory relief stating that coverage should exist for those drivers who coverage was improperly canceled and that the insurance should cover claims realized in the interim.<sup>54</sup>

GranCare, Inc., a California corporation, and its Colorado subsidiary, AMS Properties, Inc., are facing a Colorado class action filed by some 750 individuals, mostly Colorado citizens, who resided at Cedars Health Care Center in Lakewood, Colorado from September, 1993 through February, 1998. The action alleges a variety of problems including facility-wide outbreaks of illness due to unhygienic conditions, inadequate physical and mental health care, and inadequate record-keeping. The class action charges that defendants provided substandard care to residents at their nursing home facility in violation of Colorado contract, negligence and fraud law, as well as the duty of care required under the state and federal Medicare and Medicaid programs.<sup>55</sup>

### *Protections Against Environmental Harm*

On July 26, 1993, a California plant operated by General Chemical, a Delaware corporation with offices in New Jersey,

<sup>52</sup>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.

<sup>53</sup>“Huge Price-Fixing Settlement Means Baby Formula Won’t Cost As Much,” *Salt Lake Tribune*, May 28, 1993 at A1.

<sup>54</sup>*Robert Yoxtheimer, et al. v. Dairyland Insurance Company and Sentry Insurance Company* (Civ. Ac. No. 97-C-1913, Cir. Ct. Kanawha Co.).

<sup>55</sup>*Salas, et. al. v. GranCare, Ins. & AMS Properties d/b/a Cedars Health Care Center, Civ. Action No. 96-CV-4449 (Dist. Ct, City and Cnty of Denver, Co.).*

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.<sup>56</sup>

Mobil Corp., a Delaware corporation with offices in Virginia, entered into a \$14 million settlement agreement with a class of over 10,000 Louisiana residents relating to a November, 1990 fire at their oil refinery that scattered debris in St. Bernard Parish and the Algiers section of New Orleans. The fire lasted over twelve hours and sent volatile and hazardous compounds into the air, killing one person and forcing most residents to evacuate. The settlement included \$13.43 million in compensation payable to residents, who would each receive between a few hundred dollars and several thousand dollars, and an additional \$1 million permanent endowment. The interest generated by the endowment will produce at least \$50,000 yearly, which will be given to civic and charitable organizations in St. Bernard Parish and Algiers.<sup>57</sup>

### 3. *H.R. 3789 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. 3789 benefits corporate defendants. The Department of Justice has written, “[w]hile the rights of all parties in class actions must be protected, [H.R. 3789] provides substantial benefits to defendants at the expense of plaintiffs.”<sup>58</sup> Although the legislation has been modestly pared back from the initial extreme versions introduced and reported by the subcommittee, it remains one-sided in its approach to the issue of class actions. H.R. 3789 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 their written testimony, Public Citizen observed that the notice in the John Hancock deceptive sales practice class action<sup>59</sup>

<sup>56</sup>“\$180 Million Settlement of Toxic Cloud Claims Wins Judges O.K.,” Mealey’s Litigation Reports: Toxic Torts, November 17, 1995 at 8.

<sup>57</sup>“Thousands Ask For Damages in Mobil Fire,” *Saturday State Times/Morning Advocate*, June 22, 1996, at 12A; “10,000 File Claims in Fire; Mobil Settlement Deadline Passes,” *New Orleans Times-Picayune*, June 21, 1996, A1.

<sup>58</sup>See Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to the Honorable Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property, House Judiciary Committee 2 (June 18, 1998) (on file with the minority staff of the House Judiciary Committee).

<sup>59</sup>*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).

was “impenetrable [and] would make it much less likely that deserving claimants would, in fact, pursue their claims for redress.”<sup>60</sup> Similarly, class action expert Ralph Wellington testified that “class notices should be written in plain language. It is possible to tell class members clearly and simply what benefit they will receive, how much money class counsel will receive, and where that money will come from.”<sup>61</sup> Unfortunately, H.R. 3789 completely ignores this problem, at both the state and federal level.

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*<sup>62</sup> 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 practice.<sup>63</sup> Any serious effort to reform class actions should address these issues, whether they arise at the federal or state level.<sup>64</sup>

#### CONCLUSION

H.R. 3789 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. 3789 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,<sup>65</sup> and the few state court trial court de-

<sup>60</sup>*Id.* at 7.

<sup>61</sup>*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 Ralph G. Wellington, Esq., Schnader, Harrison, Segal & Lewis, LLP).

<sup>62</sup>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).

<sup>63</sup>See also *Matsushita v. Epstein*, *supra* note 26; *Grimes v. Vitalink Communications Corp.*, 17 F. 3d 1553, 1563–64 (3d Cir.), *cert denied*, 115 S. Ct. 480 (1994) (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).

<sup>64</sup>Public Citizen has pointed to a number of potentially problematic coupon and other low value settlements involving defective vehicles, such as (1) the GM pick-up case (*In re: General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F. 3d 768 (3d Cir. 1995)), in which class action plaintiffs received only non-transferable and non-marketable discount coupons for future vehicle purchases; (2) the Ford Bronco case (*In re: Ford Motor Co. Bronco II Products Liability Litigation*, 1995 U.S. Dist. Lexis 3507 (E.D. La. 1995)) in which the plaintiffs received only a package of videos, stickers, and flashlights; and (3) the Chrysler Minivan case (*Hanlon v. Chrysler Corp.*, 1998 WL 296890 (9th Cir. June 9, 1998)) in which the plaintiffs received no monetary compensation and essentially no more than what Chrysler’s promise to conform with its obligation to the federal regulators.

<sup>65</sup>See *supra* notes 24–26 and accompanying text.

cisions to the contrary have been overturned.<sup>66</sup> H.R. 3789 also cannot be seen as merely prohibiting nationwide class actions file 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. 3789's rejection.

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ADDITIONAL DISSENTING VIEWS BY REPRESENTATIVES NADLER AND JACKSON-LEE RELATING TO H.R. 3789'S IMPACT ON LIABILITY ACTIONS CONCERNING TOBACCO, GUNS AND MANAGED CARE ORGANIZATIONS

In addition to the general policy concerns we have with H.R. 3789, 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. 3789. 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 we offered three separate amendments which would have carved out the tobacco, gun, and managed care industries from the legal protections provided under H.R. 3789, each was rejected by the Republican Majority. Although the Major-

<sup>66</sup>See *Ex Parte State Mutual Ins. Co.*, Nos. 1960410, et al., 1197 WL 772923 (Ala. Dec. 16, 1997); *Ex Parte American Bankers Life Assur. Co. of Fla.*, No. 1950705, 1997 WL 773322 (Ala. Dec. 16, 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).

ity 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,<sup>1</sup> 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. 3789 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<sup>2</sup> will always exist between the plaintiffs and the tobacco companies. H.R. 3789, 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 the Tobacco Products Liability Project,<sup>3</sup> the Coalition for Workers Health Care Funds,<sup>4</sup> Americans for Nonsmokers’ Rights,<sup>5</sup> the National Center for Tobacco-Free Kids,<sup>6</sup> and Save Lives, Not Tobacco (a coalition which includes the American Lung Association and the American Medical Woman’s Association).<sup>7</sup> 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 the Campaign for Tobacco Free Kids, “the tobacco industry prefers to litigate in federal court where the rules for certifying classes and maintaining class actions are more favorable to corporate defendants, and they routinely seek to remove class action lawsuits from state court to federal court. H.R. 3789 cor-

<sup>1</sup>Examples of other Republican supported carve-outs include: (1) H.R. 3789, itself, which carves out an exception for lawsuits brought under the Securities Act of 1933 and 1934 (see H.R. 3789, § (4)); (2) 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); (3) last 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 (4) 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).

<sup>2</sup>See note 5, *infra*, and accompanying text of principal dissenting views.

<sup>3</sup>Letter from Richard A. Daynard, Professor of Law, Chairman, Tobacco Products Liability Project, Northeastern University Law School, to John Conyers, Ranking Member, House Judiciary Committee (July 14, 1998) (on file with the minority staff of the House Judiciary Committee).

<sup>4</sup>Letter from David Mallino, Legislative Director, Coalition for Workers Health Care Funds, to John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (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.

<sup>5</sup>Letter from Julia Carol, Co-Director, and Robin Hobart, Co-Director, Americans for Non-Smokers’ Rights, to John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (on file with minority staff of House Judiciary Committee).

<sup>6</sup>Letter from Matthew Meyers, Executive Vice President and General Counsel, National Center for Tobacco-Free Kids, to John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (on file with minority staff of House Judiciary Committee).

<sup>7</sup>Letter from Paul G. Billings, American Lung Association; Michele Bloch, American Medical Women’s Association; Joan Mulhern, Public Citizen; William Godshall, SmokeFree Pennsylvania to House Judiciary Committee Member[s] (July 15, 1998) (on file with minority staff of House Judiciary Committee).

responds perfectly with the industry's litigation strategy, and furthers the industry's goal of avoiding liability."<sup>8</sup> Similarly, one of the nation's foremost tobacco liability experts, Professor Richard Daynard has observed, "Federal courts have, by and large, been hostile to class actions on behalf of toxic tort victims in general and tobacco victims in particular" and H.R. 3789 "would have the practical effect of ending most class actions against the tobacco companies."<sup>9</sup> Pro-tobacco Wall Street analyst Gary Black echoed this sentiment when he acknowledged that tobacco class actions are practically impossible to pursue in federal court.<sup>10</sup>

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, H.R. 3789 would have undermined classes of plaintiffs in *Engle v. R.J. Reynolds Tobacco Co.*,<sup>11</sup> a class action on behalf Florida citizens who have become wrongfully addicted to tobacco, and *Broin v. Phillip Morris*<sup>12</sup> which considered the claims of some 60,000 flight attendants harmed by second hand smoke. In addition, the bill would have impacted an additional 12 class actions filed on behalf of individuals currently pending in state courts for smoking related claims<sup>13</sup> and could have affected five 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.<sup>14</sup>

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

<sup>8</sup>Meyers letter, *supra* note 6.

<sup>9</sup>Daynard letter, *supra* note 3.

<sup>10</sup>*Id.* (citing July 10, 1998 newsletter). The fact that the legislation does not directly limit individual actions is of little import. In *Broin v. Phillip Morris*, 641 So. 2d 888, 892 (Fla. 3d Dist. Ct. App. 1994). The Florida Circuit Court observed that if the law required each class member to sue as individuals "the result would be . . . financially prohibitive . . . [and] the vast majority of class members . . . would be deprived of a remedy."

<sup>11</sup>672 So. 2d 39 (Fla. Dist. Ct. App. 3d 1996).

<sup>12</sup>*Supra* note 10.

<sup>13</sup>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), six of which are currently pending at the state level. See *Brown v. American Tobacco*, No. 00711400 (Super. Ct., State of Calif., Cnty. of San Diego, filed June 10, 1997); *Norton v. RJR Nabisco*, No. 48D01-9605-CP-0271 (Madison Super. Ct., State of Ind., County of Madison, filed May 3, 1996); *Scott v. American Tobacco*, No. 96-8461 (Civ. Dist. Ct., Parish of Orleans, State of La., filed May 24, 1996); *Tepper v. Philip Morris*, No. BER-L-4983-97-E (Super. Ct. of NJ, Law Division, Bergen Cnty., filed May 28, 1997); *Connor v. American Tobacco*, No. CV-96-8464 (2nd Jud. Dist. Ct., Cnty. of Bernalillo, State of NM, filed Sept. 10, 1996); *Hoskins v. R.J. Reynolds*, No. 110951/96 (S. Ct., State of NY, Cnty. of NY, filed Sept. 19, 1996).

Six other non-*Castano* class actions involving tobacco liability are also pending in state courts. See *Morgan v. US Tobacco*, No. 68655B (10th Jud. Ct., Parish of Natchitoches, La.); *Scott v. American Tobacco*, No. 96-8461 (Civil Dist. Ct., Parish of New Orleans, La.); *Brammer v. R.J. Reynolds*, No. 73061 (Iowa Dist. Ct., Polk County, Ia.); *Knowles v. American Tobacco*, No. 97-11517 (State of La., Parish of Orleans); *Avallone v. American Tobacco* (NJ Super., Atlantic Co. Law Div.); *Richardson v. Philip Morris*, No. 96145050/CL212596 (Md. Cir., Balto. City (certified)).

<sup>14</sup>*Construction Laborers v. Philip Morris*, CA No. 972-8799 (Cir. Ct. St. Louis, CA, removed to E.D. Mo.—E. Div., CA No. 4:97 CV-02030-ERW, filed Sept. 2, 1997); *Teamsters v. Philip Morris*, CA No. 71C019709CP0128 (Cir. Ct. St. Joseph County, filed Sept. 12, 1997); *Multi-Craft Health v. Philip Morris*, No. CV-97-0009118 (N.M. Dist. Court—2nd Jud. Dist. Bernalillo Co., filed Oct. 10, 1997); *Operating Engineers v. Philip Morris*, CA No. 97-741291 CZ (Cir. Ct. Cnty. Of Wayne, filed Dec. 30, 1997); *Steamfitters v. Philip Morris*, CA No. 92260 Div. 2 (Cir. Ct. of Tenn., filed Jan. 7, 1998). Numerous additional health and welfare actions are expected to be filed in the future against the tobacco industry.

class actions in the now aborted settlement they reached with the state attorneys general.<sup>15</sup> By severely limiting state class actions, H.R. 3789 would provide the tobacco industry indirectly what Congress was unwilling to give them directly—protection from liability.<sup>16</sup>

## II. Impact on Gun Liability

We also oppose H.R. 3789 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,<sup>17</sup> the Coalition to Stop Gun Violence,<sup>18</sup> and the Violence Policy Center, which has written, “[c]urrently, the civil justice system is the only mechanism available to protect consumers from defect-related death and injury and to ensure that guns . . . are safe and free from defects in design or manufacture.”<sup>19</sup> 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, major American cities, such as Detroit and Chicago, are considering 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. A state class action brought in Texas ultimately resulted in a \$31 million settlement against Remington.<sup>20</sup> Another class action is pending in Texas concerning pistols asserted to have been defectively made and marketed.<sup>21</sup> Yet another class action was brought in New York against manufacturers alleged to have negligently marketed handguns to unscrupulous dealers who illegally sold the weapons.<sup>22</sup> A liability action is also pending in Illinois brought by the families of three young children who were killed by juveniles illegally carrying handguns alleged to be mar-

<sup>15</sup> 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.

<sup>16</sup> It has been reported that “tobacco industry leaders insist that they will not curb advertising that is attractive to youths without Congressional approval of a settlement that grants them substantial liability from immunity.” *Id.* Similarly, a spokesman for the tobacco companies, Mr. Meyer Koplow recently admitted that “[the tobacco industry] might return to practices such as cartoon advertising if Congress fails to grant protection from lawsuits.” Jessica Lee, “Health Groups Line Up Against Tobacco Deal,” *USA Today*, Feb. 18, 1998, at 9A.

<sup>17</sup> Letter from Dennis Henigan, General Counsel, Handgun Control, to John Conyers, Ranking Member, House Judiciary Committee (July 16, 1998) (on file with minority staff of House Judiciary Committee).

<sup>18</sup> Letter from Michael K. Beard, President, Coalition to Stop Gun Violence, to John Conyers, Ranking Member, House Judiciary Committee (July 21, 1998) (on file with minority staff of House Judiciary Committee).

<sup>19</sup> Letter from M. Kristen Rand, Director of Federal Policy, Violence Policy Center, to John Conyers, Ranking Member, House Judiciary Committee (July 14, 1998) (on file with minority staff of House Judiciary Committee).

<sup>20</sup> See *Garza v. Remington*, 1996 U.S. Lexis 2009 (W.D. Tex. 1996) (class of shotgun owners sued the Remington Arms Company claiming that their shotguns barrels were insufficiently strong and susceptible to bursting during normal usage).

<sup>21</sup> *Spence v. Glock*, No. 97-013 (E.D. Tex. filed Aug. 5, 1997).

<sup>22</sup> *Hamilton v. Accu-tec*, 935 F. Supp. 1307 (1996).

keted to gang members, and the plaintiffs are considering recasting this case as a class action.<sup>23</sup>

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 individuals 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 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."<sup>24</sup>

### *III. Impact on Managed Care Liability*

Finally, H.R. 3789 would undermine a series of recent class action suits against health maintenance organizations resulting from their alleged fraud, over billing and failure to provide coverage. 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. 3789 which would deny more patients access to justice in state court. The following are examples of class actions currently pending in state courts which could be preempted and possibly terminated by federal courts under the legislation:

On June 23, 1997, Harold Kaitlin filed a class action in Pennsylvania State court against his psychiatrist, David Tremoglie, and Keystone Health Plan East Inc., his HMO, alleging that the psychiatrist had treated hundreds of patients without a medical license.<sup>25</sup> 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 unlicensed 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.<sup>26</sup>

Two class actions were brought in Connecticut state court against CIGNA Healthcare of Connecticut over the termination of doctors from its HMO in 1994. In *Hollis*, the plaintiffs are insureds who had begun treatment with physicians participat-

<sup>23</sup> *Young v. Bryco Arms*, No. 98106684 (Cook Co. Ill. Cir. Ct. 1998)

<sup>24</sup> Hennigan letter, *supra* note 17.

<sup>25</sup> *Kaitlin v. Tremoglie, et al.*, No. 002703 (Pa. Comm. Pls., Philadelphia Co. 1997).

<sup>26</sup> 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.

ing in the plan who were then removed from the list of participating physicians.<sup>27</sup> In *Napoletano*, the plaintiffs are nine physicians who had treated the plaintiffs in *Hollis* and were terminated from their contract for supposedly not following utilization review procedures.<sup>28</sup> Both cases allege violations of the Connecticut Unfair Trade Practices Act.

Two men who were denied referrals to urologists by their primary care physicians and were later diagnosed with prostate cancer filed a class action in 1997 in Florida against Humana, which is based in Kentucky, on behalf of all Florida Medicare beneficiaries who joined Humana's HMO.<sup>29</sup> The suit sought compensatory damages or rescission. Humana's contracts with its primary care physicians allegedly created inappropriate financial disincentives to provide treatment at all or to refer members to specialists and prohibited physicians from discussing with members treatments that the HMO did not wish to cover.

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, is seeking class-action status in a lawsuit against both Oxford and North Shore. The class will include all Oxford members who were referred to North Shore by Oxford for covered services, but whose bills have not been paid or have only been partially paid by Oxford. Oxford has 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 have reportedly privately admitted to Kaplan that she should have no liability for the bill, and North Shore personnel have also apparently admitted privately that they are billing Oxford plan members to pressure Oxford to pay for claims. Kaplan claims here credit has been ruined by her unpaid bill and she has been harassed by a collection agency.

JERROLD NADLER.  
SHEILA JACKSON LEE.

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<sup>27</sup> *Hollis v. CIGNA Healthcare of Connecticut, Inc.* No. CV-94-070537 (Conn. Super., 1994).

<sup>28</sup> *Napoletano v. CIGNA Healthcare of Connecticut, Inc.*, No. CV-94-0705358 (Conn. Super. 1994).

<sup>29</sup> *Castillo v. Humana Inc.*, No. 97-1917 (Fla. Cir., 13th Jud. Cir. 1997).