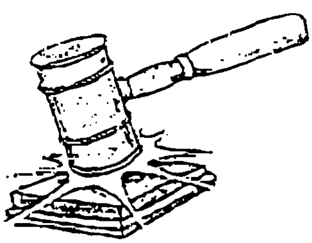
THE WALL STREET JOURNAL WEDNESDAY, MAY 6, 1998

A Class Action Should Be a Federal Case

By JIM MORAN

As Congress searches for ways to sustain economic growth and to make the nation more competitive in the next century, it should begin by curbing the growing cottage industry of class-action lawsuits in state courts.

Such lawsuits—in which one or a few people bring a claim on behalf of thousands of other class members—have increased exponentially over the past few years, according to the Institute for Civil Justice. This lawsuit avalanche is occurring not because corporations have suddenly lost their moral compass and are launching campaigns to defraud or injure consumers. Rather, a few opportunistic trial lawyers exploit the legal system to enrich themselves while hurting honest businesses.



The small group of lawyers filing these suits pick state courts where class certification standards can be lax; uniform rules across state lines are nonexistent. Their lawsuits force many companies to settle rather than spend millions of dollars in interminable out-of-state proceedings. When such settlements occur, the only real winners are the plaintiffs' lawyers.

In a state court class-action settlement involving the Bank of Boston, the members of the class actually had to pay up themselves. They each lost $91.13, while their lawyers walked off with $8.5 million. The average award to class members in five cases directed against Wells Fargo was $9.07. Who would sue a bank for $9.07? In these five cases, the total damages awarded and paid amounted to $14 million, roughly equivalent to the attorneys' fees.

Several factors explain the growth of class-action lawsuits. The most important is that procedural rules that were intended to preserve federalism and safeguard out-of-state defendants have been turned on their heads. The federal courts exist in large measure to adjudicate large, serious disputes between plaintiffs and defendants who live in different states. As such, there is perhaps no lawsuit for which federal jurisdiction is more appropriate than the class action, with its multiple plaintiffs and aggregated claims in the millions of dollars.

Yet longstanding procedural rules require all plaintiffs and all defendants to be from different states in order to get the case into federal court. In this way, federal jurisdiction is too easily defeated by lawyers who—in bad faith—enlist plaintiffs from the same state as the defendant to keep these suits out of federal court. Although state courts are well suited to mete out justice in truly local disputes, they are not the best venues to settle major, multistate class actions. Many state judges lack the complex litigation training, experience and resources necessary to preside over such cases.

Furthermore, "amount in controversy" rules sometimes require each plaintiff in a class-action dispute to have more than $75,000 at stake in the suit to bring it before a federal judge. Under these rules, a Maryland citizen could have a $75,000 remodeling dispute with a Virginia contractor that would be heard in federal court, while a $2 billion motor vehicle defect dispute between 100,000 vehicle owners and a California-based manufacturer could be heard only in a state court! It seems illogical that a person injured in a fall in a downtown Washington building owned by a Virginia company could sue the building owner in federal court, but a federal court cannot hear a class-action lawsuit in which thousands of citizens residing in many different states jointly assert billions of dollars in damages.

The solution is to try more class actions in federal courts, which are eminently capable of handling such matters evenhandedly. Without delay, Congress should clearly define the division of jurisdiction between the federal and state benches to allow both more class actions into the former. It's the only way to put an end to the trial lawyers' runaway class action abuses.

Mr. Moran is a Democratic congressman from Virginia.

Don't Let Class Action "Reform" Deny Justice to Consumers in Your State

There is No class action crisis.

- This bill literally came out of "thin air" last Congress when there was no crisis about class actions in the state courts, no expression of concern from either the federal or state judiciaries, and no decision by the Supreme Court that cast doubt on the workings of federalism in our system of justice.

There is no legitimate need for massive reform of our civil justice system.

- Although proponents of new restrictions on class actions like to point to rare and atypical anecdotes to justify "class action reform," the truth is that the overwhelming majority of class actions are meritorious. And while proponents are quick to decry a "tidal wave" of class action filings, there is no statistical evidence to support this claim.

Class action "reform" will further clog federal courts.

- Federalizing class actions, which would be the primary result of this bill, will exponentially delay the judicial process for injured consumers and other class action plaintiffs.

Class action "reform" will deny many plaintiffs their day in court.

- It is no secret that federal courts are generally less willing to entertain complex civil litigation than state courts, and as a result, they are often quick to refuse class certification to multi-state plaintiff classes. Indeed, no federal class of tobacco plaintiffs has ever been successfully certified.

State courts are better suited to adjudicate class actions.

- State courts' civil dockets often move with much greater speed than their federal counterparts due to a smaller caseload and greater experience with the state's civil laws.

Class actions motivate responsible corporate behavior and save lives.

- Big Business's fear of successful class actions motivates it to weigh consumer safety and protection concerns in its bottom line decisions. This concern results in safer products for all Americans and is why every consumer advocacy group in America wants to protect the present class action rules.

Reject Big Business's Plan for Class Action "Reform"

House Doc 440204

Don't Believe the Hype – Class Action "Reform" is Not About Frivolous Suits ... It's About Limiting Consumers' Access to Justice

This bill literally came out of "thin air" last Congress when there was no crisis about class actions in the state courts, no expression of concern from either the federal or state judiciaries, and no decision by the Supreme Court that cast doubt on the workings of federalism in our system of justice.

But they're back!!! Big Business defendants are back again this Congress, lobbying for class action reform. And again, there is no need for massive civil justice reform.

Despite the cries of Big Business, there is no legitimate need for massive reform of our civil justice system.

- Although proponents of new restrictions on class actions like to point to completely rare and atypical anecdotes to justify "class action reform," the truth is that the overwhelming majority of class actions are meritorious. And while proponents are quick to decry a "tidal wave" of class action filings, there is no statistical evidence to support this claim.
- Class actions provide access to justice for thousands of American consumers and small businesses that would otherwise have no realistic means of taking their case to court.
- Importantly, neither the Federal Judicial Conference nor the Conference of State Judges support the proposed changes to the civil justice system. It is these associations of judges who traditionally have recommended changes in the Federal Rules of Evidence or the Federal Rules of Civil Procedure to the Senate and House Judiciary Committees. But no such recommendation has been forthcoming. In this case, only Big Business is pushing reform; state and federal judges support the status quo.

Class action "reform" will further clog federal courts.

- Federalizing class actions, which would be the primary result of this bill, will exponentially delay the judicial process for injured consumers and other class action plaintiffs.
- The bill's proponents know that since the mid-1990s, the federal civil dockets have been severely backlogged – as the result of unprecedented numbers of judicial vacancies and the increasing federalization of state and local criminal and drug laws. Federalizing all state class actions at this moment only ensures that such cases will go to the back of the line of the civil docket – all the more so because class actions require so much judicial attention in handling discovery and trial.
- Postponing class action adjudication by removal to federal court will delay justice for thousands and cause countless more to abandon legitimate claims. Justice delayed for such long periods is truly justice denied.

The Department of Justice opposes federalizing class actions.

- The Department of Justice has clearly stated its opposition to H.R. 1875 and its companion Senate bill, S. 353, in testimony before the House and Senate Judiciary Committees this year. In addition, the Administration issued a Statement of Administration Policy last year stating that the Attorney General would recommend that the President veto H.R. 3789 (a similar class action bill) if it were presented to him.

State courts are better suited to adjudicating class actions than federal courts.

- State courts' civil dockets often move with much greater speed than their federal counterparts due to a smaller caseload and greater experience with the state's civil laws.
- State courts are also much more willing to consider new applications of state law than federal courts, which are understandably reluctant to decide controversial issues of state law. This is precisely why Big Business defendants so ardently want to remove cases to federal courts.
- It is simply misleading for proponents of class action reform to suggest rampant incompetence among state judges. State courts are held to the very same standards of due process as their federal counterparts, and many federal class actions have experienced some of the same problems associated with state class actions.

... And if state judges fail to perform their duties appropriately, states have adequate mechanisms for reprimanding them.

- Proponents of class action reform like to point to the rare state judge who shows an unwarranted propensity for certifying nationwide classes. What they don't want to tell you is the fact that these situations have been appropriately handled by state Supreme Courts.
- In Alabama, for example, the State Supreme Court has recently reprimanded certain state judges who had certified numerous classes of questionable merit to ensure that such abuse would not occur in the future. Over and over, we hear about the "Alabama" experience to justify this legislation - but in the end, the Alabama courts worked properly in handling all possible abuses.
- Indeed, for every anecdote about a "frivolous" claim, there are dozens of worthy suits appropriately won by injured plaintiffs. Because of the hurdles and burdens placed upon class action plaintiffs by the proposed legislation, however, many of these actions, including virtually all tobacco litigation, would have never seen their day in court. Additionally, state courts are often more receptive to new theories of public policy. These types of cases include the following:

✓ Foodmaker, Inc., the parent company of Jack-in-the-Box restaurants, agreed to pay $14 million in a class action settlement in Washington State. The class included 500 people, mostly children, who became ill in 1993 after eating undercooked hamburgers tainted with e. coli 0157:H7 bacteria. The victims suffered a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died. The settlement was approved by the King County, Washington Superior Court. Under the class action "reform" bill, this suit would have been removable to federal court because Jack-in-the-Box is incorporated in California, and the settlement would surely have been delayed many years as a result of the backlogged federal courts.

✓ A class action lawsuit was brought in Pennsylvania state court on behalf of residents and businesses whose electric rates increased substantially after the Three Mile Island accident. The suit was brought against General Public Utilities Corporation and several power companies that drew electricity from Three Mile Island's production. The two parties settled, with the defendants agreeing to pay $1.25 million; the money was used to pay electric bills of those too poor to do so on their own. Under the class action "reform" bill, this suit would have been removable to the backlogged federal court docket since the defendant's nuclear subsidiary is headquartered in New Jersey.

✓ Two manufacturers of pesticides agreed to pay $50 million to a class of 3,500 people living near a pesticide plant that contaminated their New Orleans neighborhood. The pesticide and herbicide plant began operating in the 1950s and was closed down in 1987, when the New Orleans Sewerage and Water Board discovered contamination of its wastewater. Although the suit involved a local contamination, it would have been removable to the backlogged federal court because one of the defendants was incorporated out-of-state. Had this suit been delayed for years in federal court, this settlement might never have been reached.

✓ A current class of persons involved in accidents with West Virginia drivers insured by the Dairyland Insurance Company has alleged that Dairyland improperly canceled auto insurance policies without giving drivers the 30-day notice required under West Virginia law. The class has petitioned for declaratory relief stating that coverage should exist for those whose coverage was improperly canceled. Although the suit involves only questions of West Virginia law, and the insurance policies at issue were all written for West Virginians, the case would be removable from its current locus in Kanawha County, West Virginia to federal court because Dairyland is incorporated in Wisconsin.

Class actions motivate responsible corporate behavior and save lives.

- Big Business's fear of successful class actions motivates it to weigh heavily consumer safety and protection concerns into its bottom line decisions. This concern results in safer products for all Americans and is why every consumer advocacy group in America sees the present class action rules so worthy of protection.

* * * * *

Big Business Defendants Who Seek to End State Class Action Lawsuits Have Not Made Their Case: Not to State Judges, Not to Federal Judges, Not to State Legislatures, And Now, Not to Congress.

House Doc 440218

State Courts Are Fair and Effective Arbiters of Class Action Lawsuits

It is simply misleading for proponents of class action reform to suggest rampant incompetence among state judges. State courts are held to the very same standards of due process as their federal counterparts, and many federal class actions have experienced some of the same problems associated with state class actions.

... If state judges fail to perform their duties appropriately, states have adequate mechanisms for reprimanding them.

- Proponents of class action reform like to point to the rare state judge who shows an unwarranted propensity for certifying nationwide classes. What they don't want to tell you is the fact that these unusual situations have been appropriately handled by state Supreme Courts.
- In Alabama, for example, the State Supreme Court has recently reprimanded certain state judges who had certified numerous classes of questionable merit to ensure that such abuse would not occur in the future. Over and over, we hear about the "Alabama" experience to justify this legislation – but in the end, the Alabama courts worked properly in handling all possible abuses.

It makes no sense to scrap the U.S. civil justice system for a handful of anecdotes.

- In general, today's civil justice system works. Currently, federal and state tort claims are resolved in about the same amount of time. Also, the success rates for federal tort plaintiffs and state tort plaintiffs is virtually identical.
- Indeed, for every anecdote about a "frivolous" claim, there are dozens of worthy suits appropriately won by injured plaintiffs. Because of the hurdles and burdens placed upon class action plaintiffs by the proposed legislation, however, many of these actions, including virtually all tobacco litigation, would have never seen their day in court. Additionally, state courts are often more receptive to new theories of public policy. These types of cases include the following:

✓ Foodmaker, Inc., the parent company of Jack-in-the-Box restaurants, agreed to pay $14 million in a class action settlement in Washington State. The class included 500 people, mostly children, who became ill in 1993 after eating undercooked hamburgers tainted with e. coli 0157:H7 bacteria. The victims suffered a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died. The settlement was approved by the King County, Washington Superior Court. Under the class action "reform" bill, this suit would have been removable to federal court because Jack-in-the-Box is

Doc. 438453

incorporated in California, and the settlement would surely have been delayed many years as a result of the backlogged federal courts.

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Leave Class Action Lawsuits in the State Courts, Where They Rightfully Belong.

Federalizing Class Actions Tips the Scales of Justice Unfairly Against Consumers.

What the Experts Have to Say About H.R. 1875, The Interstate Class Action Jurisdiction Act

Chief Justice of the United States William Rehnquist
"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." Address to the American Law Institute Annual Meeting, May 1998.

Eleanor D. Acheson, Assistant Attorney General, U.S. Department of Justice
"H.R. 1875's federalization of class actions would deny state residents a state forum (and in many cases any meaningful ability to seek recovery for their injuries), replace the public policy of all 50 States about how to operate their courts with a single federal policy, and overburden the federal judiciary with class actions dealing solely with issues of state law. Because we disagree with a measure having these effects, the Department of Justice strongly opposes H.R. 1875." Statement before the House Judiciary Committee, July 21, 1999.

Professor Richard Daynard, Northeastern University School of Law
"[W]hatever its motivations, H.R. 1875 would have the almost-certain effect of extinguishing all class actions against tobacco companies." Statement before the House Judiciary Committee, July 21, 1999.

Dennis C. Vacco and W.A. Drew Edmondson, Attorneys General for the States of New York and Oklahoma, respectively
"Passage of this legislation would substantially diminish the availability of class actions as a device to redress consumer harm... Transferring state court class actions to an already overburdened court system will do nothing less than ensure the unavailability of this important tool for consumer redress. Curbing class action abuses can surely be accomplished by measures far short of throwing the baby out with the bath water." Letter expressing opposition to nearly identical legislation in the 105th Congress sent to The Honorable Newt Gingrich and The Honorable Richard Gephardt, October 6, 1998.

Judge Walter Stapleton (3rd Cir.), U.S. Court of Appeals, Chair of the Judicial Conference Committee on Federal-State Jurisdiction (on opposing similar class action provisions in the Y2K bill)
"The transfer of [Y2K class actions] to the federal courts holds the potential of overwhelming federal judicial resources and the capacity of the federal courts to resolve effectively in a timely manner not only Y2K cases, but other causes of action as well." Statement before the House Judiciary Committee concerning H.R. 775, the Year 2000 Readiness and Responsibility Act, April 13, 1999.

The Experts Agree: Federalizing Class Actions is a Bad Idea

Doc. 455697

Statute of Repose Bill Would Close The Courthouse Door To Thousands More American Workers

Big Business seeks to limit the rights of injured workers.

- H.R. 2005, the "Workplace Goods Job Growth and Competitiveness Act of 1999," now being pushed by business interests would completely cut off the rights of workers to hold wrongdoers accountable when they are injured by a defective product that is more than 18 years old, regardless of how long the product was built to last. Thousands of Americans maimed and killed each year by defective products would find themselves locked out of the courthouse and denied their right to hold reckless manufacturers responsible. Many items today – industrial machinery, construction tools, etc. – are made to last longer than 18 years.

Many workers who have sustained life-altering injuries would no longer be able to collect non-economic damages.

- This "statute of repose" legislation applies to injured workers who are covered by workers' compensation. For these workers, recovery for harm suffered is drastically limited: they would only be able to recover the actual funds they have lost – and nothing more. That means covered workers who have lost fingers or arms or who will have lingering brain damage or other serious effects cannot recover anything for the very real pain and suffering they have endured.

Employers could no longer recover for property damage caused by older equipment.

- In addition, employers will suffer if this legislation is enacted. First, they will no longer be able to recover for any property damage they suffer when older equipment fails. For example, if a twenty year old machine results in some sort of explosion, causing injury to an employee and damage to a workplace, the employer will no longer be able to recover the costs of the repairs to the workplace. Second, this bill would cost employers hundreds of thousands of dollars because they would no longer have any means to recover the funds paid to an injured employee through the workers' compensation program. Under current law, employers routinely recover these workers' compensation payments from any damages awarded the employee.

Here are just a few of the cases that would be <u>completely barred</u> under this anti-consumer measure:

CALIFORNIA

In January 1995, Reginaldo Gonzalez, 47, was operating a printing press designed and manufactured in 1973 by Heidelberg, Inc., when his hand became caught in the rollers, resulting in the traumatic amputation of his arm at the shoulder. Testimony revealed that the company added safeguards to this printing press model in 1974 and again in 1980, yet never took steps to notify prior owners of the machine's dangerous defect. It also was learned that by 1995, at least eight pressmen had their arms amputated or crushed while operating pre-1974 presses. A jury found the early design defective and the company's conduct negligent, and awarded Gonzalez $4.1 million.

ILLINOIS

In 1978, J. Jamie, 29, suffered severe injuries resulting in the amputation of his right hand while operating a rotary hydraulic molding machine. Evidence at trial revealed that the machine was manufactured more than 20 years prior to this incident. In addition, this machine was designed and constructed without proper guarding devices, which could have prevented Jamie's hand from being caught, crushed and burned. A jury awarded Jamie about $1.1 million for this tragedy.

MASSACHUSETTS

On April 13, 1984, John Jones was bending material in a press brake designed and manufactured by Cincinnati, Inc. in 1966 when the unguarded press suddenly closed, crushing his hands. The court awarded Jones $500,000, finding that Cincinnati was aware that press operators would have their hands in vulnerable positions while operating this machine, and that the manufacturer was reckless for not incorporating safeguards (available to the manufacturer in 1966) into the press's design that could have prevented this accident.

NEW JERSEY

Thomas Middleton, 33, was bending metal in a press brake in 1988 when the machine crushed four fingers on his left hand. Each finger's knuckle was removed and the remaining portions of the fingers were reattached. The jury found that the press brake, made in 1955, was defectively designed and lacked operator controls, and awarded Middleton $1.2 million.

NORTH CAROLINA

While working at a construction company in 1972, Allen Raftery was struck on the head and killed when a crane made in 1953 by the Michigan Equipment Co. collapsed on top of him. Evidence revealed that the crane was negligently designed and manufactured by the company.

NORTH DAKOTA

In 1983, Todd Hefta was crushed to death while working for the City of Williston. Hefta was standing behind a 12-ton earth packer machine when another worker started the packer in gear. The packer, manufactured in 1963 by the Ingram Company, suddenly lurched backward at a rapid rate of speed, crushing Hefta.

TEXAS

On July 21, 1978, Don Rhea, while working at a refinery, suffered severe burns over 30 percent of his body when hot oil sprayed from the cracked valve cover of a steam pump he was trying to repair. The defective pump was manufactured over 20 years earlier by the National Transit Pump and Machine Co. The parties eventually settled for $300,000.

WISCONSIN

On June 8, 1979, Dexter Hamilton was injured while operating a meat grinder manufactured over 20 years earlier by the Enterprise Manufacturing Company. Hamilton's right hand was caught in the grinder and four fingers were amputated by the cutting blades. The jury found that the grinder was negligently designed and manufactured, and awarded Hamilton $322,186 for his pain, suffering, and disfigurement, and lost earning capacity.

Oppose H.R. 2005 . . .

Give American Workers A Fighting Chance!

The Office of Congressman Marty Meehan

Fifth District, Massachusetts

2434 Rayburn House Office Building, Washington, DC 20515

202-225-3411 (phone) 202-226-0771 (fax)

FAX TRANSMISSION

To: Dianne Benos

With:

Fax: 456-7028

From: Jeff Miller

Date:

Message:

* Judicial Conf. of the U.S,
— Federal Judges are against this bill,

— Tobacco Free Kids - Sheila Jackie Lee.

"Class Action" Lawsuits

Nadler very involved

~~Lawyg~~ — Lawyers get all the $. (60%)

① certification in federal court ~~is~~ is harder.

— Easier to file a state ~~B~~ class action.

HR 1875 — PIKE — Floor Wednesday

— ~~Had~~ Harder to get a suit "certified" or "accepted" by ~~a~~ a federal judge. Under Rule 23 under rules of civil ~~prog~~ procedure.

Committee Amendments to exempt:
- Tobacco
- Guns
- HMO's
failed amend.

b/c harder to certify.

Aug. 3rd 15-Yes. + Boucher
12 No.
D's
R's

Alabama is good on but for —

— Currently to file in fed. court - you need "complete" diversity - all plaintiffs + def. are from diff. states, + above $75,000. But this bill calls for "minimal diversity" (999 Wisconsin + 1 from Illinois could go to federal)

allows defendant to move to federal

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Bill 1 of 2

There is 1 other version of this bill.

[redacted]

Interstate Class Action Jurisdiction Act of 1999 (Introduced in the House)

HR 1875 IH

106th CONGRESS

1st Session

H. R. 1875

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

IN THE HOUSE OF REPRESENTATIVES

May 19, 1999

Mr. GOODLATTE (for himself, Mr. BOUCHER, Mr. BRYANT, Mr. MORAN of Virginia, Mr. DELAY, Mr. ARMEY, Mr. HYDE, Mr. SENSENBRENNER, Mr. MCCOLLUM, Mr. GEKAS, Mr. SMITH of Texas, Mr. GALLEGLY, Mr. CANADY of Florida, Mr. CHABOT, Mr. BARR of Georgia, Mr. HUTCHINSON, Mr. CANNON, Mr. ROGAN, Mrs. BONO, Mr. BLILEY, Mr. COX, Mr. CRAMER, Mr. DREIER, Mr. GOODE, Mr. HOLDEN, Mr. JOHN, Mrs. JOHNSON of Connecticut, Mr. LINDER, Mr. OXLEY, Mr. STENHOLM, Mr. SUNUNU, and Mr. UPTON) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

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

SECTION 1. SHORT TITLE AND REFERENCE.

(a) SHORT TITLE- This Act may be cited as the `Interstate Class Action Jurisdiction Act of 1999'.

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

SEC. 2. FINDINGS.

The Congress finds that--

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

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

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

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

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

SEC. 3. JURISDICTION OF DISTRICT COURTS.

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

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

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

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

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

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

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

`(i) an intrastate case,

`(ii) a limited scope case, or

`(iii) a State action case.

For purposes of this subparagraph, the term `intrastate case' means a class action in which the record indicates that the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed and the substantial majority of the members of all proposed plaintiff classes are citizens of that State of which the primary defendants are also citizens. For purposes of this subparagraph, the term `limited scope case' means a class action in which the record indicates that all matters in controversy asserted by all members of all proposed plaintiff classes do not in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs, or a class action in which the number of members of all proposed plaintiff classes in the aggregate is less

than 100. For purposes of this subparagraph, the term `State action case' means a class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

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

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

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

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

SEC. 4. REMOVAL OF CLASS ACTIONS.

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

`Sec. 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 no later than 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the court's direction.

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

(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, it shall dismiss the action. An action dismissed pursuant to this subsection may be filed again in a State court, but any such refiled action may be removed again if it is an action of which the district courts of the United States have original jurisdiction. In any action dismissed pursuant to this subsection, 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. 5. APPLICABILITY.

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

.Bill Summary & Status for the 106th Congress

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H.R.1875

SPONSOR: Rep Goodlatte, Bob (introduced 05/19/99)

COSPONSORS(37):

Rep Boucher, Rick - 05/19/99	Rep Bryant, Ed - 05/19/99
Rep Moran, James P. - 05/19/99	Rep DeLay, Tom - 05/19/99
Rep Armey, Richard K. - 05/19/99	Rep Hyde, Henry J. - 05/19/99
Rep Sensenbrenner, James, Jr. - 05/19/99	Rep McCollum, Bill - 05/19/99
Rep Gekas, George W. - 05/19/99	Rep Smith, Lamar - 05/19/99
Rep Gallegly, Elton - 05/19/99	Rep Canady, Charles T. - 05/19/99
Rep Chabot, Steve - 05/19/99	Rep Barr, Bob - 05/19/99
Rep Hutchinson, Asa - 05/19/99	Rep Cannon, Chris - 05/19/99
Rep Rogan, James E. - 05/19/99	Rep Bono, Mary - 05/19/99
Rep Bliley, Tom - 05/19/99	Rep Cox, Christopher - 05/19/99
Rep Cramer, Robert E. (Bud) Jr. - 05/19/99	Rep Dreier, David - 05/19/99
Rep Goode, Virgil H., Jr. - 05/19/99	Rep Holden, Tim - 05/19/99
Rep John, Christopher - 05/19/99	Rep Johnson, Nancy L. - 05/19/99
Rep Linder, John - 05/19/99	Rep Oxley, Michael G. - 05/19/99
Rep Stenholm, Charles W. - 05/19/99	Rep Sununu, John E. - 05/19/99
Rep Upton, Fred - 05/19/99	Rep Miller, Gary - 07/16/99
Rep Goss, Porter J. - 07/16/99	Rep Bartlett, Roscoe G. - 07/16/99
Rep Biggert, Judy - 07/16/99	Rep Davis, Thomas M. - 07/16/99
Rep Bachus, Spencer - 07/16/99	

Bill Summary & Status for the 106th Congress

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H.R.1875
SPONSOR: Rep Goodlatte, Bob (introduced 05/19/99)

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TITLE(S):

- SHORT TITLE(S) AS INTRODUCED:
  Interstate Class Action Jurisdiction Act of 1999

- OFFICIAL TITLE AS INTRODUCED:
  A bill to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

STATUS: Floor Actions
09/14/99 Reported to House from the Committee on the Judiciary, amended, H. Rept. 106-320 (CR H8289)

STATUS: Detailed Legislative Status

House Actions

May 19, 99:
Referred to the House Committee on the Judiciary.
Jul 21, 99:
Committee Hearings Held.
Jul 27, 99:
Committee Consideration and Mark-up Session Held.(Aug 3, 99).
Aug 3, 99:
Ordered to be Reported (Amended) by the Yeas and Nays: 15 - 12.
Sep 14, 99:
Reported (Amended) by the Committee on Judiciary. H. Rept. 106-320.
Sep 14, 99:
Placed on the Union Calendar, Calendar No. 190.

STATUS: Congressional Record Page References

05/19/99 Introductory remarks on Measure (CR E1026)

COMMITTEE(S):

- COMMITTEE(S) OF REFERRAL:
  House Judiciary

AMENDMENT(S):

NONE

INTRODUCTION OF THE INTERSTATE CLASS ACTION JURISDICTION ACT -- HON. BOB GOODLATTE (Extension of Remarks - May 19, 1999)

[Page: E1026] *GPO's PDF*

HON. BOB GOODLATTE

in the House of Representatives

WEDNESDAY, MAY 19, 1999

- Mr. GOODLATTE. Mr. Speaker, today I rise on behalf on my colleagues Mr. **Boucher,** Mr. **Bryant** and Mr. **Moran** of Virginia to introduce important bipartisan legislation to correct a serious flaw in our federal jurisdiction statutes. In recent years, the number of class action filings has risen dramatically and the large majority of these cases are brought in state courts. A 1999 survey indicates that the number of state court class actions pending against surveyed companies has increased by 1,042 percent over the ten-year period 1988-1998. This increase in class action filings has been accompanied by a number of abuses of our judicial system.

- Interstate class actions are flooding into certain state courts because those courts tend to favor local lawyers in cases against out-of-state companies; however, state courts are often ill-equipped to handle such cases. Many state courts don't have either the support staff and other resources or the complex litigation experience to handle interstate class actions, which often involve thousands (and sometimes millions) of purported class members.

- In addition to forum-shopping, lawyers frequently exploit major loopholes in federal jurisdiction statutes to block the removal of class actions that belong in federal court. For example, plaintiffs' counsel may name parties that are not really relevant to the class claims in an effort to destroy diversity. In other cases, counsel may waive federal law claims or shave the amount of damages claimed to ensure that the action will remain in state court.

- Some state courts use very lax class certification criteria, making virtually any controversy subject to class action treatment and allowing state courts to hear purely interstate class actions. The result is that state courts are increasingly deciding out-of-state residents' claims against out-of-state companies under other states' laws. When state courts preside over class actions involving claims of residents of more than one state (especially nationwide class actions), they end up dictating the substantive laws of other states, sometimes over the protests of those other states.

- At present, our federal diversity jurisdiction statutes essentially provide that interstate disputes involving significant sums of money may be heard in a federal court. But because class actions (as we now know them) did not exist when those statutes were initially framed, class actions were omitted, leading to outrageous results. For example, under current law, a citizen of one state usually may bring in a federal court a simple $75,001 slip-and-fall action against a party from another state. But if a class of 25 million product owners living in all 50 states bring claims collectively worth $15 billion against the product manufacturer, that lawsuit usually must be heard in a state court.

- Our legislation offers a solution to class action abuse by making it easier for plaintiff class members and defendants to remove class actions to federal court, where cases involving multiple state laws are more appropriately heard.
- This legislation does not limit the ability of anyone to file a class action lawsuit. It does not change anybody's rights to recovery. It merely closes the loophole, allowing federal courts to hear big lawsuits involving truly interstate issues, while ensuring that purely local controversies remain in state courts. This is exactly what the framers of the Constitution had in mind when they established federal diversity jurisdiction.
- I urge my colleagues to support this important legislation.

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INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999

DISSENTING VIEWS

We strongly oppose H.R. 1875, the `Class Action Jurisdiction Act of 1998.' Although the legislation is described by its proponents as a simple procedural fix, in actuality it represents a major rewrite of the class action rules that would bar most forms of State class actions. H.R. 1875 is opposed by the Justice Department, 1

[Footnote] both the State 2

[Footnote] and Federal 3

[Footnote] judiciaries, as well as consumer and public interest groups, including Public Citizen. 4

[Footnote]

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

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

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

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

By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation. This legislation will undercut that important principle by making it far more burdensome, expensive, and time-consuming for groups of injured persons to obtain access to justice. In doing so, it will make it more difficult to protect our citizens against violations of the consumer health, safety and environmental laws, to name but a few important laws. The legislation goes so far as to prevent State courts from considering class action cases which involve solely violations of State laws, such as State consumer protection laws.

H.R. 1875 provides for the removal of State class action claims to Federal court in cases involving violations of State law where any member of the plaintiff class is a citizen of a different State than any defendant. 5

[Footnote] The only exceptions provided in H.R. 1875 are that Federal courts are directed to abstain from hearing a class action where (1) a `substantial majority' of the members of the proposed class are citizens of a single State of which the primary defendants are citizens and the claims asserted will be governed primarily by laws of that State (`an intrastate case'); (2) all matters in controversy do not exceed $1,000,000 or the membership of the proposed class is less than 100 (`a limited scope case'); or (3) the primary defendants are States, State officials, or other Government entities against whom the district court may be foreclosed from ordering relief (`a State action case'). 6

[Footnote] In the event the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Procedure 23, under the bill the court must dismiss the action, 7

[Footnote] which has the effect of striking the class action claim. 8

[Footnote]

[*Footnote 5:* H.R. 1875, Sec. 3(b)(1). Current law requires there to be complete diversity before a State law case is eligible for removal to Federal court, that is to say that all of the defendants must be citizens residing in different States than all of the defendants. See *Stawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Snyder* v. *Harris*, 394 U.S. 332 (1969), the Supreme Court held that the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.]

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

[*Footnote 7:* H.R. 1875 Sec. 4(e).]

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

H.R. 1875 will damage both the Federal and State courts. As a result of Congress' increasing propensity to federalize State crimes and the Senate's unwillingness to confirm judges, the Federal courts are already facing a dangerous workload crisis. By forcing resource intensive class actions into Federal court, H.R. 1875 will further aggravate these problems and cause victims to wait in line for as much as three years or more to obtain a trial. Alternatively, to the extent class actions are remanded to State court, the legislation effectively only permits case-by-case adjudications, potentially draining away precious State court resources.

We also object to the fact that the bill is written in a one-sided manner favoring corporate defendants at the expense of harmed victims. At previous hearings on this matter, the Committee received complaints that class action notices can be incomprehensible and that defendants offer `sweetheart' deals which payoff one class in order to eradicate future claims which were not even before the court. Yet H.R. 1875 does nothing to deal with these concerns.

We would also note that before even considering H.R. 1875, Congress should insist on receiving objective and comprehensive data justifying such a dramatic intrusion into State court prerogatives, since nothing in the way of such information now exists. 9

[Footnote] The results of a pending study by the Rand Institute is expected by the end of this year. Contrary to assertions by some proponents, a report by the Federal Judiciary Mass Torts Working Group did not address the issues raised by this legislation, nor did it suggest any solutions to problems in mass tort litigation. 10

[Footnote]

[*Footnote 9:* The most comprehensive study completed was the 1994/95 Judicial Center review of class actions which rebutted claims that class actions constituted frivolous `strike' suits and that attorneys were unreasonably benefitting from class action cases. See Willging, *et al.*, Empirical Study of Class Actions in Four Federal District Courts--Final Report to the Advisory Committee on Civil Rules (Federal Judicial Center 1996). Another study made a single recommendation regarding interlocutory appeals which has already taken effect. See Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Compiled by the Judicial Conference Advisory Committee on Civil Rules (recommending the allowance of interlocutory appeals of class certifications). The study made no recommendation regarding federalizing class actions. The other studies cited by H.R. 1875's supporters are incomplete and inconclusive. The so-called `Stateside' study cited by John Hendricks (on behalf of the Chamber of Commerce) and John Martin (on behalf of Ford) in their testimony during the 105th Congress only covers six Alabama's counties, and the problems found in the study have already been resolved by the Alabama Supreme Court (see *infra* note 67).]

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

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

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

A. Impact on Federal Courts

Expanding Federal class action jurisdiction to include most State class actions, as H.R. 1875 does, will inevitably result in a significant increase in the Federal courts' workload. In its letter to the Judiciary Committee, the Judicial Conference warned that `the effect of the class action provisions of [H.R. 1875] would be to move virtually all class action litigation into the Federal courts, thereby offending well-established principles of federalism [and] . . . hold[ing] the potential for increasing significantly the number of [class action] cases currently being litigated in the Federal system.' 11

[Footnote]

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

The workload problem in the Federal courts is already at an acute stage. In 1998, 69 judicial vacancies existed, or approximately 8 percent of the Federal judicial positions. At year end, on average, Federal district court judges had some 400 civil filings backlogged on its docket. 12

[Footnote] 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:

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

> In my annual report for last year, I criticized the Senate for moving too slowly in the filling of vacancies on the Federal bench. This criticism received considerable public attention. I also criticized Congress and the president for their propensity to enact more and more legislation which brings more and more cases into the Federal court system. This criticism received virtually no public attention. And yet the two are closely related: We need vacancies filled to deal with the cases arising under existing laws, but if Congress enacts, and the president signs, new laws allowing more cases to be brought into the Federal courts, just filling the vacancies will not be enough. We will need additional judgeships. 13

[Footnote]

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

Judge Ralph K. Winter, Chief Justice of the Second Circuit, echoed these concerns when he complained, `[t]he political branches have steadily increased our Federal question jurisdiction, have maintained an unnecessarily broad definition of diversity jurisdiction, and have then denied us resources minimally proportionate to that jurisdiction . . . The result is that a court with proud traditions of craft in decision-making and currency in its docket is now in danger of losing both.' 14

[Footnote] By federalizing State class actions, H.R. 1875 runs precisely counter to Chief Justice Rehnquist's and Chief Judge Winters' admonition and risks severely aggravating the judicial workload crisis.

[*Footnote 14:* Annual report to the 2nd Circuit Judicial Conference, presented June, 1998.]

B. Impact on the State Courts

In addition to overwhelming the Federal courts with new time intensive class actions, the legislation will undermine State courts. This is because in cases where the Federal court chooses not to certify the State class action, H.R. 1875 prohibits the States from using class actions to resolve the underlying State causes of action. It is important to recall the context in which this legislation arises--a class action has been filed in State court involving numerous State law claims, each of which if filed separately would not be subject to Federal jurisdiction (either because the parties are not considered to be diverse or the amount in controversy for each claim does not exceed $75,000). When these individual cases are returned to the State courts upon remand, thousands upon thousands of new cases may be unleashed on the State courts. It is because of concerns such as these that the Conference of Chief Justices has called H.R. 1875 an `unwarranted incursion on the principles of judicial federalism.' 15

[Footnote]

[*Footnote 15:* See Conference of Chief Justices letter, *supra* note 2.]

In addition to these potential workload problems, the legislation raises serious constitutional issues. H.R. 1875 does not merely operate to preempt an area of State law, rather it unilaterally strips the State courts of their ability to use the class action procedural device to resolve State law disputes. As the Conference of Chief Justices stated, the legislation in essence `unilaterally transfer[s] jurisdiction of a significant category of cases from State to Federal courts' and is a `drastic' distortion and disruption of traditional notions of judicial federalism. 16

[Footnote]

[*Footnote 16:* See *id.*]

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

[Footnote] the Supreme Court observed that it is an `unassailable proposition. . . . that States may establish the rules of procedure governing litigation in their own courts.' Similarly in *Johnson* v. *Fankell* 18

[Footnote] the Court reiterated what it termed `the general rule `bottomed deeply in belief in the importance of State control of State judicial procedure . . . that Federal law takes State courts as it finds them' 19

[Footnote] 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.' 20

[Footnote]

[*Footnote 17:* 487 U.S. 131, 138 (1988) (finding Wisconsin notice-of-claim statute to be preempted by 42 U.S.C. Sec. 1983, which holds anyone acting under color of law liable for violating constitutional rights of others).]

[*Footnote 18:* 520 U.S. 911 (1997) (holding that Idaho procedural rules concerning appealability of orders are not preempted by 42 U.S.C. Sec. 1983).]

[*Footnote 19: Id.* at 919 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).]

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

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

[Footnote]

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

Arguments that H.R. 1875 is nonetheless justified because State courts are `biased' against out-of-State defendants in class action suits are vastly overstated. 22

[Footnote] First, the Supreme Court has already made clear that State courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co.* v. *Shutts*, 23

[Footnote] the Supreme Court held that in class action cases, State courts must assure that: (1) the defendant receives notice plus an opportunity to be heard and participate in the litigation; 24

[Footnote] (2) an absent plaintiff must be provided with an opportunity to remove himself or herself from the class; (3) the named plaintiff must at all times adequately represent the interests of the absent class members; and (4) the forum State must have a significant relationship to the claims asserted by each member of the plaintiff class. 25

[Footnote]

[*Footnote 22:* Of course the entire premise of the argument would need to be based on bias by the judges, since the juries would be derived from citizens of the State where the suit is brought, whether the case is considered in State or Federal court.]

[*Footnote 23:* 472 U.S. 797 (1985).]

[*Footnote 24:* See *id.* at 812 (stating that the notice must be the `best practicable, reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.') (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950)).]

[*Footnote 25:* See *id.* at 806-810. These findings were reiterated by the Supreme Court in 1995 in Matshusita Elec. Indust. Co. v Epstein, 516 U.S. 367 (1995) (holding that State class actions are entitled to full faith and credit so long as, *inter alia*: the settlement was fair, reasonable, and adequate and in the best interests of the settlement class; notice to the class was in full compliance with due process; and the class representatives fairly and adequately represented class interests).]

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

[Footnote] For example, Congress enacted the Federal Courts Improvement Act of 1996, 27

[Footnote] which *increased* the amount in controversy requirement needed to remove a diversity case to Federal court from $50,000 to $75,000. This statutory change was based on the Judicial Conference's determination that fear of local prejudice by State courts was no longer relevant 28

[Footnote] and that it was important to keep the Federal judiciary's efforts focused on Federal issues. 29

[Footnote] The American Law Institute has also recently found `there is no longer the kind of prejudice against citizens of other States that motivated the creation of diversity jurisdiction,' 30

[Footnote] and a Federal Courts Study Committee report concluded that local bias `is no longer a major threat to litigation fairness' particularly when compared to other types of prejudice that litigants may face, such as on account of religion, race or economic status. 31

[Footnote] Indeed, in 1978, the House twice passed legislation that would have completely abolished general diversity jurisdiction. 32

[Footnote]

[*Footnote 26:* Ironically, during the 104th Congress the Republican Party was extolling the virtues of State courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional State law convictions in Federal court. At that time Chairman Hyde stated:]

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

[*Footnote 27:* 28 U.S.C. Sec. 1332(a) (West Supp. 1998).]

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

[*Footnote 29:* See *id.*]

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

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

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

Thirdly, as the legislation is currently written, it assumes a defendant will be automatically subject to prejudice in any State where the corporation is not formally incorporated (typically Delaware) or maintains its principal place of business. In so doing, H.R. 1875 ignores the fact that many large businesses have a substantial commercial presence in more than one State, through factories, business facilities or employees. For example, if General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees, it does not seem reasonable to expect the defendants to face any great risk of bias. 33

[Footnote] Similarly, if the Disney Corporation, one of Florida's largest employers, were to face a class action brought by a class of plaintiffs in a Florida court, it would make little sense to involve the Federal courts of concern of local prejudice. 34

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

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

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

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

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

It is also likely to be far more difficult and time consuming to certify a class action in Federal court. Fourteen States, representing nearly one-third of the nation's population, 35

[Footnote] have adopted different criteria for class action rules than Rule 23 of the Federal Rules of Civil Procedure. 36

[Footnote] In addition, with respect to those States which have enacted a counterpart to Rule 23, the Federal courts are likely to represent a far more difficult forum for class certification to occur. This is because in recent years a series of adverse Federal precedent, such as *Castano* v. *American Tobacco Co.*, 37

[Footnote] *In re Rhone-Poulenc Rorer, Inc.*, 38

[Footnote] *In re American Medical Systems, Inc.*, 39

[Footnote] *Georgine* v. *Amchem Products, Inc.*, 40

[Footnote] and *Broussard* v. *Meineke Discount Mufflers*, 41

[Footnote] have made it more difficult to establish the `predominance requirement' necessary to establish a class action under the Federal rules. Just this June, in *Ortiz* v. *Fibreboard*, 42

[Footnote] the Supreme Court again invalidated a so-called `limited fund' asbestos settlement agreement on technical grounds. 43

[Footnote]

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

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

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

affect only individual members, and a class action suit is the superior model for fair and efficient adjudication. This is the most popular method of certification because the requirements imposed are the least restrictive.

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

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

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

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

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

[*Footnote 42:* 119 S.Ct. 2295 (1999).]

[*Footnote 43:* The Court found that mandatory limited fund class treatment under Rule 23(b)(1)(B) is not appropriate unless the maximum funds available are clearly inadequate to pay all claims.]

Further, as noted above, H.R. 1875 will result in substantial delay before civil class action claimants are able to obtain a trial date in Federal court. Given the current backlog in the Federal courts 44

[Footnote] and the fact that the Federal courts are obligated to resolve criminal matters on an expedited basis before civil matters, 45

[Footnote] even where plaintiffs are able to successfully certify a class action in Federal court, it is likely to take longer to obtain a trial on the merits than it would in State court.

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

[*Footnote 45:* Speedy Trial Act of 1974, 18 U.S.C. Sec. 3161-3174 (1994).]

H.R. 1875 also poses unique risks and obstacles for plaintiffs that they do not face under current law. Under H.R. 1875, if the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Civil Procedure 23, the court must dismiss the action. This has the effect of striking the class action claim and forcing all States to conform to Federal class actions standards. 46

[Footnote] While the class action may be refiled again, any such refiled action may be removed again to Federal court. Therefore, even if a State court would subsequently certify the class, it could be removed again, creating a revolving door between Federal and State court--hardly a desirable result.

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

Consumers will also be disadvantaged by the vague terms used in the legislation. The terms `substantial majority' of plaintiffs, `primary defendants,' and claims `primarily' governed by a State's laws 47

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

[*Footnote 47:* H.R. 1875, Sec. 2(b)(2).]

The net result is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the State or Federal level. The types of cases affected by this legislation range from consumer fraud and health and safety to environmental and civil rights actions. The following are examples of important class actions previously brought at the State level, but which could have been forced into Federal court under H.R. 1875, where the actions may be delayed or rejected:

> ìFoodmaker Inc., a Delaware corporation and the parent company of Jack-in-the-Box restaurants, agreed to pay $14 million in a State class-action settlement involving a violation of Washington's negligence law. The class included 500 people, mostly children and Washington residents, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli 0157:H7 bacteria. The victims suffered from a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died. 48

[Footnote]

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

> ìEquitable Life Assurance Company, an Iowa corporation, agreed to a $20 million settlement of two class-action lawsuits involving 130,000 persons filed in Pennsylvania and Arizona State courts. The class action alleged that Equitable misled consumers, in violation of State insurance fraud law, when trying to sell `vanishing premium' life insurance policies in the 1980s. Equitable sold the policies when interest rates were high, informing potential customers that after a few years, once the interest generated by their premiums was sufficiently high, their premium obligations would be terminated. However, when interest rates dropped, customers ended up having to continue to pay the premium in full. 49

[Footnote]

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

> ìOn July 26, 1993, a California plant operated by General Chemical, a Delaware corporation with offices in New Jersey, erupted leading to a hazardous pollution cloud when a valve malfunctioned during the unloading of a railroad tank car filled with Oleum, a sulfuric acid compound. The cloud settled directly over North Richmond, California, a heavily-populated community, resulting in over 24,000 residents needing medical attention. General Chemical entered into a settlement for violation of California negligence law with 60,000 North Richmond residents who were injured or sought treatment for the effects of

the cloud, or were forced to evacuate their homes. Individual plaintiffs received up to $3,500 in compensation. 50

[Footnote]

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

ìOn April 21 of this year, Nationwide entered into a State class action settlement concerning a redlining discrimination claim with the Toledo, Ohio Fair Housing Center. The lawsuit had been brought in Ohio State court by residents living in Toledo's predominately black neighborhoods, and charged that Nationwide redlined African-American neighborhoods by discouraging homeowners in minority neighborhoods from buying insurance and by denying coverage to houses under a certain value or a certain age. As a result of the settlement, Nationwide agreed to modify its underwriting criteria, increase its agency presence, step up its marketing in Toledo's black neighborhoods. Nationwide also agreed to place up to $2 million in an interest-bearing account to provide compensation to qualified class members, and agreed to deposit $500,000 with a bank willing to offer low-interest loans to residents buying homes in Toledo's black neighborhoods. 51

[Footnote]

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

III. H.R. 1875 Fails to Address Defendant and Other Abuses in Class Action Cases

Rather than responding in an even-handed manner to the various concerns raised at the hearings by plaintiffs and defendants alike, H.R. 1875 solely benefits defendants. H.R. 1875 does nothing to deal with the problem of poorly written class action notices which cannot be understood, and it does nothing to deal with collusive settlements which protect defendants from future liability and coupon settlements which provide no tangible benefits to plaintiffs.

Numerous concerns were voiced at the hearings that class action notices can be incomprehensible to potential plaintiffs with opt-out rights. In previous testimony, Public Citizen observed that the notice in the John Hancock deceptive sales practice class action 59

[Footnote] was `impenetrable [and] would make it much less likely that deserving claimants would, in fact, pursue their claims for redress.' 60

[Footnote] Similarly, class action expert Ralph Wellington testified that `class notices should be written in plain language. It is possible to tell how much money class counsel will receive, and where that money will come from.' 61

[Footnote] Unfortunately, H.R. 1875 completely ignores this problem, since changing the forum will not in any way improve the treatment of out-of-State or out-of-district class members. 62

[Footnote]

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

[*Footnote 60: Id.*]

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

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

Serious concerns have also been raised concerning abusive settlements. These include collusive settlements, in which the parties agree to a far broader settlement than was originally sought in order to insulate defendants from future liability, and coupon and other deficient settlements which provide little in the way of real relief to plaintiffs. For example, *In re Prudential Insurance Company of America Sales Practice Litigation* 63

[Footnote] involved a class action case which as filed was based only on misrepresentations to customers regarding future premiums, but as settled, released defendants from all claims concerning abusive sales practices. 64

[Footnote] These cases reflect specific problems with individual judges rather than systemic problems with the States' handling of class actions, and any serious effort to reform class actions should address these issues, whether they arise at the Federal or State level. 65

[Footnote]

[*Footnote 63:* 962 F. Supp. 450 (D. N.J. 1997) (class action based on misrepresentations to customers regarding future premiums for which settlement was approved releasing defendant from any abusive sales practice).]

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

[*Footnote 65:* See In re General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation, 55 F. 3d 768 (3d Cir. 1995) (overturning a lower Federal court's approval of a settlement awarding class members a $1,000 coupon toward future purchases of the defendant's cars); In re Ford Motor Co. Bronco II Products Liability Litigation, 1995 U.S. Dist. Lexis 3507 (E.D. La. 1995) (awarding plaintiffs only a package of videos, stickers, and flashlights); and *Hanlon* v. *Chrysler Corp.*, 1998 WL 296890 (9th Cir. June 9, 1998) (awarding plaintiffs no monetary compensation and essentially no more than Chrysler's promise to conform with its obligation to the Federal regulators).]

CONCLUSION

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

Contrary to supporters' assertions, H.R. 1875 will not serve to prevent State courts from unfairly certifying class actions without granting defendants an opportunity to respond. This is already barred by the Constitution, 66

[Footnote] and the few State court trial court decisions to the contrary have been overturned. 67

[Footnote] H.R. 1875 also cannot be seen as merely prohibiting nationwide class actions filed in State court. The legislation goes much further and bars State class actions filed solely on behalf of residents of a single State, which solely involve matters of that State's law, so long as one plaintiff resides in a different State than one defendant--an extreme and distorted definition of diversity which does not apply in any other legal proceeding.

[*Footnote 66:* See *supra* notes 24-26 and accompanying text.]

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

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

John Conyers, Jr.
Howard L. Berman.
Jerrold Nadler.
Melvin L. Watt.
Sheila Jackson Lee.
Martin T. Meehan.
Robert Wexler.
Tammy Baldwin.
Barney Frank.
Robert C. Scott.
Zoe Lofgren.
Maxine Waters.
William D. Delahunt.
Steven R. Rothman.
Anthony D. Weiner.