FH (DOJ) — Isn't the Fed. R. 23 <u>too</u> restrictive (?)

Q: Why is Barney Frank supporting this bill (?)

Under federal class action suits, if πs have different nature of damages claims, no certification.
(Knocks ~~the~~ large % of tobacco suits out).

No good justification for federalizing class actions litigation.

What else is wrong w/ federalizing all class actions (?)

(1) choice of law

(2) % caseload impact

<u>Next steps</u>

(1) @ one of next Dptys mtg. Sally to discuss strategy (1/2 pg. to Dptys memo) middle of next week

(2) 2d DOJ Letter
(including praise for the process)
continuing to oppose the bill.
mention (maybe) options we would further consider if a bill moving.

Class Actions 7/8

Full committee next week

Jack Quinn wants us to write a 2nd letter; softer tone.
He wants: (1) acknowledgment that there have been excesses & bizarre behaviors on part of state ct. judges.
(2) recognition that Kobl & Frank worked hard to attend to a number of issues - credit

Any likelihood of this bill being enacted this year?)
- could get tacked on to Hatch bill? Others?

Justice - bill after subcommittee

Would still move bulk of cases to fed ct.
(tobacco; insurance; drug companies?)

goal of proponents = federalization of class actions.
Frank & Moran share concern about varied standards applying to class actions.

Pincus →
Our arg. could be that we ~~could assert~~ support removal if class action TTs includes people from outside the state and/or where locus of transaction not w/in the state

as the only place where we could go.

MEMORANDUM

To: Office of Management and Budget

From: Office of the General Counsel, Securities and Exchange Commission

Re: H.R. 3789, the "Class Action Fairness Act of 1998"

You have requested our views on H.R. 3789, the "Class Action Fairness Act of 1998." The following views are those of Commission staff; the Commission itself has taken no position on the bill.

We have no comment on the larger policy issues presented by the bill, which we assume will be addressed by the Department of Justice. The Senate and the House have, however, recently considered some of these issues and determined that certain securities-related class action claims should be resolved in state courts. To make H.R. 3789 conform to S. 1260 (passed the Senate May 13, 1998) and/or H.R. 1689 (marked up by the House Commerce Committee on June 24),[1] the following technical amendments are needed:

1) *Carve-out for state corporate governance claims.* Language in both S. 1260 and H.R. 1689 exempts from preemption state-court class actions involving matters of corporate governance. This exemption reflects a judgment that matters involving state corporate governance – which are the subject of a considerable body of specialized state law and are handled quickly and expertly by specialized state courts, such as the Delaware Court of Chancery -- ought not to be forced into federal court. To give effect to this judgment, exemptive language from S. 1260 or H.R. 1689 would need to be added to H.R. 3789.[2]

2) *Claims involving bond indenture contracts and certain debt securities.* An amendment added to H.R. 1689 at full committee markup makes clear that class actions involving certain debt securities not required to be registered with the Commission, and class actions involving contractual agreements between issuers and indenture trustees, could still be brought in state

---

[1] Amendments to H.R. 3789 adopted at the subcommittee markup on June 24 exempt from the bill's coverage any class action brought under the Securities Act of 1933 or the Securities Exchange Act of 1934. This may be an attempt by the subcommittee to exempt from H.R. 3789's removal scheme the class of cases addressed in the securities litigation reform bills, S. 1260 and H.R. 1689. If so, the attempt fails because the exemption is underinclusive. The litigation reform bills cover common-law and state statutory securities fraud claims, not just claims brought under the federal securities laws. To make H.R. 3789 conform to the litigation reform bills, Congress would have to amend H.R. 3789 to exempt class actions involving "covered securities," as defined in those bills.

[2] S. 1260 and H.R. 1689 also explicitly state that they do not preempt shareholder derivative suits. The status of these suits is unclear under H.R. 3789.

courts. To preserve these judgments, H.R. 3789 would need to include exceptions for bond indenture claims and exempt debt security claims.

3) *Class actions brought by state and municipal pension funds.* Another amendment to H.R. 1689 allows state and municipal pension fund class actions to be brought in state court if the pension funds have authorized the actions. To make the bills conform, actions involving state and municipal pension funds would have to be exempted from H.R. 3789. Federal judges would probably remand these actions to state court under the bill's discretionary remand provisions, but expense and delay would be avoided by keeping these actions in state court in the first place.

THE WHITE HOUSE

SARAH ROSEN
SENIOR ADVISOR
NATIONAL ECONOMIC COUNCIL
(202) 456-5386 (Tel.)
(202) 456-2223 (Fax)

TO: See Distribution

PHONE:

FAX:

DATE:

PAGES TO FOLLOW: 3

COMMENTS: Attached is info prepared by the department of Justice to be discussed at the Class Action Bill mtg. on 7/8 at 1:00 pm Rm 239 OEOB.
Thank you.

Call Sonya if fax is incomplete at 456-5351.

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HOUSE SUBCOMMITTEE AMENDMENTS TO HR 3789

Original bill

The Class Action Litigation Act, H.R. 3789, as originally introduced, provided for removal of class actions to federal court at any defendant's option whenever minimal diversity existed between any plaintiff in the class and any single defendant. It eliminated the amount in controversy requirement. The usual one-year time limit on removal would not apply to class actions. If any removed case did not meet the requirements of Rule 23, it was to be dismissed, rather than remanded to state court. The provisions of the bill would be retroactive, applicable to any case in progress.

The Department of Justice opposed the bill, raising concerns about the widespread movement of class action litigation from state to federal courts, thus supplanting state authority and increasing the federal court caseload. It also raised concerns about many of the specific provisions described above. See the attached June 18, 1998 Letter to Chairman Coble from L. Anthony Sutin.

Subcommittee amendments

H.R. 3789 was amended in the House Judiciary Committee's Subcommittee on Courts and Intellectual Property on June 24, 1998. The bill's modified structure gives the federal court some limited discretion to abstain from hearing class action cases that could otherwise be removed from state court, if (1) the substantial majority of the proposed class are from the same state as the primary defendants and claims will be governed primarily by state law; (2) all matters in controversy do not exceed $1 million in value; (3) the class has fewer than 100 members; or (4) primary defendants are states, state officials or others against whom federal courts may not order relief.

amt. in controversy high

The amended bill allows limited removal by a plaintiff class member, eliminates the retroactivity provision, and provides that a case that does not meet the Rule 23 requirements is to have its class allegations struck and remanded to state court, rather than being dismissed for lack of jurisdiction. Pending claims would be deemed tolled during the pendency of the federal court action.

makes huge swath of class cases have to meet the federal standard

The amendments also include provisions making explicit that substantive state law would continue to apply, and which exempt cases under the securities laws from the bill's provisions.

Effect of the Amendments

The amended bill is an improvement over the original text, but remains a vehicle to transfer many (and possibly most) class actions into federal court.

While the provisions providing federal court discretion to "abstain" in some cases do limit to some degree the state class action cases that would necessarily end up in federal court, the discretion is quite limited in scope.[1] One million dollars and a class of 100 members are both probably fairly low thresholds. We do not know how many cases would fit within these or the other criteria. There are no good data about the numbers of cases in state or federal courts, nor on how this legislation would affect them.

The amendments do address some of the specific concerns raised in the DOJ letter, at least to some degree:

> Plaintiffs now have at least a limited opportunity to remove to federal court, although this may only apply in Rule 23(b)(3) cases.
>
> The specific language that any removed case would be deemed as brought under Rule 23 is gone, but the significance of the change is unclear; Rule 23 would probably apply in any event.
>
> The retroactivity provision has been eliminated.
>
> Fed ct. or nothing for certain (most?) class actions.
>
> Cases that do not meet Rule 23 criteria are no longer to be dismissed in their entirety. Rather, the case is remanded to state court (<u>but with the class allegations struck</u>), and the claims are deemed to have been tolled for the period the case was pending in federal court.

The exemption from the one-year limit on removal remains, although <u>it appears</u> that it is not intended to allow unlimited removal at any time. (It must be tied to a new event supporting removal.)

Two bottom line questions raised in our letter remain. First, to what extent do we want to support the federalization of state class actions in principle? Two, what implications will this have on federal caseloads?

2 Qs

In addition, the implications for tobacco cases should be considered. It seems likely that under this bill, all tobacco class actions would end up in federal court. Does the Administration want to limit state court jurisdiction for tobacco class actions?

---

[1]Congressman Frank indicated at the mark-up that he was considering proposing an amendment at the full Committee level that would make remand in these cases mandatory.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 18, 1998

The Honorable Howard Coble
Chairman
Subcommittee on Courts and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Justice Department on H.R. 3789, the "Class Action Jurisdiction Act of 1998." The Department opposes this bill.

This legislation would allow any class action in which even the most minimal diversity of citizenship existed (or developed) to be filed in, or removed to, Federal court. The broad definition of diversity in section 2 of the bill, coupled with the elimination of the amount-in-controversy requirement, essentially would federalize class action litigation, even where most of the parties were from one State and the case was based on State law. 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. While the Federal courts may be particularly appropriate as the venue for some types of class actions (*e.g.*, some mass torts), not all class actions need to or should be heard there.

This is particularly true at a time when serious concerns have been expressed about the caseload of the Federal courts. *See, e.g.*, Chief Justice Rehnquist, The 1997 Year-End Report on the Federal Judiciary at (I)(A). Preliminary data from RAND's ongoing study of class actions suggest that more than half of such litigation is currently in State courts. Class action cases are among the most resource-intensive litigation before the judiciary. H.R. 3789 could move most of this litigation into the Federal judicial system. Addressing the resulting caseload could require substantial additional Federal resources. Responsibility in this area should continue to be shared among both Federal and State judicial systems.

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 an important mechanism for aggregating small claims that otherwise might not warrant individual litigation. While the rights of all parties in class actions must be protected, this bill provides substantial benefits to defendants at the expense of plaintiffs.

For example, H.R. 3789 would allow removal of a class action to Federal court essentially at the defendants' option. Since the bill would require only one plaintiff to be from a State different from that of a defendant, only rarely would a class action case be ineligible for removal to Federal court

Moreover, a case initially proceeding under State class action rules would, upon removal, become subject to Federal Rule 23. Rule 23 might involve different standards or procedures. For example, a class certified under State law might not be certifiable under Rule 23 or different notice requirements might apply. And because section 4 of the bill would require dismissal rather than remand if the removed case did not meet Rule 23 requirements, State claims for which the statute of limitations expired in the interim would be permanently barred.

The bill would cause significant disruption and inefficiency. For example, as currently drafted, the bill would exempt class action cases from 28 U.S.C. § 1446's one-year deadline for removal of diversity cases. Thus, no matter how far the State court litigation had progressed, a case could become eligible for removal to Federal court if even a single plaintiff were to move out-of-state for any reason during the pendency of the litigation. Therefore, a defendant could stay in State court until it received some adverse rulings, then choose to remove the case to Federal court. The potential for disruption is exacerbated because the bill would apply to litigation already in progress at the time of enactment.

To the extent that this legislation might have the effect of narrowing access to class action procedures, it should be considered with considerable skepticism. If the bill is intended to respond to concerns with State court class action procedures, we believe that States should make appropriate modifications. And while there may be particular types of class actions that might most appropriately be heard in Federal courts, moving virtually all class action cases to Federal court would be an excessive and counterproductive response.

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

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Barney Frank
Ranking Minority Member

THE WHITE HOUSE

SARAH ROSEN
SENIOR ADVISOR
NATIONAL ECONOMIC COUNCIL
(202) 456-5386 (Tel.)
(202) 456-2223 (Fax)

TO: See Distribution List

PHONE:

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COMMENTS: Pls find attached additional Materials from DOJ on the Class Action Bill to be discussed at tomorrows mtg. Wed. July 8th at 4:00pm Rm 239. Thank you.

Pls. call Sonjia at 456 5351 if fax incomplete.

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Total Pages: ___

LRM ID: IMS362

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Wednesday, June 17, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO:	Legislative Liaison Officer - See Distribution below
FROM:	James J. Jukes (for) Assistant Director for Legislative Reference Schroeder for Jukes
OMB CONTACT:	Ingrid M. Schroeder PHONE: (202)395-3883 FAX: (202)395-3109
SUBJECT:	**JUSTICE Report on HR3789 Class Action Jurisdiction Act of 1998**
DEADLINE:	**4pm Wednesday, June 17, 1998**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: A House Judiciary subcommittee hearing on HR 3789 is scheduled for tomorrow, Thursday, June 18th.

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LRM ID: IMS362 **SUBJECT:** JUSTICE Report on HR3789 Class Action Jurisdiction Act of 1998

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Ingrid M. Schroeder Phone: 395-3883 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: ______________________ (Date)
______________________ (Name)
______________________ (Agency)
______________________ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: ______________

_____ FAX RETURN of _____ pages, attached to this response sheet

U. S. Department of Justice

Office of Legislative Affairs

Draft

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Howard Coble
Chairman
Subcommittee on Courts and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Justice Department on H.R. 3789, the "Class Action Jurisdiction Act of 1998." We have serious concerns about this bill.

This legislation would allow any class action in which even the most minimal diversity of citizenship existed (or developed) to be filed in, or removed to, Federal court. The broad definition of diversity in section 2 of the bill, coupled with the elimination of the amount-in-controversy requirement, essentially would federalize class action litigation, even where most of the parties were from one State and the case was based on State law. There is no compelling justification for supplanting State court remedies in this area. We do not believe State courts should lose their opportunity to address class actions according to the needs of their citizens. While the Federal courts may be particularly appropriate as the venue for some types of class actions (*e.g.*, some mass torts), not all class actions need to or should be heard there.

This is particularly true at a time when serious concerns have been expressed about the caseload of the Federal courts. *See, e.g.*, Chief Justice Rehnquist, The 1997 Year-End Report on the Federal Judiciary at (I)(A). Preliminary data from RAND's ongoing study of class actions suggest that more than half of such litigation is currently in State courts. Class action cases are among the most resource-intensive litigation before the judiciary. H.R. 3789 could move most of this litigation into the Federal judicial system. Responsibility in this area should continue to be shared among both Federal and State judicial systems.

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 remedies offer an important mechanism for aggregating small claims that otherwise might not warrant individual litigation. While the rights of all parties in class actions must be protected, this bill provides substantial benefits to defendants at the expense of plaintiffs.

For example, H.R. 3789 would allow removal of a class action to Federal court essentially at the defendants' option. Since the bill would require only one plaintiff to be from a State different from that of a defendant, only rarely would a class action case be ineligible for removal to Federal court

Moreover, a case initially proceeding under State class action rules would, upon removal, become subject to Federal Rule 23. Rule 23 might involve different standards or procedures. For example, a class certified under State law might not be certifiable under Rule 23 or different notice requirements might apply. And because section 4 of the bill would require dismissal rather than remand if the removed case did not meet Rule 23 requirements, State claims for which the statute of limitations expired in the interim would be permanently barred. good point

The bill would cause significant disruption and inefficiency. For example, as currently drafted, the bill would exempt class action cases from 28 U.S.C. § 1446's one-year deadline for removal of diversity cases. Thus, no matter how far the State court litigation had progressed, a case could become eligible for removal to Federal court if even a single plaintiff were to move out-of-state for any reason during the pendency of the litigation. Therefore, a defendant could stay in State court until it received some adverse rulings, then choose to remove the case to Federal court. The potential for disruption is exacerbated because the bill would apply to litigation already in progress at the time of enactment.

To the extent that this legislation might have the effect of narrowing access to class action remedies, it should be considered with considerable skepticism. If the bill is intended to respond to concerns with State court class action procedures, we believe that States should make appropriate modifications. And while there may be particular types of class actions that might most appropriately be heard in Federal courts, moving virtually all class action cases to Federal court would be an excessive and counterproductive response.

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

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Barney Frank
Ranking Minority Member

5:30pm

From: Ingrid M. Schroeder on 06/23/98 08:25:12 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: James J. Jukes/OMB/EOP

Subject: HR 3789 - Class Action Suits - Markup

FEDERAL JURISDICTION OVER CLASS ACTION SUITS
Subcommittee Markup
Future House committees * Revised *
(SCHEDULE 06/24/98; Judiciary -- Subcommittee on Courts and Intellectual Property)
Item Key: 120

--- --- --- --- --- --- --- --- --- --- --- --- --- --- --- --- --- --- --- ---

FEDERAL JURISDICTION OVER CLASS ACTION SUITS * Revised *
Subcommittee Markup

Courts and Intellectual Property Subcommittee (Chairman Coble, R-N.C.) of House Judiciary Committee will mark up on pending legislation.

Graham - don't support Smith bill
Wyden - didn't call back
Bishop - positive

June 24 2:00 pm B-352 Rayburn Bldg.

Agenda:

HR3789 - A bill to amend title 28, U.S. Code, to enlarge federal court jurisdiction over purported class actions.

Note: Hearing was held June 18.

Message Sent To:

6-2896

William P. Marshall/WHO/EOP
Julie A. Fernandes/OPD/EOP
James Boden/OMB/EOP
David J. Haun/OMB/EOP
Sarah Rosen/OPD/EOP

Witnesses
GAO
Michigan Farm Bureau
Fla. Fruit & Veg.
Lots of members (only House members)
Berman (?)
Sen Craig Wyden Graham Coverdell

Could be 6 or 8 members

Appropriations — ~~CJS~~ EEOC & INS

House

Approp: Livingston
obey (D.)?
stokes (D)?

CJS Approp: Rogers
Mollohan (D)

Senate

Approp. stevens?

CJS Approp: Gregg

Authorizers

EEOC

House

Econ. & Educ. Opportunities
Goodling (R)
Clay (D)

Employer-Employee Relations (subcommittee)
Fawell (R)
Payne (D)

Senate

INS

House

Judiciary
~~[illegible]~~
Hyde

Subcomm. on Immig.
Smith (R)
Watt (D)

Senate

Judiciary
~~[illegible]~~
Hatch (R)
Kennedy (D)

Subcomm on Imm.
Abraham (R)
Kennedy (D)

Dems. on Approp. Comm.
Stokes
Dixon
* Durbin
Lowey

Could be for members

poop on EEOC appropriation

GAO