

Scribner, Sharon

10. YOUNG THE BEANS
Fr. Sharon

From: Doty, John
Sent: Thursday, September 23, 1999 9:57 AM
To: Dear Colleague
Subject: Dear Colleague; Judiciary; Nadler Amendment to H.R. 1875

September 23, 1999

**GUN MAKERS DON'T DESERVE
THE SPECIAL PROTECTIONS
PROVIDED BY H.R. 1875**

SUPPORT THE NADLER AMENDMENT

Dear Colleague:

Please support my amendment to exempt gun makers from the special protections provided by the Interstate Class Action Jurisdiction Act, H.R. 1875.

This amendment would allow the existing rules governing class action lawsuits to apply to cases that are brought for harm caused by a firearm or ammunition.

Citizen lawsuits currently serve as practically the only safety "regulation" of the firearms industry. In fact, lawsuits are the only way to force manufacturers to make their guns safer. Remington Arms settled a class action suit in 1995 for \$31.5 million which led to the implementation of greater safety protections for owners of shotguns.

Handgun Control, the Coalition to Stop Gun Violence, and the Violence Policy Center all strongly oppose the underlying bill, H.R. 1875, because it benefits companies marketing gun products which are dangerous and defective and have no reasonable use as self defense.

The victims of gun violence are beginning to sue gun manufacturers for their injuries. In addition, over 20 American cities as well as the NAACP have filed lawsuits against gun manufacturers to hold them accountable for the millions of dollars that the public sector must spend coping with the consequences of gun violence. Gun plaintiffs, like tobacco plaintiffs, prefer to sue gun manufacturers as part of a class action, because suing as single plaintiffs is often prohibitively expensive. We should not handicap these important civil suits before they have even begun.

As you know, in addition to expanding federal jurisdiction over class actions, this bill would also give gun manufacturers a procedural advantage by allowing them to more easily remove cases to federal court. Federal courts tend to be much more conservative in interpreting state law than do state courts. Since this is not their primary domain, federal courts tend to be very reluctant to extend state law or apply it to new situations. With gun litigation, however, many cases require courts to extend the law, or to apply established law to a new situation.

We should support gun consumers and victims of gun violence in their efforts to hold the firearms industry accountable when its products cause injury or death. The least we can do for the victims of gun

violence is not to subject them to this cruel bill specifically designed to protect gun makers. Please join me in creating this narrow exemption for victims of harm caused by firearms and ammunition.

If you have any questions or would like to support this amendment please contact me or John Doty at 225-5635. Thank you.

Sincerely,

Jerrold Nadler
Member of Congress

STATEMENT BY REP. NADLER ON A GUN VIOLENCE AMENDMENT
July 26, 1999

This amendment would allow the existing rules governing class action lawsuits to apply to cases that are brought for harm caused by a firearm or ammunition.

According to the Violence Policy Center, guns kill almost twice as many Americans every year as all other household and recreational products combined. Despite this grim fact, the gun industry is the last unregulated manufacturer of a consumer product.

Citizen lawsuits currently serve as practically the only safety "regulation" of the firearms industry. In fact, lawsuits are the only way to force manufacturers to make their guns safer. Remington Arms settled a class action suit in 1995 for \$31.5 million which led to the implementation of greater safety protections for owners of shotguns.

As you know, in addition to expanding federal jurisdiction over class actions, this bill would also give gun manufacturers a procedural advantage by allowing them to more easily remove cases to federal court. Why would we want a federal court ruling on what is clearly a state law? That is unfair, misguided, and dangerous to our health and safety.

Federal courts tend to be much more conservative in interpreting state law than do state courts. Their expertise is federal, not state, law. Yet, according to the Erie doctrine, in personal injury or product liability cases, federal courts must apply state law. Moreover, they must apply it by guessing what a state court would do in a similar situation. Since this is not their primary domain, federal courts tend to be very reluctant to extend state law or apply it to new situations. With gun litigation, however, many cases require courts to extend the law, or to apply established

law to a new situation (e.g., the July 1993 101 California Street assault weapon massacre). Why not just allow victims of gun violence to bring their cases in state courts? Why bring them before a federal judge who will have less expertise on this local issue, and will have to divert his attention from cases involving, for example, violence against women, or access to clinics? Aren't our federal judges busy enough? Do we really need them to take on thousands of new cases? Do we really need them to decide issues of state law that can be handled by a state judge?

We should support gun consumers and victims of gun violence in their efforts to hold the firearms industry accountable when its products cause injury or death. Don't the victims of violent crime deserve better treatment than to be thrown into court where the gun makers have an advantage? Where delay protects manufacturer's of dangerous products?

I urge my colleagues to support this exception for the victims of gun violence and their families.

HANDGUN CONTROL

**ONE MILLION STRONG . . . working to
keep handguns out of the wrong hands.**

July 19, 1999

The Honorable Jerrold Nadler
United States House of Representatives
2334 Rayburn H.O.B.
Washington, DC 20515

Dear Representative Nadler:

As the House Judiciary Committee prepares to markup H.R.1875, The Interstate Class Action Jurisdiction Act of 1999, I ask you to consider the inequities contained in the bill.

Under current law, class actions may be litigated in state or federal court. To a large extent, this choice of forum is up to the injured class member plaintiffs, since they can keep a lawsuit in state court if any plaintiff and any defendant are from the same state. Defendants cannot remove the case to federal court unless and until all defendants are from a state different from any plaintiff.

The proposed bill would turn this rule on its head. Under the new rule, if any member of a proposed plaintiff class is a citizen of a state different from any defendant, the case can be removed from state to federal court. Thus, even if all but one of the plaintiffs were from a single state, and the primary defendant was also from that state, if even one other defendant or plaintiff was from a different state, the case would end up in federal court. Moreover, this removal motion can be made by any defendant, and can be made at any point in the case (eliminating the one-year statute of limitations on removal motions).

How does this impact gun litigation? Federal courts tend to be much more conservative in interpreting state law than do state courts. Their expertise is federal, not state, law. Yet, according to the Erie doctrine, in personal injury or product liability cases, federal courts must apply state law. Moreover, they must apply it by guessing what a state court would do in a similar situation. Since this is not their primary domain, federal courts tend to be very reluctant to extend state law or apply it to new situations. With gun litigation, however, many cases require courts to extend the law, or to apply established law to a new situation (e.g., the July 1993 101 California Street assault weapon massacre).

July 19, 1999

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There are numerous examples of this conservative approach, but two come to mind. In McCarthy v. Olin, 119 F.3d 148 (2d Cir. 1997), the Second Circuit, in a 2-1 decision, declined to certify to state court the question whether it was negligent for Olin Corp. to have sold the "Black Talon" hollow-point ammunition which was used by Colin Ferguson in the Long Island Railroad massacre. The dissenting judge, Guido Calabresi, argued that the case should have been certified to the New York Court of Appeals since, given the novelty of the tragedy, it may well have extended its law to find liability. The Second Circuit, however, dismissed the case. Similarly, in Bubalo v. Navegar, 1998 U.S. Dist. Lexis 3598 (N.D. Ill. 1998), the court dismissed a case involving the murder of a police officer by an assault weapon brought under a novel public nuisance cause of action. Although it allowed the case to proceed in an initial opinion, on reconsideration, the federal court dismissed, holding that "this court is reluctant to recognize a new theory of nuisance liability under Illinois law without a more solid foundation in the state decisional law." *Id.* at *14-15.

We believe that present law which gives injured plaintiffs greater latitude to determine the forum, is ultimately more fair.

Sincerely,



Robert J. Walker
President

**AMENDMENT TO H.R. 1875, AS REPORTED
OFFERED BY MR. NADLER OF NEW YORK**

Page 6, line 5, strike the quotation marks and second period.

Page 6, insert the following after line 5:

1 “(5)(A) Paragraph (1) shall not apply to any class
2 action that is brought for harm caused by a firearm or
3 ammunition.

4 “(B) As used in this paragraph, the term ‘firearm’—

5 “(i) has the meaning given that term in section
6 921(3) of title 18; and

7 “(ii) includes any firearm as defined in section
8 5845 of the Internal Revenue Code of 1986.”.

Page 8, line 16, strike the quotation marks and second period.

Page 8, insert the following after line 16:

9 “(3) FIREARMS OR AMMUNITION.—(A) This
10 section shall not apply to any class action that is
11 brought for harm caused by a firearm or ammunition.
12 tion.

13 “(B) As used in this paragraph, the term
14 ‘firearm’—

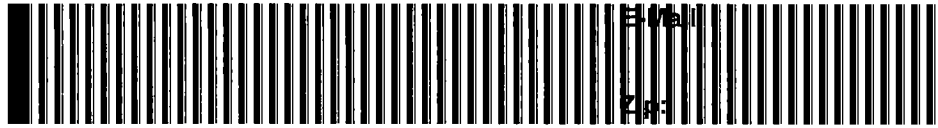
15 “(i) has the meaning given that term in
16 section 921(3) of title 18; and

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H.L.C.

2

1 “(ii) includes any firearm as defined in
2 section 5845 of the Internal Revenue Code of
3 1986.”.

**School News****Politics Headlines****Thursday September 23 6:36 PM ET**

House OKs Lawsuit Rule Changes

By JIM ABRAMS Associated Press Writer

WASHINGTON (AP) - The House took aim Thursday at what Republicans called abuses in class action lawsuits, passing legislation that would move most such suits into federal courts.

Most Democrats and the White House opposed the measure, saying it would make it harder for individuals to seek grievances from a wrongdoing company.

The measure, passed 222-207, would grant federal courts jurisdiction in cases where any member of the proposed class is a citizen of a state different from any defendant.

Shifting many class action lawsuits away from state courts would prevent such practices as "forum shopping," in which attorneys file suits in states where they are more likely to get a favorable ruling, supporters said.

"Hundreds of frivolous lawsuits are filed in favorable state courts and used as high-stakes court-endorsed blackmail devices against companies that usually settle rather than face a long and arduous court battle," said Rep. John Linder, R-Ga.

The legislation is backed by business groups and industries that have been the target of class action lawsuits, including the tobacco, gun and auto industries. But its prospects are uncertain in the Senate, and the administration said in a statement that it would recommend a presidential veto if the bill ever wins final approval.

Many state residents would be denied access to their own state courts, and the legislation coincides with "a time when the chief justice, among others, has repeatedly expressed serious concerns about the increasingly burdensome workload of the federal courts," the administration said.

"This is really the camel's nose under the tent," said Frank Clemente, director of Public Citizen's Congress Watch. He said passage would be a victory for corporate interests pressing their Republican allies to pass legislation giving them more protection from what they regard as predatory liability lawsuits.

"If this legislation is enacted, it will provide the tobacco industry with unprecedented legal protection," said Rep. Henry Waxman, D-Calif. "It is nothing less than a backdoor immunity from class action lawsuits."

Democrats proposed amendments to exempt lawsuits involving firearms or tobacco from the legislation, but they were defeated.

Rep. Robert Goodlatte, R-Va., the chief sponsor of the legislation, argued that legislation was necessary because different certification standards for class actions in the states have opened the way for abuse.

Attorneys, he said, shop around until they find the one judge in the one state ``who thinks anything goes."

He said his bill would keep purely local matters in state courts. Cases would not go to federal courts when a substantial majority of the class members and defendants are citizens of the same states and the claims governed primarily by that state's law.

Cases where the primary defendants are states or state officials, or where the class has fewer than 100 members and the amount in controversy is less than \$1 million would also stay in the state court.

The legislation was opposed by the Judicial Conference of the United States, which represents federal judges, on the grounds that it would upset principles of federalism and add to the burdens of federal courts. With the addition of more class action suits, it said, ``substantial backlogs and attendant delays can be expected."

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The bill is H.R. 1875.



[Sep 22](#) | [Sep 21](#) | [Sep 20](#) | [Sep 19](#) | [Sep 18](#) | [Sep 17](#) | [Sep 16](#) | [Sep 15](#) | [Sep 14](#) | [Sep 13](#)



Questions or Comments

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GUIDANCE ON CLASS ACTIONS

September 24, 1999

Q: Is the Administration concerned by House passage of the Class Action bill yesterday and its potential impact on large class-action lawsuits against tobacco companies and gun manufacturers?

A: The Administration is concerned by House passage of the Class Action bill and its potential impact on **all kinds** of class actions brought on behalf of injured Americans who have no practical way to protect their rights individually. For example, state class actions can be brought to remedy injuries from fraud, dangerous products, discrimination, and negligence causing public health or environmental damage.

Moreover, as Chief Justice Rehnquist has noted, the bill would unnecessarily flood the Federal courts with state law cases that can competently be handled by our state courts. This would threaten the Federal courts' ability to provide civil litigants anything resembling swift justice – *especially at a time when so many Federal court vacancies remain unfilled due to Senate delays in confirmation.*

The President's senior advisors will recommend that he veto the bill if it comes to his desk. And, given the strong, bipartisan opposition to the bill in the House (207 votes against), such a veto would be overwhelmingly sustained.

It is ironic that the same Congress, which is so concerned about protecting state prerogatives and Federalism, is so quick to argue the incompetence of state courts.

Background

The House yesterday passed Class Action reform by a vote of 222 – 207. While we are not pleased by the bill's passage, the slender margin of victory is encouraging.

The legislation would grant Federal District Courts jurisdiction over class actions dealing with state law as long as any class member is from a different state than any defendant and the action involves more than 100 class members or \$1 million (as nearly every class action does). It would allow any party to remove these state cases to federal court, without concurrence of any other party. Thus, effectively, it would move the bulk of state class actions to Federal courts where class certification standards are typically higher. If the case were not certified as a class in Federal court, the case could be refiled in state court but would be forever subject to removal and redissmissal.

On the House floor, amendments were offered and defeated that would have carved out tobacco and gun cases from the bill's purview. The amendments were offered to highlight the impact that the legislation would have on major public health and safety cases making their way through the Federal courts.

DPC recommended, however, that the Administration not make Tobacco or Guns a prominent feature in our opposition. Those cases are generally perceived as public health and safety issues. We feared that our efforts there could become embroiled in debates about trial lawyers. Thus, we are emphasizing the broader consumer protection concerns and leaving the tobacco and gun debate to members of Congress.

Prospects in the Senate are unclear. While Senator Kohl and Senator Grassley have co-sponsored the bill, it is not clear that Senator Hatch is eager to move the bill through the Judiciary Committee. *We hope that the connection will be made to the number of judicial vacancies (as the NYT's article did), because Hatch will be less likely to move the bill if he fears it will bring further criticism of his Committee's pace in confirming our judicial nominees.*

PAGE 2

1ST CASE of Level 1 printed in FULL format.

LEONEL GARZA, JR., RODOLFO VEGA, RONALD RESSMAN, MICHAEL P. O'NEILL, CHRISTOPHER GILL, LAURA GILL, GREG DEWINNE, TOM FRANCE, WILLIAM H. MITCHELL, HUEY JOHNSON, and TYLER JOHNSON, And Additional Plaintiffs Listed on Exhibit "A" to the Complaint, Individually and on Behalf of Others Similarly Situated, as a Class Action, Plaintiffs, VS. SPORTING GOODS PROPERTIES, INC., formerly known as Remington Arms Company, Inc.; DuPONT CHEMICAL and ENERGY OPERATIONS, INC.; E.I. DuPONT de NEMOURS & CO., INC.; and REMINGTON ARMS COMPANY, INC., formerly known as RACI Acquisition Corporation, Defendants.

*Remington
Case 1*

CIVIL ACTION NO. SA-93-CA-1082

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

1996 U.S. Dist. LEXIS 2009

February 6, 1996, Decided

NOTICE: [*1] NOT FOR PUBLICATION

CORE TERMS: settlement, barrel, shotgun, steel, gun, class action, lodestar, burst, replacement, named, gauge, expended, proposed settlement, negotiation, multiplier, class certification, modified, common fund, discovery, entity, replace, warranty, manufactured, calculation, personal injury, estimated, certification, adequacy, expertise, time spent

COUNSEL: For LEONEL GARZA, JR., Individually and on behalf of others similarly situated as a class action, RODOLFO VEGA, Individually and on behalf of others similarly situated as a class action, RONALD RESSMAN, Individually and on behalf of others similarly situated, as a class action, CHRISTOPHER GILL, Individually and on behalf of others similarly situated, as a class action, LAURA GILL, Individually and on behalf of others similarly situated, as a class action, GREG DEWINNE, Individually and on behalf of others similarly situated as a class action, plaintiffs: Oliver Samuel Heard, Jr., [COR LD NTC], Heard, Goggan & Blair, San Antonio, TX. James L. Branton, [COR LD NTC], Branton & Hall, San Antonio, TX. Jon Robinson, [COR LD NTC], Hull, Campbell & Robinson, Decatur, IL. Robert G. Mullendore, [COR LD NTC], William C. Watt, [COR LD NTC], Mullendore, Tawney & Watt, P.C., Missoula, MT. For MONTANA WILDLIFE FEDERATION, TOM FRANCE, WILLIAM H. MITCHELL, HUEY JOHNSON, TYLER JOHNSON, plaintiffs: James L. Branton, [COR LD NTC], Branton & Hall, San Antonio, TX. Robert G. Mullendore, [COR LD NTC], William C. Watt, [COR LD NTC], Mullendore, Tawney & Watt, P.C., [*2] Missoula, MT.

ATTORNEYS FOR THE DUPONT DEFENDANTS: Howard P. Newton, MATTHEWS & BRANSCOMB, A Professional Corporation, San Antonio, Texas. Fred S. Souk, CROWELL & MORING, Washington, D.C. Michael L. Clarke, Senior Counsel, E.I. DUPONT DE NEMOURS AND COMPANY, Wilmington, Delaware.

ATTORNEYS FOR REMINGTON ARMS COMPANY, INC.: Charles J. Smith, James D. Guess, GROCE, LOCKE & HEBDON, San Antonio, Texas. Anne E. Cohen, DEBEVOISE & PLIMPTON, New York, New York. Andrew T. O'Neill, Office of General Counsel, REMINGTON

1996 U.S. Dist. LEXIS 2009, *

PAGE 3

ARMS COMPANY, INC., Wilmington, Delaware.

JUDGES: FRED BIERY, UNITED STATES DISTRICT JUDGE

OPINIONBY: FRED BIERY

OPINION: ORDER APPROVING CLASS ACTION SETTLEMENT AND DISMISSING ACTION WITH
PREJUDICE

Exemplifying the idea that peaceable resolution of disputes is not an exact science but is the essence of the art of compromise, a suggested agreement to bring closure to this controversy has been considered by the Court. This case was removed to federal court on December 20, 1993, and has been preceded by fifteen years of related litigation. The parties, through their counsel, have engaged in tens of thousands of hours of legal work, investigation, analysis, [*3] and mediation. Resulting from this effort is a joint motion by the named plaintiffs and defendants Sporting Goods Properties, Inc., formerly known as Remington Arms Company, Inc. ("SGPI"); DuPont Chemical and Energy Operation, Inc. ("DuPont Chemical"); E.I. du Pont de Nemours and Company, ("DuPont"); (collectively, the "DuPont Defendants"); and Remington Arms Company, Inc., formerly known as RACI Acquisition Corporation ("Remington"); (collectively, the "Defendants") for approval of a proposed settlement (the "Settlement") pertaining to a settlement class (the "Settlement Class") consisting of:

all persons or entities in the United States, or its possessions and territories including the District of Columbia and the Commonwealth of Puerto Rico, who now or hereafter own one or more Remington 12-gauge shotguns, of Models 870, 1100, 11-87, 3200 and Sportsman Models 58, 12A and 12P, manufactured after 1960 (the "Shotguns") with barrels made of a steel known as American Iron and Steel Institute C-1140 modified steel ("1140M Steel"), and who have not opted out pursuant to this Court's order of August 31, 1995 and excluding, however, any entity in which any Defendant has [*4] a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries, distributors, resellers and/or assigns of any such controlled entity, or of any Defendant. This exclusion shall not apply to (a) non-officer and/or non-director employees of Defendants as to guns personally owned by them, or (b) Defendants' resellers or distributors (or the employees thereof) as to guns owned by them for personal use (rather than for resale or business promotional purposes), and who, if otherwise eligible, would be Settlement Class Members;

which was conditionally certified by Order of this Court dated August 31, 1995, under rules 23(a), (b) (3) and (e) of the Federal Rules of Civil Procedure, solely for the purpose of settlement. The compromise and settlement agreement was reached by the parties and their counsel with the assistance of the Honorable Fred Shannon, a former Texas and United States District Judge. All parties, counsel, and Judge Shannon have represented to the Court their unanimous opinion the proposed settlement is fair, adequate, and reasonable.

This joint motion for final approval of the settlement was briefed, [*5] supported by affidavits, testimony and documents in the record, and was the subject of an extensive hearing (the "Settlement Hearing") on December 29, 1995. Recognizing that no settlement will please all the people all the time, and based on these submissions and the Court's Findings of Fact and Conclusions of

Law Regarding Fairness of Class Action Settlement rendered below, the Settlement is APPROVED.

1. CERTIFICATION OF CLASS/JURISDICTION

A. JURISDICTION

Prior to reaching a proposed settlement, the parties to this litigation fought many battles. The first concerned this Court's jurisdiction. Defendants timely removed the case to federal court based on diversity of citizenship. Defendants acknowledged the plaintiffs attempted to plead actual damages per plaintiff below the \$ 50,000 jurisdictional amount but claimed the compensatory and punitive damages plus attorney's fees sought exceeded \$ 50,000. In their motion to remand, plaintiffs quoted the language of their original petition which prayed for a sum not to exceed \$ 50,000 for each plaintiff. These issues were further briefed for the Court nl by defendants' response to the motion to remand, plaintiffs' supplemental [*6] brief, and defendants' response to plaintiffs' supplemental brief. No action on these pending motions was taken. At a status conference held by Magistrate Judge Nowak on September 7, 1994, the plaintiffs agreed to withdraw their motion because of concern that a remand at this time might impede or hinder ongoing settlement negotiations.

-Footnotes-

nl When this case was filed in federal court, it was assigned to the docket of Judge Edward C. Prado and referred to United States Magistrate Judge Nancy Stein Nowak pursuant to the General Referral Order. On March 17, 1994, the case was reassigned and transferred to the docket of Judge Fred Biery.

-End Footnotes-

In an effort to ensure federal court jurisdiction, plaintiffs filed a motion for leave to file a first amended complaint which was granted on November 14, 1994. In that complaint, plaintiffs stated:

this case is brought as a class action on behalf of all persons in the United States who own or use Remington shotguns but have not yet been injured by an unobstructed barrel burst, [*7] pursuant to the Lanham Act, 15 U.S.C. @ 1125, the Magnuson-Moss Act, 15 U.S.C. @ 2310 (with respect to the named individual Plaintiffs' claims), state consumer protection and warranty statutes, and the common law of fraud, malice, negligence, gross negligence, and strict liability.

In addition, plaintiffs stated the amount in controversy exceeds \$ 50,000.

Jurisdiction was discussed at this Court's first conference with the parties held on June 26, 1995. The Court noted that if the action was being brought under the Magnuson-Moss Act as a class action, the number of named plaintiffs needed to be one hundred. Defendants remained firm that diversity of citizenship was the basis for jurisdiction. In plaintiffs' third amended complaint, section 2130(d) (3) (C) of the Magnuson-Moss Act was satisfied as 100 plaintiffs were named. In addition, plaintiffs claim the aggregate amount in controversy exceeds \$ 50,000 exclusive of interest and costs, and the citizenship of all named plaintiffs is diverse from the citizenship of all the defendants. The parties

now agree that class members' punitive damages claims may be aggregated in order to determine the jurisdictional amount in [*8] controversy. Thus, the Court is now satisfied it has jurisdiction based on diversity of citizenship, federal claims or both. n2

-Footnotes-

n2 Although defendants do not believe plaintiffs' federal law claims are meritorious, the assertion of such a claim, whether or not meritorious, gives the Court jurisdiction. DAVID HITTNER ET AL., RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL @ 2:700--5TH CIR. ED. (The Rutter Group 1995); see Sarmiento v. Texas Ed. of Veterinary Medical Examiners, 939 F.2d 1242, 1245 (5th Cir. 1991) (if it appears federal claim without merit, court should dismiss for failure to state claim not jurisdictional grounds).

-End Footnotes-

B. CLASS CERTIFICATION

Another controversy between the parties prior to settlement concerned class certification. Although the original petition filed in state court and all subsequent amended complaints filed in federal court were on behalf of named plaintiffs and "on Behalf of Others Similarly Situated, as a Class Action," no formal motion for class certification [*9] was filed pursuant to Western District of Texas Local Rule CV-23 until June 14, 1995. n3 Prior to this Court's determination of the issue, the parties reached the proposed settlement, and the defendants agreed to class certification for settlement purposes only. n4 On August 20, 1995, plaintiffs and defendants jointly moved for an order from this Court conditionally certifying the settlement class which was granted. Despite the conditional class certification, however, one circuit has held that "courts employing settlement classes must still make findings that the class complies with Rule 23(a) and the appropriate parts of Rule 23(b)" and the failure to do so is "a plain error of law, and hence an abuse of discretion, requiring the certification be set aside." In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 800 (3rd Cir. 1995). Therefore, this Court will examine the class action prerequisites.

-Footnotes-

n3 Local Rule CV-23 became effective January 1, 1994, and provides:

When a class action allegation is made in any pleading, the movant shall file, within thirty (30) days after any defendant's first pleading, a motion for class certification. The motion shall include, but is not limited to, the information set forth in Appendix A. Failure to timely file a motion for class certification shall constitute a waiver of the request for any class action.

[*10]

n4 The motion for leave to file class certification was filed on June 14, 1995. Plaintiffs argued the time limit for filing a class action should not have passed until all of the multiple defendants had answered and were fully joined. A response to this motion was received by this Court on June 23, 1995. Three days later, on June 26, 1995, plaintiffs filed their motion for leave to file a supplemental memorandum of law in support of their motion for class certification in excess of ten pages. On that same date, a premediation

1ST CASE of Level 1 printed in FULL format.

MICHAEL BUBALO and CARYN DOFFYN, as Special Administrator of the Estate of DANIEL DOFFYN, Deceased, and as mother and next friend of BRITTANY DOFFYN, a minor, Plaintiff, v. NAVEGAR, INC. d/b/a/ INTRATEC FIREARMS, a Florida corporation, Defendant

Case No. 96 C 3664

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1998 U.S. Dist. LEXIS 3598

March 16, 1998, Decided
March 20, 1998, Docketed

DISPOSITION: [*1] Defendant's Motion for reconsideration Granted. Remaining Counts of Plaintiffs' complaint, counts I, 4 and 7 dismissed. Case dismissed in its entirety.

COUNSEL: For MICHAEL BUBALO, BRITTANY DOFFYN, plaintiffs: Peter Francis Geraci, Scott Douglas Clark, Law Offices of Peter Francis Geraci, Chicago, IL.

For BRITTANY DOFFYN, plaintiff: Steven J. Diamond, Peter Francis Geraci, Chicago, IL.

For CARYN DOFFYN, executor plaintiff: Peter Francis Geraci, Scott Douglas Clark, Law Offices of Peter Francis Geraci, Chicago, IL.

For NAVEGAR, INC., defendant: James Phillip Dorr, Sarah L. Olson, Wildman, Harrold, Allen & Dixon, Chicago, IL.

JUDGES: David H. Coar, United States District Judge.

OPINIONBY: David H. Coar

OPINION: MEMORANDUM OPINION AND ORDER

The defendant Navegar, Inc. ("Navegar" or "defendant") has moved this court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to reconsider its June 11, 1997 decision denying the defendant's motion to dismiss as to the plaintiffs' public nuisance claims (counts I, IV, and VII). For the reasons stated in this Memorandum Opinion and Order, the defendant's motion is granted. As the pertinent facts and relevant legal standard for motions [*2] to dismiss were discussed in this court's earlier opinion, it is not necessary to review them here. See Bubalo v. Navegar, Inc., 1997 U.S. Dist. LEXIS 8551, 1997 WL 337210, *1-2 (N.D. Ill. June 13, 1997).

I. DISCUSSION

A. The Law of Public Nuisance

A public nuisance is defined by the Restatement (Second) of Torts as "an unreasonable interference with a right common to the general public."

Restatement (Second) of Torts (1979), @ 821B (1) [hereinafter "Restatement"]. A public right is one common to all members of the public. *Id.* at @ 821B(g). See also Prosser and Keeton on Torts (5th ed. 1984), ch. 15, @ 90 at 645 ("To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual or several.") (footnotes omitted). Illinois courts have adopted the Restatement's definitions of a public nuisance. See *Wheat v. Freeman Coal Mining Corp.*, 23 Ill. App. 3d 14, 18, 319 N.E.2d 290, 294 (Ill. App. 5 Dist. 1974) ("Our courts have adopted the Restatement definition of nuisance."); *City of Chicago v. Commonwealth Edison Co.*, 24 Ill. App. 3d 624, 631, 321 N.E.2d 412, 418 (Ill. App. 1 Dist. 1974) (accepting [*3] the Restatement's definition of nuisance); *Village of Wilsonville v. SCA Servs., Inc.*, 86 Ill. 2d 1, 21, 426 N.E.2d 824, 834, 55 Ill. Dec. 499 (Ill. 1981) (defining a public nuisance as "an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all").

Illinois statutes have defined public nuisances to include "air and water pollution, the abuse of cannabis and controlled substances, obstructing a highway or waterway, and operating a house of prostitution." Michael J. Folelli & Bruce L. Ottley, *Illinois Tort Law* (2d Ed. 1993) @ 20.01 at 20-2. Activities that are not defined in a statute to constitute a public nuisance may nonetheless be found to be a public nuisance under common law theory. *Id.* A private individual may bring an action for public nuisance if she suffers damages different from those suffered by the public at large. *David H. Swain & Son v. Chicago, B. & O. R. Co.*, 252 Ill. 622, 626, 97 N.E. 247, 248 (Ill. 1911); Restatement, @ 821C.

As this court stated in its previous opinion, the requirements for stating a claim for public nuisance are "not strenuous because the 'concept of common [*4] law public nuisance elude[s] precise definition' and the existence of a nuisance 'depends on the peculiar facts presented by each case.'" *Gilmore v. Stanmar, Inc.*, 261 Ill. App. 3d 651, 660, 633 N.E.2d 985, 992 (Ill. App. 1 Dist. 1994, 199 Ill. Dec. 189) (internal citations omitted). A cause of action for public nuisance requires the plaintiff to "facts from which the law gives him certain rights, a transgression of those rights by the defendant and resulting damages. This is all the law requires in pleading." See *Feder v. Perry Coal Co.*, 279 Ill. App. 314, 318 (Ill. App. 4 Dist. 1935). This court found in its previous opinion that the facts alleged in the plaintiffs' complaint successfully allege that there exists a public right "to be free from disturbance and reasonable apprehension of danger to person and property." See *Bubalo*, 1997 WL 337218 at *4 (citing *Village of Desplaines v. Poyer*, 123 Ill. 346, 14 N.E. 677, 5 Am. St. Rep. 524 (Ill. 1888)).

B. Defendant's Contentions That The Court's Ruling Imposes Virtually Limitless Liability on the Manufacturers of Non-Detective, Legal Products

The defendant argues in its motion to reconsider that the court's ruling [*5] is "clearly erroneous" because it places "unlimited liability against manufacturers of well-designed, well-made and lawful products for injuries sustained long after the sale of those products." (Mot. at 6-7.) The defendant forgets, however, that in order to sustain a cause of action for public nuisance interference with the public right must rise to the level of being "unreasonable." Restatement, @ 821B(1). Thus, the court's decision is far from declaring "unlimited liability" for manufacturers. Rather, the only manufacturers that may be held liable, according to Illinois law, are

1998 U.S. Dist. LEXIS 3590, *

those that unreasonably interfere with a public right. According to the Restatement, the "circumstances may sustain a holding that an interference with a public right is unreasonable include":

- (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows [*6] or has reason to know, has a significant effect upon the public right.

Restatement, @ 821B(2). The plaintiffs' complaint alleges both the first and third factors: (1) the alleged conduct affects public safety, (Compl. P 16), and (2) the conduct has caused the plaintiff permanent damages, (Compl. P 18), and the defendant allegedly designed and manufactured the TEC-DC9 in such a way that it would significantly affect public safety, (Compl. PP 8, 9, 17.). The determination of whether a defendant's actions are unreasonable is generally a question for the jury. *Gilmore v. Stanmar, Inc.*, 261 Ill. App. 3d 651, 661, 633 N.E.2d 985, 993 (Ill. App. 1 Dist. 1994, 199 Ill. Dec. 189) (citing *Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Commission*, 34 Ill. 2d 544, 216 N.E.2d 788 (Ill. 1966)).

The defendant next argues that Illinois product liability law bars a finding for the plaintiffs. (Mot. at 9.) A nuisance may be based upon either negligent or intentional conduct. Therefore, tort law governing negligence and strict liability is relevant to an action for public nuisance only in cases where the defendant's interference with the public right is unintentional: [*7]

The defendant is held liable for a public nuisance if his interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities. . . . If the interference with the public right is intentional, it must also be unreasonable. . . . If the interference was unintentional, the principles governing negligent or reckless conduct, or abnormally dangerous activities all embody in some degree the concept of unreasonableness.

Restatement, @ 821B(e) (emphasis added); See *Patterson v. Peabody Coal Company*, 3 Ill. App. 2d 311, 316, 122 N.E.2d 48, 51 (Ill. App. 4 Dist. 1954) ("We have found no better treatise or guide on the subject of private nuisances than that contained in the Restatement of the Law on Torts . . . [the elements necessary for recovery in a nuisance claim are] (1) the invasion must be substantial and (2) the invasion must be either (a) intentional and unreasonable or (b) actionable under rules governing liability for negligence."). See also *Gilmore*, 261 Ill. App. 3d at 661, 633 N.E.2d at 993 (Ill. App. 1 Dist. [*8] 1994) (citing *Wheat*, 23 Ill. App. 3d at 17, 319 N.E.2d at 294) ("The allegations necessary to plead a public nuisance cause of action may be based in part on negligence actions.") (emphasis added). The plaintiffs in this case have sufficiently alleged that the defendant's actions were intentional. See Compl. P 17. As such, this court need not address in its motion to dismiss the sufficiency of plaintiffs' pleading for a public nuisance claim

alleging unintentional acts (and thus requiring a showing of liability under negligence and/or strict liability theory). nl

-----Footnotes-----

nl The defendant cites two Illinois cases, *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 111, 454 N.E.2d 197, 73 Ill. Dec. 337 (Ill. 1983) and *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill. 2d 335, 637 N.E.2d 1020, 202 Ill. Dec. 284 (Ill. 1994), for the principle that Illinois product liability law rejects position that a non-defective, lawfully sold product can form the basis for a manufacturer's liability in tort. Both of these cases, however, are based on strict liability analyzed under the "consumer expectations test." The defendant neglects to mention that Illinois has adopted a second test, the "risk/benefit test," in which a plaintiff may subject a manufacturer to strict liability by either (1) introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. *Lamkin v. Towner*, 130 Ill. 2d 510, 563 N.E.2d 449, 150 Ill. Dec. 562 (Ill. 1990). In addition, the defendant does not address the negligence standard: Illinois plaintiffs may hold manufacturers liable under a negligence standard by proving that "the defendant owed a duty of reasonable care in connection with the transaction, that the defendant breached the duty by action or omission, and that the injury that resulted was caused by the breach of the duty." *Michael J. Polcilli & Bruce L. Otley, Illinois Tort Law* (2d Ed. 1993) @ 19.06 at 19-9.

-----End Footnotes-----

[*9]

C. The Court's Analysis of Public Nuisance Law Contains an Error of Law

Defendant takes issue with this court's description of the Seventh Circuit's opinion in *City of Bloomington, Ind. v. Westinghouse Electric Corp.*, 891 F.2d 611, 613 (7th Cir. 1989), as "expressly" upholding the viability of a nuisance claim against the manufacturer of a non-defective product for injuries arising from the use of the product subsequent to the point of sale. This court agrees that the term "expressly" mischaracterizes the holding. In *City of Bloomington, Monsanto Company ("Monsanto")* manufactured PCB's and sold them to customers, including Westinghouse Electric Corporation ("Westinghouse"). The City of Bloomington, Indiana sued Westinghouse and Monsanto, alleging that Westinghouse discharged waste containing PCB's into Bloomington's sewers, contaminating its waste treatment facility and a landfill. The Seventh Circuit affirmed an order of the district court dismissing those portions of the complaint asserting *inter alia* liability for public and private nuisance. In so doing, the panel agreed with the district court that the essence of a nuisance action involved an actor "using his [*10] property to the detriment of the use and enjoyment of others." *Id.* at 614 (citations omitted). Noting that the plaintiff could offer no case in which a manufacturer had been found liable for public or private nuisance claims arising from use of a product subsequent to the point of sale, the Seventh Circuit determined that Westinghouse could be the only target of a nuisance claim. In arriving at that conclusion, however, the panel noted that @ 834 of the Restatement provides: "One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but

also when he participates to a substantial extent in carrying it on." Id. at 614 n. 5.

The court concluded that, under the facts of the case, n2 Monsanto could not be said to "participated in carrying on the nuisance." Id. at 614. Suppose, however, that Monsanto had not taken steps to alert customers of the risks of the product, or intentionally marketed the product to customers who it knew or should have known would dispose of PCB's in a manner that would harm the environment. Nothing in the opinion in City of Bloomington would preclude the imposition of liability on the manufacturer [*11] under those facts.

-Footnotes-

n2 "The uncontested record shows that when alerted to the risks associated with PCB's, Monsanto made every effort to have Westinghouse dispose of the chemicals safely. Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product." City of Bloomington, 891 F.2d at 614 (citing Johnson County v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984), modified on other grounds, 664 F. Supp. 1127 (E.D. Tenn. 1985).

-End Footnotes-

In this case, plaintiffs make a serious and disturbing allegation about the defendant's conduct: that the design and marketing of these powerful assault weapons were targeted to appeal to criminals. If the nuisance involves the interference with the public's right to be free from injury from the use of powerful assault weapons by criminals, the plaintiffs' allegations, if true, suggest a degree of participation by the manufacturer not present in City of Bloomington and the cases cited [*12] therein. Unlike those cases, plaintiffs here allege that the manufacturer did more than merely manufacture and sell a dangerous product.

There is, however, a different discussion in City of Bloomington that argues in favor of the defendant's position. In that case, the district court also dismissed a count of the complaint dealing with abnormally dangerous activity. See 891 F.2d at 615. See also Restatement § 519. In affirming the dismissal, the panel discussed its decision in Martin v. Harrington and Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984) (holding that the manufacturer of handguns is not an ultrahazardous activity and that there can be no liability for merely manufacturing dangerous products); the decision of the Court of Appeals of the District of Columbia in Delahanty v. Hinckley, 564 A.2d 758 (D.C. Ct. App. 1989) (holding that the marketing of a handgun is not dangerous in and of itself, and when injury occurs it is not the direct result of the sale, but rather the result of actions taken by a third party); and, the decision of the Fifth Circuit Court of Appeals in Perkins v. F.T.E. Corp., 762 F.2d 1250, 1265 n. 43 (5th Cir. 1985) (also finding that [*13] the marketing of a handgun is not dangerous in and of itself and that resulting injuries are the fault of actions taken by third parties).

Martin, Delahanty, and Perkins involved claims against a manufacturer/distributor of handguns, although the plaintiffs in these cases (apparently) did not include claims that the guns were designed for and marketed to criminals. The opinion in Martin deserves special attention because it suggests a rationale that goes beyond the issue of whether the manufacturer

and sale of handguns are ultrahazardous activities:

Cases requiring liability impose liability for the ultrahazardous activity as a result of the use of the product. To recognize liability of a manufacturer or distributor would virtually make them the insurer for such products as explosives, hazardous chemicals or dangerous drugs even though such products are not negligently made nor contain any defects. Although such a social policy may be adopted by the legislature, it ought not to be imposed by judicial decree.

Martin, 743 F.2d at 1204 (quoting Riordan v. International Armament Corp., 132 Ill. App. 3d 642, 645, 477 N.E.2d 1293, 87 Ill. Dec. 765, 81 L.2d 923 (Circuit Court Cook County, Law Division, [*14] 1983)). Although the issue before the court in Martin was whether the sale of a nondefective product in Illinois could subject a manufacturer to liability for ultrahazardous activity, the Seventh Circuit's analysis provides ample justification for precluding the application of Illinois nuisance law to reach a similar result. Indeed, City of Bloomfield supports this view. Where does this leave us?

This is a case of first impression under Illinois nuisance law, involving allegations of intentional or negligent conduct by a manufacturer of a nondefective product that goes beyond the mere manufacture and sale of that product. The plaintiffs have not cited, and this court has not been able to find, cases from other jurisdictions that provide guidance as to how the Illinois Supreme Court would decide this issue if it was presented for decision. Although the allegations in the plaintiffs' complaint as to the design and marketing of the TEC-DC9 allege substantial participation "to a substantial extent" within the meaning of that phrase in the Restatement @ 834, this court is reluctant to recognize a new theory of nuisance liability under Illinois law without a more solid [*15] foundation in the state decisional law. Therefore, the defendant's motion for reconsideration is granted and the remaining counts of the plaintiffs' complaint (counts I, IV, and VII) are dismissed.

II. CONCLUSION

WHEREFORE, the defendant's motion for reconsideration is GRANTED.

Enter:

David H. Coar,

United States District Judge

Dated: March 16, 1998

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Defendant's Motion for reconsideration is Granted. The remaining Counts of the Plaintiffs' complaint, counts I, 4 and 7 are dismissed. This case is dismissed in its entirety and closed.

Date: 3/16/98

Violence Policy Center



1140 19th Street, NW
Suite 600
Washington, DC 20036

202.822.8200 voice
202.822.8205 fax
www.vpc.org web

FAX TRANSMISSION COVER SHEET

TO: Deanne Benson

FAX: _____

FROM: Kristen Hand

DATE: _____

TOTAL NUMBER OF PAGES (INCLUDING COVER): 11

MESSAGE:

As I mentioned earlier, the
Remington case is really long --
it will be easier to get it off Lexis
Wustlaw.

September 21, 1999

TO: Leanne

FR: Deanne

RE: Interstate Class Action Jurisdiction Act (HR 1875)

Per our discussion, I have pulled together various materials floating from gun groups and outlined a few ways in which the Interstate Class Action Jurisdiction Act (HR 1875) would impact the gun lawsuits:

STATUS

- (1) The bill is expected to come to the floor Wednesday.**
- (2) Three amendments failed in House Judiciary Committee to exempt gun lawsuits, tobacco lawsuits and HMO lawsuits. The bill passed on nearly a straight partyline vote -- 15 to 12. Rep. Boucher was the only Democrat voting in favor of the bill.**
- (3) The Judicial Conference opposes the bill.**
- (4) Floor amendments will be introduced to exempt gun lawsuits (Nadler) and tobacco lawsuits (Jackson Lee) and probably on HMO's as well. Rep. Barney Frank plans to introduce an amendment to prevent defendants from prolonging the certification process. As drafted, this bill allows defendants to move cases back to federal courts that have already been denied certification in federal court when plaintiffs attempt to file them in state courts. Therefore, it would ensure no action would be taken on the cases. Frank's amendment would require that the lawsuits be considered by the state courts once a federal court denies certification to keep the case active.**

BACKGROUND

- (1) Citizen lawsuits -- including class actions -- serve as the only safety "regulation" of the firearms industry. In fact, lawsuits are the only method to force manufacturers of defective firearms to make their guns safer. Moreover, litigation is now being used to target the gun industry's unscrupulous marketing and distribution practices.**
- (2) The bill would make it easier for defendants in class action lawsuits (i.e. gun manufacturers, tobacco companies, HMO's) to file cases in federal courts by lowering the diversity threshold from complete diversity to minimal diversity. Since it is more difficult to get a class action lawsuit certified in federal court and accepted by a federal judge, the concern is that many of these cases would never be considered -- in fact NO tobacco class action lawsuit has ever been certified by a federal judge.**

GUN LAWSUIT -- POTENTIAL IMPACT EXAMPLES

- (3) For example, Remington Arms settled a class action suit in 1995 for \$31.5 million. This suit involved 12 models of shotguns manufactured over a 35-year period. The plaintiff shotgun owners alleged that the guns' barrels were made from insufficiently strong steel and therefore prone to explode.

As part of the settlement, Remington agreed to upgrade the steel used in its shotguns and to distribute a Shotgun Safety Bulletin warning of the hazard of shotgun barrel explosion.

Since no federal safety agency has the authority to recall defective firearms, a lawsuit was the sole mechanism for such gun owners to seek redress.

- (4) Furthermore, lawsuits filed recently by cities and individuals seeking to hold the gun industry liable for its marketing and distribution practices often argue "untested" legal theories (i.e. Chicago's nuisance lawsuit). Federal courts are very reluctant to validate legal arguments that have not been heard and accepted by state courts, even if those arguments are entirely consistent with existing state law. Class action suits asserting such theories are likely to be filed in the very near future. If they were forced into federal court, such suits would almost certainly be doomed to failure because of the reluctance of federal courts to embrace legal theories not formally recognized by state courts.

Violence Policy Center



September 21, 1999

1140 19th Street, NW
Suite 600
Washington, DC 20036202.822.8200 voice
202.822.8205 fax
www.vpc.org web

Dear Representative:

The Violence Policy Center (VPC) is a non-profit organization dedicated to reducing firearms violence in America. The **VPC strongly opposes H.R. 1875**, a bill that would radically alter state court jurisdiction over class action lawsuits.

Guns kill almost twice as many Americans every year as all other household and recreational products combined. Despite this grim fact, the gun industry is virtually the last unregulated manufacturer of a consumer product.

Citizen lawsuits—including class actions—serve as the only safety “regulation” of the firearms industry. In fact, lawsuits are the only method to force manufacturers of defective firearms to make their guns safer. Moreover, litigation is now being used to target the gun industry’s unscrupulous marketing and distribution practices.

For example, Remington Arms settled a class action suit in 1995 for \$31.5 million. The suit involved 12 models of shotguns manufactured over a 35-year period. The plaintiff shotgun owners alleged that the guns’ barrels were made from insufficiently strong steel and therefore prone to explode. As part of the settlement, Remington agreed to upgrade the steel used in its shotguns and to distribute a Shotgun Safety Bulletin warning of the hazard of shotgun barrel explosion. Since no federal safety agency has the authority to recall defective firearms, a lawsuit is the sole mechanism for such gun owners to seek redress. The VPC opposes any legislation that dilutes the ability of consumers to bring such lawsuits.

Furthermore, lawsuits filed recently by cities and individuals seeking to hold the gun industry liable for its marketing and distribution practices often argue novel, untested legal theories. Federal courts are very reluctant to validate legal arguments that have not been heard and accepted by state courts, even if those arguments are entirely consistent with existing state law. Class action suits asserting such theories are likely to be filed in the very near future. If they were forced into federal court, such suits would almost certainly be doomed to failure because of the reluctance of federal courts to embrace legal theories not formally recognized by state courts.

H.R. 1875 is simply the latest assault on the rights of gun consumers and victims of gun violence to hold the firearms industry accountable when its products cause injury or death. **The VPC urges you to oppose H.R. 1875.**

Sincerely,

M. Kristen Rand
Director of Federal Policy



Violence Policy Center

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September 17, 1999

Deanne:

Wanted to make sure you have a copy of the following letter opposing H.R. 1875, the class action jurisdiction bill. The Administration has told us (and Public Citizen) that a statement of policy in opposition to the bill will be issued next week sometime before the House vote now scheduled for next Thursday. Just wanted you to be aware of the gun angle. Hope things are going ok.

Best,

Kristen



Violence Policy Center

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FAX TRANSMISSION COVER SHEET

TO:

Deanne Benson

FAX:

FROM:

Hunter Rand

DATE:

TOTAL NUMBER OF PAGES (INCLUDING COVER):

36

MESSAGE:

*There's more info on the Back-up
on our website at www.vpc.org
click on the "Texas State & Law" link
at the top.*

456-7028

KEMPER.**Michael F. Dineen**

Vice President, Legislative Affairs

Suite 1250
325 Seventh Street, N.W.
Washington, DC 20004-2801
202/347-8193
FAX 202/347-9304

September 17, 1999

The Honorable Rod R. Blagojevich
331 Cannon House Office Building
Washington, D. C. 20515

Dear Rod:

The full House of Representatives is expected to vote next week on H.R. 1875, the Interstate Class Action Jurisdiction Act. This very carefully written measure would ensure that most major interstate class action suits are heard in federal court. The measure would not prevent any claim from being heard and does not close the courthouse door to any plaintiff. The bill only affects where the case would be heard. This legislation will improve the efficiency of our judicial system because federal courts have special procedural tools for dealing with complex litigation and are better able to manage claims involving parties from multiple states.

There is a serious problem with class action litigation in our legal system. There has been an explosion of interstate class action suits filed in state courts with many of these interstate and nationwide in scope since plaintiff class members and defendants are from many states. Some state courts have lax certification standards and are thus magnets for these suits. This has resulted in county and state court judges of one state deciding nationwide class actions worth millions or even billions of dollars and dictating the laws of the other states.

Under current rules trial lawyers are in a position to "game the system" to keep class action suits out of federal court. Accompanying this cover letter is an op-ed piece written by Congressman Jim Moran which deals with this point. H.R. 1875 is a measure which has drawn support from a number of influential mainstream Democrats including Congressmen Rick Boucher, Jim Moran, Charlie Stenholm, Bud Cramer, Virgil Goode, Tim Holden and Chris John.

It is important to note that this act will not change the substantive law governing any claims. The bill is totally procedural in scope. Also, please note that the bill is prospective only. It will apply only to cases filed after the date of enactment.

On behalf of the Kemper Insurance Companies, I would like to urge you to support H.R. 1875. If I may respond to any questions which you or your staff have with regard to this bill, please do not hesitate to call me.

Sincerely,



Michael F. Dineen

Enclosure

—Wednesday & Balance of the Week—

Interstate Class Action Jurisdiction Act (HR 1875, H Rept 106-320)

FLOOR SITUATION: As of press time Friday, it was not known what, if any, amendments would be made in order by the recommended rule. The measure will be managed by Chairman Hyde, R-Ill., chairman of the Judiciary Committee. The Democratic manager will be Rep. Conyers, D-Mich.

BACKGROUND: The Judiciary Committee reported the bill with dissenting views by a vote of 12 to 15 (H Rept 106-320).

Last October, the Judiciary Committee reported an almost identical bill (HR 3789) by a vote of 17 to 12. That bill, however, was never considered on the House floor. (See House Action Reports Legislative Week of Oct. 5, 1998.)

SUMMARY: This bill gives jurisdiction over class action lawsuits to federal district courts if any of the plaintiffs or defendants reside in different states, or if either a plaintiff or defendant resides in a foreign country — thus making most class action suits susceptible to federal jurisdiction.

The bill does, however, allow federal judges to reject class action cases (thereby sending the case to state courts) in certain situations, including when:

- A majority of the plaintiffs and defendants are from one state;
- The claims primarily involve state laws;
- Damages would not exceed \$1 million;
- There are fewer than 100 plaintiffs; or
- The primary defendants are state governments or state officials.

The bill applies only to pending or current class action lawsuits, and would not affect past litigation or certain securities class action suits.

—Wednesday & Balance of the Week—

Interstate Class Action Jurisdiction Act (cont.)

Finally, the measure directs the General Accounting Office to conduct a study of the impact of expanded federal jurisdiction over class action suits on the workload of the federal courts, and to report to Congress within one year of the bill's enactment.

AMENDMENTS: As of press time Friday, it was not know what, if any, amendments would be made in order by the recommended rule.

COMMENTARY: The administration position was unavailable as of press time Friday.

REFERENCES: See CQ Weekly, p. 1952; and House Action Reports Legislative Week of Oct. 5, 1998.

By Heather Ann Hope
hahope@cq.com
202-822-1400

❖ ❖ ❖

H.R. 1875 - the "Interstate Class Action Jurisdiction Act of 1999"
Amendments

1. If a class action that is removed to federal court is remanded to state court (b/c fed. ct. does not certify), it cannot be removed again by defendants to federal court (state court may proceed with certification) - **Frank/Conyers/Berman/Meehan**
2. (a) Once a class action is removed to federal district court from state court, it must become a priority on the civil docket **or** (b) within 60 days of removal, the federal district court must hold a hearing on certification of the class - **Scott/Doggett?**
3. Tobacco carve-out - **Jackson-Lee/Waxman**
4. Gun carve-out - **Nadler**
5. (a) HMO **or** (b) nursing home carve-out - **Nadler**
6. State opt-out provision - **Watt**
7. This bill does not take effect until the Judicial Conference determines that the vacancies in the federal judiciary have been reduced to 3% - **Waters/Delahunt?**
8. This bill does not apply to the extend a defendant has as substantial business interest in the state - **Blue Dog Democrat?**



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

August 23, 1999

LEONIDAS RALPH MECHAM
Secretary

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-1306

Dear Mr. Chairman:

On July 23, 1999, the Executive Committee of the Judicial Conference of the United States voted to express its opposition to the class action provisions in H.R. 1875 and S. 353, in their present form. The Executive Committee noted, among other things, its serious concern about the practical effect these bills would have on the caseload of the federal courts by shifting a significant number of class actions from the state to the federal courts. Concern was also expressed about the conflict between these provisions of the bills and long-recognized principles of federalism. The Executive Committee encouraged further deliberate study of the complicated issues raised by class action and mass tort litigation.

On July 26th, this Judicial Conference position was transmitted to you and other members of the House Judiciary Committee in anticipation of the markup of H.R. 1875 that began the following day.¹ That letter also stated that a more detailed explanation of the position would be forthcoming. This letter provides a more complete explanation of both the federalism and workload concerns, following a brief description of the bill.

H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999," amends section 1332 of title 28, United States Code, to grant the United States district courts original jurisdiction over class actions having minimal diversity—where at least one plaintiff and one defendant are citizens of different states or nations. It precludes district courts from exercising jurisdiction over a class action if the action is: (1) an "intrastate case" (a case primarily governed by the laws of the state in which the action was 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

¹The House Judiciary Committee reported favorably H.R. 1875, as amended, on August 3, 1999. The changes made to the bill did not alter the provisions upon which the Judicial Conference position is based.

Honorable Henry J. Hyde

Page 2

citizens); (2) a "limited scope case" (a case in which all claims aggregated do not exceed \$1 million or where there are fewer than 100 members of the proposed plaintiff class); or (3) a "State action case" (a case in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief). Removal of class actions to federal court is permitted by any defendant without the consent of all defendants or by any plaintiff class member who is not a named or representative class member, without the consent of all members of such class. H.R. 1875 also excludes such class actions from the limitation, otherwise applicable to diversity cases, that prohibits removal more than one year after the commencement of the suit.²

The effect of the class action provisions of this bill would be to move virtually all class action litigation into the federal courts, thereby offending well-established principles of federalism. The state and federal courts in our country comprise an integrated system for the delivery of justice. State courts are courts of general jurisdiction and have traditionally adjudicated the vast majority of claims based on state law. They currently handle approximately 95% of the judicial caseload in our country. The courts of our federal system, on the other hand, are specialized courts of limited jurisdiction that are staffed and supported to function as such.

This bill focuses entirely on the litigation of state-created rights of action that presumptively belong in state courts. In expanding the scope of diversity jurisdiction, H.R. 1875 has no impact on the range of federal-law class actions that existing jurisdictional statutes have already made cognizable in federal court. Rather, the bill targets class actions involving claims that arise under the law of property, tort, contract, and state regulatory statutes—areas of law that have remained the province of state courts and legislatures in our federal system. In that system, state courts and legislatures enjoy presumptive competence, within constitutional limits, to fashion the rules of decision that will govern the resolution of state-created actions. Although federal courts may occasionally hear such claims in the exercise of diversity jurisdiction, such matters typically present no questions of federal law that implicate the expertise of the federal judiciary.

The federalization of class actions that would result from this legislation would not only deprive our integrated judicial system of the state court resources currently processing class actions pending there, it would also infringe upon the traditional authority of the states to manage their own judicial business. State legislatures and other rule-making bodies provide rules for the aggregation of state-law claims into class-wide litigation in order to achieve certain litigation economies of scale. By providing for class treatment, state policymakers express the view that the state's own resources can be best deployed not through repetitive and potentially duplicative

²In addition, H.R. 1875 generally provides that the class action provisions do not apply to claims relating to certain securities and corporate governance activities.

Honorable Henry J. Hyde
Page 3

individual litigation, but through some form of class treatment. The bill could deprive the state courts of the power to hear much of this class litigation and might well create incentives for plaintiffs who prefer a state forum to bring a series of individual claims. Such individual litigation might place a greater burden on the state courts and thwart the states' policies of more efficient disposition.

While it is difficult to predict with precision the impact that the federalization of class actions will have on the federal judicial system, one can predict with confidence that it will impose a very substantial burden. As of September 30, 1998, there were 3,114 class action civil cases pending in the United States district courts, up from 2,641 twelve months prior.³ Statistics are not available indicating the number of class actions pending (or filed) in the state courts. An interim report of a pending study on class actions found, however, that more than half of the appellate decisions reported by LEXIS between July 1, 1995, and June 30, 1996, were from the state courts. *Preliminary Results of the RAND Litigation Study of Class Action Litigation* (1997) at 14.⁴ If this finding reflects the distribution of class action cases today between the state and federal courts, the federalization of class actions holds the potential for increasing significantly the number of such cases currently being litigated in the federal system.

In order to appreciate how substantial that impact would be, it must also be understood that class action cases, by their nature, make extraordinary demands on judicial resources. A 1996 study by the Federal Judicial Center (FJC), for example, found that the median time from filing to disposition for class actions tends to be two to three times that of other civil cases. *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, Federal Judicial Center (1996) at 19. Moreover, the FJC report found that class action cases consume almost five times as much judicial time as the average civil case. *Id.* at 22-23. When the additional, burdensome litigation resulting from H.R. 1875 is added to the already overcrowded dockets of federal courts across our country, substantial backlogs and attendant delays can be expected.⁵

³During the twelve-month period ending September 30, 1998, 1,881 class action cases were filed in federal court, up from 1,475 during the prior twelve months.

⁴The RAND Institute for Civil Justice is conducting a study of class action litigation, and its final report is anticipated this fall. The stated goals of that project are to: (1) provide a more detailed picture of the current class action landscape and suggest some implications of this landscape for rule changes; (2) describe current litigation practices and suggest some implications of these practices for rule changes; and (3) describe the specific and general consequences of class actions.

⁵The average weighted caseload per district judgeship (which is derived from a survey of the amount of judge time required by each type of case) has climbed 25% since 1991, from 386 to 484 (as of September 30, 1998). In addition, as of June 30, 1999, there were 19,112 civil cases pending three years or more in the district courts.

Honorable Henry J. Hyde

Page 4

H.R. 1875 appears to be motivated by a desire to address abuses that have occurred on occasion in class action litigation (e.g., collusive class certifications and settlements, modest awards for plaintiffs in conjunction with disproportionately large fees for attorneys, duplicative class action litigation, and forum shopping). The House Judiciary Committee heard anecdotal evidence of such abuses in a few state courts during its hearing on July 21, 1999. We do not discredit such evidence. Such abuses may occur in state courts, just as they unfortunately may occur from time to time in the federal system.

To the extent that there are abuses of class action processes, the states involved should be afforded a reasonable opportunity to take corrective measures. In fact, they have already begun to do so. For example, some of the anecdotal evidence heard by the Judiciary Committee concerned class action litigation in Alabama. The Supreme Court of Alabama has already responded, however, to specific problems in class certifications.⁶ In addition, the Alabama State Legislature recently enacted a law that, among other things, tightens the requirements before a class may be certified and provides for interlocutory appellate review of certification decisions. (See Act 99-250, enacted May 25, 1999.)

Affording affected states an opportunity to take corrective measures would also have the benefit of providing Congress with an opportunity to determine whether the identified abuses reflect a systemic problem that warrants a national solution and to consider alternative measures, short of federalizing class actions. The final report of the RAND study of class actions will hopefully provide empirical data and analysis concerning the nature and extent of any problems. Based upon the limited empirical evidence now available, however, we are not persuaded that a *systemic* problem exists in class action litigation.

In addition, the federal judiciary is in the process of studying more generally the problems created by the aggregation of claims for litigation in the area of mass torts. The Mass Torts Working Group appointed by the Chief Justice in 1998 filed a report earlier this year that identifies the complex problems presented by the aggregation of large numbers of claims and catalogues the various solutions that have been suggested. That report is an immeasurably valuable resource for those studying class action litigation. It is anticipated that the work

⁶*Ex parte* Green Tree Financial Corp., 723 So.2d 6 (Ala. 1998) (directing the trial court to vacate an order conditionally certifying a class because of the lack of evidence as to the issues of predominance and superiority under Rule 23(b)(3)); *Ex parte* Federal Express Corp., 718 So.2d 13 (Ala. 1998) (directing the trial court to vacate an order conditionally certifying a class action and to allow defendant time to undertake discovery before the court conducts an evidentiary hearing on request for class certification); *Ex parte* AmSouth Bancorporation, 717 So.2d 357 (Ala. 1998) (holding that the trial court abused its discretion in certifying the class); *Ex parte* First Nat'l Bank of Jasper, 717 So.2d 342 (Ala. 1997) (holding that the trial court's order of conditional certification failed to comply with Rule 23); and *Ex parte* Citicorp Acceptance Co., 715 So.2d 199 (Ala. 1997) (holding that the trial court improperly certified the class without first giving proper notice and that the prerequisites for class certification under Rule 23(a) had not been met).

Honorable Henry J. Hyde

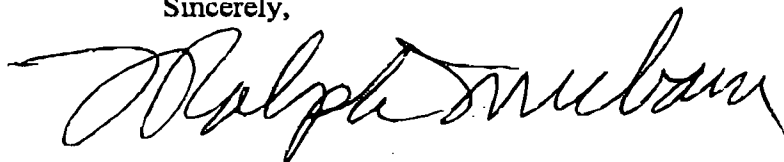
Page 5

reflected there will be carried forward by the relevant committees of the Judicial Conference or by an ad hoc committee created for that purpose. Whoever carries this work forward will stand ready to work with Congress in evaluation of the need for national action and in development of an alternative approach to handle the complicated issues raised by class action and mass tort litigation.

As the Judicial Conference has recognized, minimal diversity jurisdiction can be a useful approach in some contexts. The Conference has previously endorsed its use, for example, in streamlining the process for resolving multiple claims arising from single-event mass torts, like airplane crashes. Time-honored principles of federalism, however, counsel that access to the federal courts be expanded only where the expansion would serve a substantial federal interest and only where the parameters of the expansion have been carefully crafted to address the perceived problem without unnecessary adverse effects on state judicial processes. The class action provisions of H.R. 1875 fail to meet this standard. Even assuming that the limited evidence currently available warrants a conclusion that some federal action is warranted, the proposed federalization of class actions is not a remedy carefully tailored to address the identified abuses and carries a price tag entirely too high in terms of its potential adverse impact on both the federal and the state judicial systems.

The Judicial Conference would appreciate your consideration of its position opposing the class action provisions in H.R. 1875. We emphasize that we are not disputing the existence of significant problems of overreaching by a few state courts in some class actions. And we fully support the exploration of ways in which federal jurisdiction may wisely be extended to include some class actions that today cannot be brought in federal court. Further deliberate consideration is required to identify alternative approaches that will reduce the total costs borne by both federal and state courts and ensure the appropriate allocation of jurisdiction over class action litigation. The federal judiciary is available to explore with Congress less intrusive and burdensome approaches to address legitimate concerns identified with class action litigation. If you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs (202-502-1700).

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Member
Members of the Committee on the Judiciary

Conference of Chief Justices

PRESIDENT

David A. Bruck
Chief Justice
Supreme Court of New Hampshire
Noble Drive
Concord, NH 03301
(603) 271-2149
FAX: (603) 271-4610



Association of Mayors
National Center for State Courts
300 Newport Ave. (Zip Code 23185)
P.O. Box 8798
Williamsburg, VA 23107-0798
(757) 259-1841
FAX: (757) 259-1510

July 19, 1999

The Honorable Henry J. Hyde, Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Hyde:

I write on behalf of the Board of Directors of the Conference of Chief Justices (CCJ), to express, briefly, some of our concerns with H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999." We also wish to offer our continuing assistance to the Committee in its future deliberations on this matter. We understand that H.R. 1875 will be the subject of a hearing on July 21, 1999.

We believe that H.R. 1875, in its present form, is an unwarranted incursion on the principles of judicial federalism underlying our system of government. In essence, it would unilaterally transfer jurisdiction of a significant category of cases from state to federal courts. So drastic a distortion and disruption of traditional notions of judicial federalism is not justified, absent clear evidence of the inability of the state judicial systems to process and decide class action cases in a fair and impartial manner and in timely fashion. Our discussions on this issue within the Conference have failed to identify any systemic problems in state class action procedures. Rather, we have heard only anecdotes of isolated problems that are being addressed on an ongoing basis by state judicial and legislative bodies. We believe strongly that there is no rational basis for so drastic an invasion of state judicial prerogatives, as encompassed in H.R. 1875.

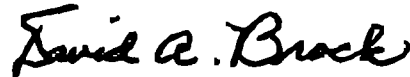
With regular communication and cooperative effort, state and federal courts have developed a delicate, complementary role in class action jurisprudence. H.R. 1875 would radically alter this relationship.

The Honorable Henry J. Hyde
Page 2
July 19, 1999

The Conference of Chief Justices will meet in Williamsburg, Virginia, from August 1 through August 5, 1999. This issue will be the subject of extensive discussions during the meeting. We hope that we will have the opportunity to share with you CCJ's further thoughts on this legislative proposal. In the meantime, should you or your committee staff become aware of specific problems not addressed by state courts in processing and deciding class actions cases, we would be grateful if you would share them with us so that they could better inform our future discussions.

Please feel free to contact me directly, or contact Tom Henderson or Ed O'Connell who staff our Government Relations Office should you have any questions. They can be reached at (703) 841-0200.

Respectfully,



David A. Brock
Chief Justice
President, Conference of Chief
Justices

c: Members of the House Judiciary Committee



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

July 26, 1999

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-1306

Dear Mr. Chairman:

On behalf of the Judicial Conference of the United States, I write to inform you 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 and S. 353, in their present form. The Committee noted, among other things, its serious concern about the practical effect these bills would have on the caseload of the federal courts by shifting a significant number of class actions from the state to the federal courts. Concern was also expressed about the conflict between these provisions of the bill and long-recognized principles of federalism. The Executive Committee encouraged further deliberate study of the complicated issues raised by class action and mass tort litigation.

We will be providing the committee with a more detailed explanation of our opposition in the near future; however, in light of the markup of H.R. 1875 now scheduled for July 27, 1999, we wanted to provide you with our general position. The Judicial Conference greatly appreciates your consideration of these views in the ongoing deliberations of class action legislation. If you or your staff have any questions, please contact Mike Blommer, Assistant Director, Office of Legislative Affairs (202-502-1700).

Sincerely,

A handwritten signature in dark ink, appearing to read "Ralph", written over a horizontal line.

Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Member
Members of the Committee on the Judiciary

Conference of Chief Justices

PRESIDENT

David A. Brock
Chief Justice
Supreme Court of New Hampshire
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July 19, 1999

The Honorable Henry J. Hyde, Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Hyde:

I write on behalf of the Board of Directors of the Conference of Chief Justices (CCJ), to express, briefly, some of our concerns with H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999." We also wish to offer our continuing assistance to the Committee in its future deliberations on this matter. We understand that H.R. 1875 will be the subject of a hearing on July 21, 1999.

We believe that H.R. 1875, in its present form, is an unwarranted incursion on the principles of judicial federalism underlying our system of government. In essence, it would unilaterally transfer jurisdiction of a significant category of cases from state to federal courts. So drastic a distortion and disruption of traditional notions of judicial federalism is not justified, absent clear evidence of the inability of the state judicial systems to process and decide class action cases in a fair and impartial manner and in timely fashion. Our discussions on this issue within the Conference have failed to identify any systemic problems in state class action procedures. Rather, we have heard only anecdotes of isolated problems that are being addressed on an ongoing basis by state judicial and legislative bodies. We believe strongly that there is no rational basis for so drastic an invasion of state judicial prerogatives, as encompassed in H.R. 1875.

With regular communication and cooperative effort, state and federal courts have developed a delicate, complementary role in class action jurisprudence. H.R. 1875 would radically alter this relationship.

OPPONENTS OF THE CLASS ACTION BILLS

The Following State Attorneys General Are Opposed To S. 353/H.R. 1875

As of September 17, 1999

Elliot Spitzer, Attorney General of New York
Drew Edmonson, Attorney General of Oklahoma
Richard Blumenthal, Attorney General of Connecticut
Robert A. Butterworth, Attorney General of Florida
Alan G. Lance, Attorney General of Idaho (only opposed to H.R. 1875)
Thomas J. Miller, Attorney General of Iowa
Carla J. Stovall, Attorney General of Kansas
Thomas Reilly, Attorney General of Massachusetts
Mike Hatch, Attorney General of Minnesota
Philip T. McLaughlin, Attorney General of New Hampshire
Hardy Meyers, Attorney General of Oregon
Mike Fisher, Attorney General of Pennsylvania
William Sorrell, Attorney General of Vermont
John Knox Walkup, Attorney General of Tennessee
Darrell V. McGraw, Jr., Attorney General of West Virginia



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
ALBANY, NY 12224

ELIOT SPITZER
Attorney General

(518) 474-7330

July 27, 1999

The Honorable J. Dennis Hastert
Speaker
United States House of Representatives
H-232
The Capitol
Washington, D.C. 20515

The Honorable Richard Gephardt
Minority Leader
United States House of Representatives
H-204
The Capitol
Washington, D.C. 20515

Re: HR 1875: Interstate Class Action Jurisdiction Act of 1999

Dear Mr. Speaker and Mr. Minority Leader:

As Attorneys General of the States of New York, Oklahoma, Connecticut, Florida, Idaho, Iowa, Kansas, Massachusetts, Minnesota, New Hampshire, Oregon, Pennsylvania, Vermont, Tennessee and West Virginia, we are writing to express our strong objection to H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999."

The class action device is an important vehicle for the redress of small claims that might otherwise not be remedied. In a time of tight governmental budget constraints, the availability of private consumer class actions serves an important "private attorney general" function in policing manufacturers and merchandisers who engage in practices that result in economic harm to consumers on a broad scale. At the same time, many State Attorney General offices have expressed grave concerns about class action abuses in testimony submitted in response to proposed amendments to Rule 23 of the Federal Rules of Civil Procedure and in amicus briefs filed in cases before the United States Supreme Court, including *Amchem Products, Inc. v. George Windsor et al.*

SEP 21 1999

OPPONENTS OF THE CLASS ACTION BILL

The Following Organizations Are Opposed to S. 353/H.R. 1875 The Class Action Jurisdiction Act

As of September 20, 1999

American Association of Public Health Physicians
Action on Smoking and Health
AIDS Action Council
Alliance for Justice
American Association for Health Education
American Cancer Society
American Council on Science & Health
American Heart Association
American Lung Association
American Medical Student Association
American Medical Women's Association
American Society of Addiction Medicine
Americans for Nonsmokers' Rights
The Arc of the United States
Asian American Legal Defense Fund
Association of Trial Lawyers of America
Campaign for Tobacco-Free Kids
Center on Disability and Health
Citizens for Consumer Justice
Citizens for Corporate Accountability and
Individual Rights (CCAIR)
Coalition for Consumer Rights
Coalition for Workers Health Care Funds
Coalition to Stop Gun Violence
Community Health Education Institute
Conference of Chief Justices (State Supreme Court
Chief Justices)
Consortium for Citizens with Disabilities, Health
Task Force
Consumer Federation of America

Disability Rights Education Fund
Families USA
Handgun Control, Inc.
Judicial Conference of the United States
(Association of Federal Senior Circuit and
District Judges)
Lawyers' Committee for Civil Rights and Urban
Affairs
National Association of Local Boards of Health
National Association of Protection and Advocacy
Systems
National Black Women's Health Project
National Consumers League
National Council of La Raza
National Council of Senior Citizens
National Health Law Program
National Employment Lawyers Association
National Organization of Women Legal Defense
Fund
National Senior Citizens Law Center
NETWORK: A National Catholic Social Justice
Lobby
Public Citizen
Save Lives, Not Tobacco (A Coalition of 350
National, State, and Local Groups)
Service Employees International Union
Tobacco Products Liability Project
US PIRG
Violence Policy Center



Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

September 20, 1999

Re: Please Oppose Class Action Bill, H.R. 1875

Dear Representative:

We write to urge you to oppose H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999, scheduled for House floor action on September 23. Class action litigation is an area in which Public Citizen has considerable expertise: we have intervened in more than 30 class action cases over the past five years at both the state and federal levels to ensure that consumers receive fair treatment in class action settlements. Nothing in this bill does anything to address this problem.

Consumer class actions are filed when many individuals are similarly damaged -- whether for economic loss due to fraud or injury due to defective products. They compensate individuals for the harms they suffer at the hands of companies that commit fraudulent or harmful acts. They deter dangerous business conduct where individual consumers, acting alone, would not have the means to sue to force product changes or recalls. They also encourage reform of deceptive or fraudulent manufacturing and sales practices that cost consumers billions of dollars a year. For these reasons we believe it is perilous for Congress to tamper with a system that has served consumers well.

We have six principal objections to the bill:

■ **H.R. 1875 unfairly tilts the playing field and provides an advantage to defendants' corporations.**

Should the Interstate Class Action Jurisdiction Act become law, a significant majority of state court class actions will either have to be filed in federal court or will be removable by defendants to federal court, should defendants decide that it is to their advantage to do so. This is counter to the ordinary presumption that the plaintiff gets to choose his or her forum. Tobacco companies, HMOs, gun makers, auto manufacturers, insurance and drug companies that injure the public should not have the power to choose the legal forum they believe will benefit them most.

■ **H.R. 1875 will result in considerable delay for injured consumers.**

The current high judicial vacancy rate and backlog of pending cases in the federal judiciary leads to delay of justice in the federal courts. For example, there were more than 25,000 civil cases pending in the federal courts for more than three years as of September 1998 -- an increase of more than 13% from 1997. Also as of September 1998,

Ralph Nader, Founder

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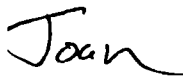
misleading, and intentionally deceptive representations about their provided coverage. One of the plaintiffs was shot in the face during an attempted car jacking and was unable to call 911 on her phone due to an unidentified "dead zone" of coverage. Even though the overwhelming number of plaintiffs reside in California and the suit is based entirely on California state law, under H.R. 1875 the defendants would have the choice of removing this case to federal court since at least some of the defendants are out-of-state corporations. There is no federal interest in resolving such a dispute because it doesn't involve federal law and is not national in character.

■ **Federalization of state class actions is another step in the strategy to limit liability for harmful corporate actions.**

In the wake of Congress's failure to pass federal products liability legislation, corporate lobbyists have moved to limit company liability in other ways. Class action legislation preempting state courts is but one example. However, the ultimate goal remains the same -- companies want to curtail (or even eliminate) legal liability for wrongdoing at the expense of injured consumers. Forcing state class actions into federal court serves these purposes: once these cases are federalized, lobbyists can then focus on changing the federal rules to severely limit *all* class actions, not just the ones filed in state court.

In a free-market system increasingly dominated by large corporations, the class-action device is an essential free-market tool to tame harmful corporate behavior. Please do not support H.R. 1875, which will only weaken this important means of consumer protection.

Sincerely,



Joan Claybrook
President



Frank Clemente
Director, Congress Watch

Consumer Federation of America
National Association of Consumer Advocates
National Consumers League

National Employment Lawyers Association
Public Citizen
U.S. PIRG
Violence Policy Center

September 20, 1999

Dear Representative:

We are writing to urge your opposition to H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999. Class actions are filed when many individuals are similarly injured and are essential to protect the rights of people whose individual claims do not warrant separate litigation. They deter and encourage reform of deceptive and fraudulent business practices that cost Americans billions of dollars a year. In addition, class actions do all this while conserving limited judicial resources that would be wasted in duplicative proceedings.

We have three main objections to the bill:

- **H.R. 1875 will end state court jurisdiction over most state class actions.** Under this bill, most defendants will be able to choose whether to remove state class actions to federal court. This will be true even in cases that have a majority of plaintiffs from one state and that involve only that state's law. Under our Constitutional framework of limited federal jurisdiction, this transfer of judicial power to federal courts from the states is both substantial and inappropriate. All of these class actions involve alleged violations of state law and state courts should be the principal interpreters of state law.
- **H.R. 1875 will result in considerable delay for plaintiffs seeking a remedy and further burden the already overburdened federal judiciary.** The current high vacancy rate in the federal judiciary and the increased federalization of criminal justice matters that traditionally were in the purview of state courts already leads to delay of justice in the federal courts. H.R. 1875 will substantially aggravate this delay, postponing justice not only for class action cases, but for all federal civil cases.
- **H.R. 1875 will slow the continued interpretation of state law.** State judges are generally more willing than federal judges to interpret state law in new and innovative ways. By moving state class actions into federal court, innovative legal arguments are likely to stagnate, limiting the evolution of legal areas like tobacco, handguns, and HMOs.

Class actions are an integral tool in the fight to vindicate plaintiffs' legal rights. The Interstate Class Action Jurisdiction Act would go far in rendering this tool ineffective. Therefore, we strongly urge you to oppose H.R. 1875.

Sincerely,

Consumer Federation of America
National Association of Consumer Advocates
National Consumers League

National Employment Lawyers Association
Public Citizen
U.S. PIRG
Violence Policy Center

**AIDS Action Council
Center on Disability and Health
Families USA
National Association of Protection & Advocacy Systems
National Black Women's Health Project
National Health Law Program
National Senior Citizen's Law Center
National Women's Health Network
NETWORK: A National Catholic Social Justice Lobby
Service Employees International Union (SEIU)
The Arc of the United States**

September 20, 1999

RE: The Harmful Impact on Health Care of H.R. 1875, the Interstate Class Action Jurisdiction Act

Dear Representative:

We are writing to oppose H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999" because of the adverse impact the bill would have on the ability of patients and consumers to use class actions to hold health care providers accountable.

H.R. 1875 weakens this important tool for patients and consumers by making it much easier for class action defendants to remove such lawsuits from state to federal courts. Even if a case is based solely on a state's consumer protection laws, H.R. 1875 would allow a defendant to force its removal to federal court. Removals to federal court are detrimental to consumers because:

- Defendants that injure the public should not have the power to choose the legal forum that benefits them most.
- Justice will be considerably delayed for injured consumers because the bill will add to the federal courts' already substantial backlog.
- State judges are more experienced in interpreting complex state tort and consumer protection laws.

HMO patient and consumer quality of care protections. H.R. 1875 would undermine the few grounds on which patient and consumer state class action suits have been filed successfully - fraud, overbilling, and medical malpractice. These suits typically involve allegations of violations of individual states' consumer fraud and unfair trade practices laws.

For example, on June 23, 1997, Harold Kaitlin filed a class action in Pennsylvania state court for consumer fraud against his psychiatrist, David Tremoglie, and his HMO, Keystone

Tobacco Control Advocacy Organizations Opposed to the Class Action Bills, S. 353/H.R. 1875

As of September 17, 1999

- | | |
|---|---|
| 1. Action on Smoking and Health | 43. Marshfield Citizens for Crud Free Alveoli, MA |
| 2. Alabama Citizens Action Program | 44. Maryland Group Against Smokers Pollution (GASP) |
| 3. Alliance for Lung Cancer Advocacy, Support, and Education (ALCASE), WA | 45. Massachusetts Association of Health Boards |
| 4. American Association of Public Health Physicians (AAPHP) Tobacco Policy Task Force | 46. Minorities For Tobacco, Alcohol & Drug-Free Communities |
| 5. American Academy of Pediatrics, Nebraska Chapter | 47. Montana PIRG |
| 6. American Association for Health Education | 48. National Association of Local Boards of Health (NALBH) |
| 7. American Cancer Society | 49. Oral Health America |
| 8. American Council on Science and Health | 50. Oregon Consumer League |
| 9. American Heart Association | 51. Oregon State PIRG |
| 10. American Heart Association of Hawaii | 52. Pennsylvania Citizens Consumer Council |
| 11. American Lung Association | 53. Pennsylvania Institute for Community Services |
| 12. American Medical Student Association | 54. PRIDE-Omaha, Inc.(Parent Resources and Information on Drug Education), NE |
| 13. American Medical Women's Association | 55. Progressive Democratic Network, WI |
| 14. American Society of Addiction Medicine | 56. REPACE ASSOCIATES, Inc. Secondhand Smoke Consultants |
| 15. Americans for Nonsmokers' Rights | 57. Roswell Park Cancer Institute, NY |
| 16. Arizona Consumers Council | 58. San Francisco Trial Lawyers Association |
| 17. Arkansas Section of the American Academy of Pediatrics | 59. Society Created to Reduce Urban Blight, PA |
| 18. Arlington Citizens for Clean Air, TX | 60. Smokefree Air for Everyone (S.A.F.E.), CA |
| 19. Association for Nonsmokers - Minnesota | 61. SmokeFree Educational Services, Inc. |
| 20. Charlevoix-Emmet-Antrim Tobacco Reduction Coalition, (NW MI Comm Health) MI | 62. SmokeFree Florida |
| 21. Children Afflicted by Toxic Substances | 63. SmokeFree Maryland |
| 22. Chippewa Valley Tobacco Free Youth Coalition, WI | 64. SmokeFree Montgomery County Coalition, Rockville, MD |
| 23. Citizens for A Tobacco-free Society (CATS) Inc., OH | 65. SmokeFree Pennsylvania |
| 24. Citizens for Consumer Justice, PA | 66. Smoke-Free USA.Com, Inc. |
| 25. City of Fort Worth Public Health Department, TX | 67. St. Joseph Medical Center, MD |
| 26. Clean Air Council, PA | 68. St. Louis County Public Health |
| 27. Coalition for a Smoke-Free Valley, PA | 69. The BADvertising Institute, NY |
| 28. Coalition for Consumer Rights | 70. The Crime Prevention Group, MI |
| 29. Community Health Education Institute | 71. The Great Cincinnati Coalition on Smoking and Health Inc., OH |
| 30. CYR and Associates, Consultants to Public and Private Non-Profit Agencies (Member of the Nevada Tobacco Prevention Coalition) | 72. The Greater New York Chapter of SOPHE (Society for Public Health Education) |
| 31. Environmental Improvement Associates, Salem, NJ | 73. Tobacco Control Law & Policy Consulting, MI |
| 32. Empire State Consumer Association, NY | 74. Tobacco Free Future Project, MN |
| 33. Families Advocating Injury Reduction (FAIR) | 75. Tobacco Free Las Cruces Coalition, NM |
| 34. Family Counseling Center, Colorado | 76. Tobacco Free Youth Coalition-Penn State Cooperative Extension, PA |
| 35. Florida PIRG | 77. United States Public Interest Research Group (USPIRG) |
| 36. Foundation for a Smokefree America- Patrick Reynolds, President | 78. Virginia GASP |
| 37. GASP of Florida | 79. Wisconsin Initiative on Smoking and Health |
| 38. Georgians Against Smoking Pollution (GASP) | 80. Zumbro Valley Medical Society, MN |
| 39. Health Advocacy Group of Southside VA | |
| 40. INFACT- Campaign for Corporate Accountability | |
| 41. Kauai Tobacco-Free Community Coalition, HI | |
| 42. La Crosse Area Health Initiative/S.A.F.E. Coalition/La Crosse Public Schools, WI | |

September 20, 1999

RE: The Harmful Impact of H.R. 1875, the Interstate Class Action Jurisdiction Act on Consumer Tobacco Lawsuits

Dear Representative:

We are writing to urge your opposition to H.R. 1875 the Interstate Class Action Jurisdiction Act of 1999 because of the adverse effect the bill would have on the ability of injured Americans to hold tobacco companies accountable in court.

Historically, state court class action litigation has been one of the most effective and efficient tools for injured citizens to gain access to the courts, particularly in cases where a defendant has injured a large number of people. Class action cases give plaintiffs the opportunity to consolidate their claims, making it financially possible for them to bring the case. Prior to recent class action victories, tobacco companies had been largely successful in avoiding litigation by making it too expensive for plaintiffs to sue them. H.R. 1875 would make this a likely scenario once again, ending the gains consumers have made in holding tobacco companies accountable for the harm they have done.

H.R. 1875 would severely limit state class action lawsuits by allowing tobacco companies to remove such cases to federal court. The bill gives federal courts jurisdiction over state class action cases except when: 1) the majority of plaintiffs are from the state where the case was filed, 2) all the "primary defendants" are from the state where the case was filed, and 3) the claim involves the law of that state. Because many tobacco companies are incorporated in different states, there will be few, if any, tobacco class action suits against the industry that will not be removable to federal court under this bill. Proponents of H.R. 1875 portray the measure as an effort to end "abusive" class action suits brought in state court. However, the bill threatens to keep legitimate cases out of court and leave injured consumers without compensation. Once removed to federal court, cases will face long delays and may even be decertified.

It is to the advantage of tobacco defendants to have a case transferred from state to federal court. Federal courts have consistently been unwilling to certify classes of tobacco victims in class action suits. Had cases such as *Engle v. R.J. Reynolds Tobacco Co.* and *Scott v. American Tobacco Co.* been removed to federal court, they probably would not have been certified as a class.

Federal courts have articulated various reasons for failing to certify federal classes, but it is often based on the idea that the states should be deciding these issues. For example, in reversing class certification of plaintiffs in *Castano v. American Tobacco Co.* 84 F.3d 734 (5th Cir., 1996), the court noted that, since there have been so few tobacco cases, and because it is often difficult to know how state supreme courts would have decided various legal issues, state courts should have first crack at addressing these issues. This bill would give Philip Morris, R.J. Reynolds and other tobacco corporations an additional and unwarranted tactical advantage by allowing them to remove state class actions to federal court against the will of the plaintiffs.

RE: The Harmful Impact of H.R. 1875, the Interstate Class Action Jurisdiction Act on Consumer Tobacco Lawsuits

**Family Counseling Center, Colorado
Florida PIRG
Foundation for a Smokefree America- Patrick Reynolds, President
GASP of Florida
Georgians Against Smoking Pollution (GASP)**

**Health Advocacy Group of Southside VA
INFACT- Campaign for Corporate Accountability
Kauai Tobacco-Free Community Coalition, HI
La Crosse Area Health Initiative/S.A.F.E. Coalition/La Crosse Public Schools, WI
Marshfield Citizens for Crud Free Alveoli, MA**

**Maryland Group Against Smokers Pollution (GASP)
Massachusetts Association of Health Boards
Minorities for Tobacco, Alcohol & Drug-Free Communities
Montana PIRG
National Association of Local Boards of Health (NALBH)**

**Oral Health America
Pennsylvania Citizens Consumer Council
Pennsylvania Institute for Community Services
PRIDE-Omaha, Inc.(Parent Resources and Information on Drug Education), NE
Progressive Democratic Network, WI**

**REPACE ASSOCIATES, Inc. Secondhand Smoke Consultants
Roswell Park Cancer Institute, NY
San Francisco Trial Lawyers Association
Society Created to Reduce Urban Blight, PA
SmokeFree Educational Services, Inc.**

**SmokeFree Florida
SmokeFree Maryland
SmokeFree Montgomery County Coalition, Rockville, MD
SmokeFree Pennsylvania
Smoke-Free USA.Com, Inc.**

**St. Joseph Medical Center, MD
St. Louis County Public Health
The BADvertising Institute, NY
The Crime Prevention Group, MI
The Great Cincinnati Coalition on Smoking and Health Inc., OH**

**The Greater New York Chapter of SOPHE (Society for Public Health Education)
Tobacco Control Law & Policy Consulting, MI
Tobacco Free Future Project, MN
Tobacco Free Las Cruces Coalition, NM**

July 26, 1999

DRAFT
M E M O R A N D U M

TO: Democratic Members, House Judiciary Committee

FR: Democratic Staff

RE: Full Committee Markup on Tuesday, July 27, 1999

There will be a markup on Tuesday, July 27, 1999 at 10:00 A.M. in 2141 Rayburn. I expect that the following bills will be considered: H.R. 1752, the Federal Courts Improvement Act of 1999; H.R. 2112, the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999; H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999; and H.R. 2260, the Pain Relief Promotion Act of 1999.

Each of these are discussed in this memorandum.

I. H.R. 1752, THE "FEDERAL COURTS IMPROVEMENT ACT OF 1999"

The Federal Courts Improvement Act is a bill traditionally introduced by request of the Judicial Conference by the chairman and ranking member of the Subcommittee on Courts and Intellectual Property. The bill is typically transmitted to the Congress by the Judicial Conference on a biennial basis, and contains provisions which the Conference believes are needed to improve the federal court system. In deference to the judicial branch, the bill is introduced as transmitted by the Judicial Conference.

A hearing was held on the bill on June 16, 1999. In addition, the ranking subcommittee member asked a number of groups concerned with the administration of justice to comment on the bill, including the Alliance for Justice, the Association of Trial Lawyers of America, the Public Citizen Litigation Group, and the National Legal Aid and Defender Association.

After hearing and review, the majority and minority collaborated on an amendment in the

nature of a substitute, reflecting those provisions on which the subcommittee chairman and the ranking member concurred. That amendment, offered by Chairman Coble, was adopted by voice vote at subcommittee markup on July 15, 1999.

The one provision of H.R. 1752 about which ranking member Howard L. Berman expressed concern at the subcommittee markup was Section 207: Multidistrict Litigation. Section 207 reflects an intention to overturn the decision of the United States Supreme Court in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach, et. al.*, 118 S.Ct. 956 (1998), interpreting 28 U.S.C. Section 1407, the federal multidistrict litigation statute. (For a more complete analysis of the *Lexecon* matter as well as the other provisions of H.R. 1752, see the majority memo). It should be noted that Section 2 of H.R. 2112, the "Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999", similarly addresses the *Lexecon* matter. Concerns regarding Section 207 of H.R. 1752 apply to Section 2 of H.R. 2112 as well.

The ranking member noted that he shared the widely-held objective of overturning the *Lexecon* decision, but questioned whether the text of Section 207 of H.R. 1752 and Section 2 of H.R. 2112 restored the pre-*Lexecon* status quo, and expressed his concern that the text was arguably more expansive than what was necessary to achieve the objective of overturning *Lexecon*. While it is agreed that the transferee court in multidistrict litigation should be fully authorized by statute to retain a case for trial on liability issues and, when appropriate, on punitive damages, the text of Section 207 of H.R. 1752 and Section 2 of H.R. 2112 strikingly does not contain the provision included in Section 3 of H.R. 2112 which creates a presumption that the trial of compensatory damages will be remanded to the transferor court.

Criticism had been heard in subcommittee that the absence of this presumption would work an unfairness on victims in personal injury cases by making it more difficult for them to prove the damages for which they are seeking to be compensated. Many argue that the difficulty and added expense posed for plaintiffs and their witnesses by having to testify in the transferee as opposed to the original local court poses an unfair burden. This burden was recognized in the mass-accident procedure in Section 3 of H.R. 2112, which creates a presumption that compensatory damages will be remanded for trial in the original court.

As a result of discussions between the minority and majority, Rep. Berman will offer an amendment to Section 2 of H.R. 2112, with the support of Chairman Coble and Rep. Sensenbrenner. The amendment will add at the end of Section 207 (and of Section 2) a new sentence: "Provided, however, that any action so transferred shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages." This amendment will add to the *Lexecon* section of H.R. 2112 (and similarly to Section 2 of H.R. 1752) the standard for compensatory damages accepted for Section 3 of H.R. 2112 regarding mass accidents.

II. H.R. 2112, THE "MULTIDISTRICT, MULTIPARTY, MULTIFORUM

JURISDICTION ACT OF 1999"

Background

H.R. 2112 is intended to improve the ability of federal courts to handle complex multidistrict litigation arising from a common set of facts. Section 2 of the bill would overturn the *Lexecon* decision; see the analysis above of Section 207 of H.R. 1752.

Section 3 expands federal court jurisdiction by requiring only minimal diversity (as opposed to complete diversity) for mass torts arising from a single incident. This provision would only apply to a very narrowly defined category of cases, for example, plane, train, bus, boat accidents and environmental spills – many of which may already be brought in federal court. On the other hand, it would not apply to mass tort injuries that involve the same injury over and over again such as asbestos and breast implants. In this respect, it can very easily be distinguished from the broader class action bill, H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999," which requires only minimal diversity for *all* civil actions brought as class actions in federal court, regardless of the amount in controversy or the number of separate incidents or injuries that may give rise to a class action.

This legislation was introduced in the 98th and 99th Congresses, and the House of Representatives approved legislation identical to Section 3 in the 101st and 102d Congresses. Additionally, the Full Committee favorably reported this language in the 103rd Congress as part of H.R. 1252. The Judicial Conference and the Department of Justice have supported this legislation in the past and continue to support it.¹

Description of Section 3&4

Section 3(a) amends 28 U.S.C. to give district courts original jurisdiction over civil actions arising out of a single accident that results in the death or injury of 25 or more persons, if the damages exceed \$50,000 per person and minimal diversity of citizenship exists. (It is unclear why \$50,000 was selected, since the current threshold for diversity actions is \$75,000). Under the bill, minimal diversity exists between adverse parties if any party is a citizen of a state and any adverse party is (1) a citizen of another state, (2) a citizen/subject of a foreign state, or (3) a foreign state. The district court would be required to notify the Multidistrict Litigation Panel of the pendency of the action. The panel would then assist in consolidating the lawsuits in a single district court. Section 3(b) authorizes venue in any district in which a defendant resides

¹See Letter from Jon P. Jennings, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to Honorable Henry J. Hyde, Chairman, U.S. House Judiciary Committee 1 (June 14, 1999) (on file with the Judiciary Committee Minority Staff).

²This provision amends the general federal venue statute, 28 U.S.C. § 1391.

or in which a substantial part of the accident occurred.² Section 3(c) expands district court jurisdiction over the transferred actions to permit trial of liability and punitive damage issues -- instead of only pretrial proceedings. This provision requires the remand of non-punitive damage determinations, but would give the Federal court the option of retaining all damages phases of the action.³

Section 3(d) provides that removal of actions from State to Federal court would be permitted within 30 days of a defendant becoming a party to a suit or at a later time with leave of the court. It establishes a presumption in favor of discretionary remand to State courts for damages determinations after rulings on liability. Section 3(e) allows the district court to make choice of law determinations without being bound by State court choice of law rules. The provision identifies five factors that the court “may consider” in making the choice of law determination. The court would be required to issue an order designating the State law to be applied in all actions arising from the accident. Finally, Section 3(f) authorizes nationwide service of process and, upon a showing of good cause, nationwide service of subpoenas with regard to actions under Section 3.

Section 4 creates the relevant effective dates. The changes set forth under Section 2 of the bill would apply to any civil action pending on or brought on or after the date of enactment of H.R. 2112. The changes set forth under Section 3 of the bill would apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of enactment of H.R. 2112.

Policy Arguments

Supporters of Section 3 argue that expanding federal court jurisdiction in this very narrowly defined category of cases would increase markedly the fair, speedy, and efficient resolution of mass tort cases and would avoid time-consuming, expensive, and repetitive liability proceedings before duplicative State and Federal Courts. Thus, liability would be determined once and for all in an expeditious manner before a court specifically designated to consider the litigation.

Opponents assert that the state courts are competent to handle personal-injury and wrongful death cases, and, although there may be reasons to consolidate cases concerning the same accident in one forum, any incursion on the state courts’ traditional jurisdiction should only be made if consolidation actually occurs. This bill, however, would allow ordinary state-court personal-injury cases to be removed to federal court which are not currently subject to removal, even where there has been no consolidation of cases concerning the same accident before a single federal judge. Additionally, regarding the choice of law provision, opponents

²This provision amends the general federal venue statute, 28 U.S.C. § 1391.

³This provision amends the multidistrict litigation statute, 28 U.S.C. § 1407.

contend that it is not appropriate to require that one state's substantive law apply to the entire case, including compensatory damages. Instead, they argue issues relating to compensatory damages should be governed by the law of the individual plaintiff's domicile. Finally, opponents generally disfavor the expansion of the jurisdiction of the already-overloaded district courts.

III. H.R. 1875, THE "INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999"

Background and Current Law

Class actions were initially created in state courts based on equity and common law. The rationale behind class actions is that because small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights, it is useful to aggregate the relatively small potential recoveries into something worth an attorney's labor. In 1849, class suits became statutory rather than merely equitable with the advent of the Field Code which several states adopted. In 1938, a federal class action rule was first enacted in the form of Federal Rule of Civil Procedure 23. In 1966, Rule 23 was substantially amended to grant more flexibility with regard to class actions. The Field Code, original Rule 23 and amended federal Rule 23 remain the three models for present-day state class action rules, and thirty-six states have adopted amended federal Rule 23. Seven states still use class action rules modeled on the original federal rule 23 (1938).⁴ Four states still use Field Code-based class rules.⁵ And three states still permit class actions at common law and have no formal class rules.⁶

Article III of the Constitution provides for a federal court system of limited jurisdiction by empowering Congress to establish federal jurisdiction over diversity cases -- cases involving citizens of different states. As a result, Congress has long permitted actions involving disputes where the parties are residents of different states and the amount in controversy exceeds a specified amount (currently set at \$75,000) to be brought or removed to federal, rather than state

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⁴Alaska, Georgia, Louisiana, New Mexico, North Carolina, Rhode Island, and West Virginia.

⁵California, Nebraska, South Carolina, and Wisconsin. California, however, has judicially adopted the amended Rule 23.

⁶Mississippi, New Hampshire, and Virginia.

⁷*Id.* The courts have the discretionary powers to deny costs to a plaintiff, and even impose costs on her, if she recovers less than \$75,000. 28 U.S.C. 1332(b). A defendant may remove a diversity case from state court to federal court within 30 days of receipt of the state court pleading, or 30 days of receipt of an amended pleading that states a removable claim. 28 U.S.C. 1446(a). The notice of removal must, however, be filed within one year of commencement of the action. 28 U.S.C. 1446(b). The one-year limitation does not apply to federal question cases.

A long line of decisions also establishes the proposition that punitive damages, when they

court.⁷ This grant of diversity jurisdiction is based on concerns that state courts may be prejudiced against the rights of out-of-state defendants.⁸ In the context of ordinary non-class action lawsuits these rules have been interpreted since as early as 1806 in *Strawbridge v. Curtiss*⁹ as requiring “complete diversity” -- *i.e.*, all of the defendants must be from different states than all of the plaintiffs for federal jurisdiction to lie.

In recent years, a number of cases have construed these various requirements in the class action context in a manner granting state courts relatively wide latitude in certifying class actions. First, in *Supreme Tribe of Ben Hur v. Cauble*,¹⁰ the Court held that courts should only consider the named plaintiffs for diversity purposes, and not the citizenship of absent class members. This means that federal jurisdiction is avoided so long as the named plaintiff class is non-diverse with the defendant. Second, in *Zahn v. International Paper Co.*,¹¹ the Court held that the “amount in controversy” requirement is satisfied only if all of the class members are seeking damages in excess of the statutory minimum (currently \$75,000). Thus, even if the aggregate amount of claims is in excess of \$75,000, the case may not be removed to federal court. In addition, the courts have held that in those cases which are subject to removal to federal court, such removal may only occur if all of the defendants join to remove the case.¹²

Other recent cases have clarified the manner in which state courts may consider so-called “national class actions,” that is to say class actions involving parties from numerous states and which may involve issues of the laws of more than one state. In *Phillips Petroleum Co. v. Shutts*,¹³ the Court held that in such cases, state courts are obligated to comply with due process requirements, and that the state court may also apply a single state’s law (its own or another’s) as long as the state’s choice of law doctrine and the Constitution so permit.¹⁴ In addition, the Supreme Court in *Matsushita Elec. Indus. Co. v. Epstein*¹⁵ held that a federal court must give

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are permitted under the governing substantive law for the claim being asserted, can be included when determining whether the jurisdictional amount in controversy has been met. *See* Wright & Miller, *Federal Practice & Procedure*, Chapter 6: Amount in Controversy, §3702: Determination of the Amount in Controversy: General Rules and the Legal Certainty Test (1997).

⁸*See* David P. Currie, *Federal Jurisdiction* 140 (3rd ed. 1990).

⁹7 U.S. (3 Cranch) 267 (1806).

¹⁰255 U.S. 356 (1921).

¹¹414 U.S. 291 (1973).

¹²*See* *Hewitt v. City of Stanton*, 798 F.2d 1230, 1232-33 (9th Cir. 1986); Moore’s *Federal Practice* 3d Sec. 107.11[1][c] (1998). There is a split in the circuit courts as to whether the supplemental jurisdiction statute, 28 U.S.C. 1367, enacted in 1990, overruled *Zahn*, abrogating the requirement that each class member have the requisite amount in controversy.

¹³472 U.S. 797 (1985).

¹⁴*See id.*

¹⁵116 S.Ct. 873 (1996).

full faith and credit to a state court class action settlement even if that settlement releases claims that are exclusively within a federal court's jurisdiction (such as federal securities or antitrust claims).

At the same time that the Supreme Court has been clarifying the expansive role permitted for state class actions, federal courts have been narrowly construing Rule 23, thereby limiting the parties' ability to bring and certify class actions in federal courts.¹⁶ For example, in *Castano v.*

¹⁶Rule 23 of the Federal Rules of Civil Procedure prescribes the conditions under which class action suits may be brought in the federal courts. Rule 23(a) outlines the prerequisites for a class action. They are (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to meeting these prerequisites, an action may only be maintained as a class action if one of the following three conditions outlined in Rule 23(b) are met: (1) the prosecution of separate actions by or against individual members of the class would create a risk of either inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

Under Rule 23(c), courts are given considerable discretion in certifying and maintaining classes. Additionally, Rule 23(c) outlines the notice requirement for actions brought under Rule 23(b)(3). Members of any class must be provided with the "best notice [of the action] practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Members of the class are automatically included in the action unless they request exclusion from the class.

Rule 23(d) outlines various orders a court may issue governing class actions, and Rule 23(e) requires court approval before a class action is dismissed or compromised.

American Tobacco Co.,¹⁷ the Fifth Circuit prevented the certification of a nationwide class action brought by cigarette smokers and their families for nicotine addiction because it found there 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. Similarly, in *In re Rhone-Poulenc Rorer, Inc.*¹⁸ the Seventh Circuit held that where claims were immature, it is preferable that they be individually adjudicated. Also, in *Georgine v. Amchem Products, Inc.*,¹⁹ the Supreme Court overturned a consensual settlement between a class of workers injured by asbestos and a coalition of former asbestos manufacturers because uncommon issues, particularly the disparate levels of the class members' knowledge of their injuries, as well as each class member's relatively large amount at stake in the litigation, meant that class treatment was not superior to individual treatment of the plaintiffs' claims. Most recently, on June 23, 1999, in *Ortiz v. Fibreboard*,²⁰ the Supreme Court again invalidated an asbestos settlement agreement on the grounds 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.

Past Legislative Action

In 1998, after a hearing and mark-up in the Courts and Intellectual Property Subcommittee, the Full Committee marked-up and reported out on a party line vote the "Class Action Jurisdiction Act of 1998," which was similar in most respects to H.R. 1875, under consideration today.²¹ The bill, however, was never considered by the Full House during the 105th Congress.

On July 15, 1999, however, President Clinton signed into law the Y2K Act, a bipartisan bill, which included a provision, similar to H.R. 1875, that places all Y2K class actions in

¹⁷84 F.3d 734 (5th Cir. 1996).

¹⁸51 F.3d 1293 (7th Cir. 1995), *cert denied*, 116 S. Ct. 184 (1995).

¹⁹117 S.Ct. 2231 (1997).

²⁰No. 97-1704, 1999 WL 412604 (U.S. June 23, 1999).

²¹There are three differences between last year's version and this year's version of the bill. First, the 1999 version of the bill *requires* a federal court to abstain from exercising diversity jurisdiction over any "intrastate," "limited scope," and "state action" cases that may be removed to federal court under the Act and to remand any such cases to state court – last year the court's decision to abstain was discretionary. Second, H.R. 1875 includes a number of findings regarding diversity jurisdiction and perceived class action abuses. Third, the 1999 version of the bill does not require the court to strike the class allegations from the action and to remand the matter to state court as an individual action if the matter could not proceed as a class action under federal class action Rule 23. Instead, if a removed case cannot proceed as a class action, the federal court must dismiss the action, and it may be filed again in State court (subject to removal again).

federal, rather than state court. This can easily be distinguished from H.R. 1875 because the problem is uniquely nationwide in its impact, and the Y2K Act expires in 2003 and completely excludes wrongful death and personal injury actions.²²

Additionally, pending before the Full Committee is H.R. 2112, the “Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999” which includes a section, similar to H.R. 1875, that expands federal court jurisdiction by requiring only minimal diversity for single accidents involving at least 25 people, where the injury has resulted in damages which exceed \$50,000 per person. This bill can also be distinguished from H.R. 1875 in that it would only apply to a very narrowly defined category of cases arising from single site mass accidents, for example, plane, train, bus, boat accidents and environmental spills.

Section-by-Section Description of H.R. 1875

Section 1 -- Short Title and Reference. This section states the short title of the legislation, “The Interstate Class Action Jurisdiction Act of 1999.” It also states that “[w]henever 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.”

Section 2 -- Findings. This section provides findings about perceived class action abuses and how the bill would address those abuses.

Section 3 -- Jurisdiction of District Courts. Sec. 3 of the legislation amends 28 U.S.C. § 1332 (the diversity statute) to provide federal courts with original jurisdiction over all civil actions brought as class actions (regardless of the amount in controversy) in which any member of a proposed plaintiff class is: (a) a citizen of a State different from any defendant, (b) a foreign state or a citizen of a foreign state and any defendant is a citizen of a State, or (c) a citizen of a State and any defendant is a citizen or subject of a foreign state.²³ Thus, it grants federal courts jurisdiction over class actions in which there is “partial diversity” rather than “complete diversity” between the plaintiffs (including all unnamed members of any plaintiff class) and defendants. Sec. 3, however, requires the district court to abstain from hearing a civil action in

²²Rep. Tom Davis (R-VA), the bill’s sponsor, noted in his testimony before the Judiciary Committee on April 13, 1999 that the Y2K problem was a “unique phenomenon.” Furthermore, the Committee report to the Y2K Act states that “H.R. 775 is about defining rights and remedies in court to address problems presented by a particular technological problem, regardless of the type of claim that results.” See H.R. Rep. No. 106-131, at 12 (1999).

²³A member of a proposed class is 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.

which: (a) 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”); (b) all matters in controversy do not exceed the sum of \$1,000,000 or the number of members of the proposed class in the aggregate is less than 100 (“a limited scope case”); or (c) 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”). Finally, Sec. 3 excludes securities-related class actions from coverage.

Section 4 -- Removal of Class Actions. Sec. 4 of the legislation amends 28 U.S.C. Sec. 1446(a) so as to permit removal of a purported class action subject to the jurisdictional provisions described above by any defendant, regardless of whether such removal is joined by any other defendant and by any unnamed class members without the consent of all members of such class.²⁴ Section 4 also amends 28 U.S.C. 1446(b) to eliminate the one-year limitation (so long as it is within 30 days of receipt of a pleading indicating that the case may be removable) on removing class actions that are subject to the jurisdictional provisions set forth above, which also applies to defendants and unnamed plaintiffs alike. Sec. 4 excludes securities-related class actions from coverage. Finally, Sec. 4 provides that if the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Procedure 23, the court must dismiss the action. This has the effect of striking the class action claim. While the class action may be refiled again, any such refiled action may be remanded again if the district court has original jurisdiction. The statute of limitations is tolled, to the full extent provided by federal law (not state law), for the period that the action is pending in federal court.

Section 5 -- Applicability. Sec. 5 of the legislation provides that the bill’s provisions shall apply to any action commenced on or after the date of enactment.

Policy Concerns

Proponents point to a number of problems in actions, which they believe should give rise to moving more cases into federal courts. Based on previous hearings, proponents have raised a number of specific concerns with class actions:

I The tendency of some state judges, notably in Alabama, to certify class actions before

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²⁴This provision applies to any class before or after the entry of any order certifying a class.

²⁵The Alabama Supreme Court, however, has responded to due process and forum-shopping concerns of corporate defendants by abolishing the practice of certifying class actions before the defendant has an opportunity to answer the suit. *See Ex Parte State Mutual Ins. Co.*, 715 So.2d 207 (Ala. 1997), and *Ex Parte American Bankers Life Assur. Co. of Fla.*, 715 So.2d 186 (Ala. 1997). In these cases, the Alabama Supreme Court clarified that classes may not be certified without notice and a full opportunity for defendants to respond and that the

permitting the defendant the opportunity to respond.²⁵ This was complained of in John Hendrick's testimony on behalf of the Chamber of Commerce, and John Martin's testimony on behalf of Ford during the Subcommittee on Courts and Intellectual Property's March 5, 1998, oversight hearing on mass torts and class actions.

- II The concern that there is insufficient coordination between state courts and that state courts do not have the authority to consolidate consideration of related actions and to avoid overlapping and possibly inconsistent adjudications.²⁶
- III The concerns that (1) cases are certified and settled without providing adequate benefits to the class, and that in particular coupon settlements where defendants, instead of paying cash to the plaintiff class members, issue discount coupons to purchase their products which provide little in the way of real relief to plaintiffs;²⁷ and that (2) collusive settlements are entered into whereby plaintiffs' attorneys agree to a far broader settlement than was originally sought in order to insulate defendants from future liability.
- IV The concern that the notice to class members is written in legal jargon that makes it

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class certification criteria must be rigorously applied.

²⁶This is not considered to be a major problem at the federal level because coordination can occur through multidistrict litigation, whereby competing cases are sent to one federal court (28 U.S.C. 1407) and because federal courts may enjoin competing state actions under the All Writs Act (28 U.S.C. 1651). *But see* the Anti-Injunction Act (28 U.S.C. 2283); and *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) (reading the anti-injunction act as barring a federal court from forbidding members of a class from settling individual punitive damage claims filed in state court).

²⁷In the landmark case, *In re General Motors Corp. Pickup Truck Fuel Tank Product Liability Litigation*, the U.S. Court of Appeals for the Third Circuit reversed the settlement of a class action filed on behalf of 5-6 million owners of GM pickup trucks with defectively designed fuel tanks. The district court approved the settlement and the fee request whereby the class members were to receive a \$1,000 coupon good for only 15 months towards the purchase of a new GM truck or minivan, and the plaintiffs' lawyers were to receive \$10 million in costs and fees. The Third Circuit found that the settlement failed to provide adequate benefits to the class and rejected the fee request.

²⁸This is illustrated by the John Hancock settlement whereby a settlement was brought on behalf of hundreds of thousands of current and former policy holders who were subject to deceptive sales practices by John Hancock. A class represented by Public Citizen objected to the settlement on two grounds: (1) the notice to the class was impenetrable to the detriment of class members and that (2) the award of \$39 million in attorneys' fees was excessive. The settling parties agreed to strengthen the notice to class members, and the court refused to award the full \$39 million up front, as counsel had requested, and largely adopted the fee structure suggested by Public Citizen. *See Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375 (D. Mass.

difficult to discern their rights and obligations as members of the class.²⁸ The “plain English” problem was identified by Ralph Wellington when he testified at the March 5, 1998 hearing that “class notices should be written in plain language. It is possible to tell class members clearly and simply what benefit they will receive, how much money class counsel will receive, and where that money will come from.”

- V The ability of plaintiffs’ attorneys to name a “friendly” defendant for the purpose of blocking a motion removing a case to federal court or avoiding complete diversity.²⁹ This concern was cited by Ford General Counsel John W. Martin, Jr., when he testified at the March 5, 1998 hearing that “plaintiffs lawyers sometimes join a ‘plaintiff-friendly’ person or entity as a defendant, with the understanding the nominal defendant will use his status to veto any removal attempt.”

Opponents have raised a number of policy concerns regarding H.R. 1875. As a threshold matter, opponents believe that before even considering legislation, Congress should insist on receiving objective and comprehensive data justifying such a dramatic intrusion into state court prerogatives. Although nothing in the way of such information now exists,³⁰ major studies by the Federal Judiciary Mass Torts Working Group and by the National Association of State Chief Justices are expected to be completed by early next year. A number of other general concerns have been raised as well:

1. Potential Damage to the Federal and State Court Systems

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1997).

²⁹As to the latter of the cases, defendants have often been able to assert that naming a “friendly” defendant constitutes “fraudulent joinder.” See, e.g., James F. Archibald, *Reintroducing “Fraud” to the Doctrine of Fraudulent Joinder*, 78 Va L. Rev. 1377 (1992).

³⁰The most comprehensive study completed was the 1994/95 Judicial Center review of class actions which rebutted claims that class actions constituted frivolous “strike” suits and that attorneys were unreasonably benefitting from class action cases. Willging, *et al.*, *Empirical Study of Class Actions in Four Federal District Courts -- Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996). Another study made a single recommendation regarding interlocutory appeals which has already taken effect. See Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Compiled by the Judicial Conference Advisory Committee on Civil Rules (recommending the allowance of interlocutory appeals of class certifications). The study made no recommendation regarding federalizing class actions. The other studies cited by H.R. 1875’s supporters are incomplete and inconclusive. The much touted Rand study is final and the so-called “Stateside” study cited by John Hendricks (on behalf of the Chamber of Commerce) and John Martin (on behalf of Ford) in their testimony only covers six Alabama’s counties, and the problems found in the study have already been resolved by the Alabama Supreme Court.

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, which continues to be at an acute stage. For example, in 1998, the federal courts faced the following:

- 69 judicial vacancies existed, or approximately 8% of the federal judicial positions.
- On average, federal district court judges had 398 civil filings pending.

In addition to its impact on the federal courts, the legislation could also undermine state courts. This is because in cases where the federal court chooses not to certify the state class action, the bill prohibits the states from using class actions to resolve the underlying state causes of action. It is important to recall the context in which this legislation arises -- a class action has been filed in state court involving numerous state law claims, each of which if filed separately would not be subject to federal jurisdiction (either because the parties are not considered to be diverse or the amount in controversy for each claim does not exceed \$75,000). When these individual cases are returned to the state courts upon remand, potential new cases may be unleashed.

In addition to these potential workload problems, the legislation raises constitutional issues. The legislation can be said to not merely operate to preempt an area of state law, rather it unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes. The courts have previously indicated that efforts by Congress to dictate such state court procedures implicate important Tenth Amendment federalism issues and should be avoided.³¹

Opponents also claim that arguments that the bill is nonetheless justified because state

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³¹For example, in *Felder v. Casey*, 487 U.S. 131, 138 (1988) (Wisconsin notice-of-claim statute found to be preempted by 42 U.S.C. § 1983, which holds anyone acting under color of law liable for violating constitutional rights of others). 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*, 520 U.S. 911 (1997) (Idaho procedural rules concerning appealability of orders held not to be preempted by 42 U.S.C. § 1983), 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,’” 1997 U.S. LEXIS 3547, *15. Most recently, the Court relied on the the principle of federalism as a foundation for its decisions in *Alden v. Maine*, 1999 WL 412617 (U.S. June 23, 1999) and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 1999 WL 412723 (U.S. June 23, 1999). Although these decisions addressed Eleventh Amendment questions, the Court’s tone suggested that any action limiting state rights or sovereignty would be closely scrutinized.

courts are “biased” against out of state defendants in class action suits are overstated. First off, the Supreme Court has already made clear that state courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co. v. Shutts*,³² 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;³³ (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.³⁴

Second, it is important to note that as fears of local court prejudice have subsided and concerns about diverting federal courts from their core responsibilities increased, the policy trend in recent years has been towards *limiting* federal diversity jurisdiction.³⁵ For example, less than two years ago Congress enacted the Federal Courts Improvement Act of 1996,³⁶ which *increased* the amount in controversy requirement needed to remove a diversity case to federal court from \$50,000 to \$75,000.

Third, as the legislation is currently written, it assumes a defendant will be automatically

³²472 U.S. 797 (1985).

³³The notice must be the “best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950)).

³⁴*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) (state class actions 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).

³⁵Ironically, in 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).

³⁶28 U.S.C. § 1332(a) (West Supp. 1998).

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, it can be said the bill ignores the fact that many large businesses have a substantial commercial presence in more than one state, through factories, business facilities or employees.

2. Impact on Consumers

Opponents also argue the bill 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 concern is the legislation will force most state class action claims into federal courts where it is likely to be far more expensive for plaintiffs to litigate cases and where defendants could force plaintiffs to travel long distances to attend proceedings.

It is also likely to be far more difficult and time consuming to certify a class action in federal court. Fourteen states, representing some 29% of the nation's population, have adopted different criteria for class action rules than Rule 23 of the federal rules of civil procedure. 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, as noted above, in recent years a series of adverse federal precedents, have made it more difficult to establish the predominance requirement of rule 23(b)(3) necessary to establish a class action under the federal rules.

Further, it is said the legislation is likely to 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 and the fact that the federal courts are obligated to resolve criminal matters on an expedited basis before civil matters, even where plaintiffs are able to successfully certify a class action in federal court, it will take longer to obtain a trial on the merits than it would in state court.

Opponents also believe the legislation poses unique risks and obstacles for plaintiffs that they do not face under current law. Because the federal courts are required to dismiss cases they choose not to certify, plaintiffs are likely to be foreclosed from forming a reconstituted class in state court upon remand which conforms to the legislation's requirements.³⁷ Even if a class could somehow be reconstituted or economically viable individual or aggregate actions could be maintained in court, under the bill they could run afoul of state statute of limitations requirements. This is because the legislation only provides that upon remand the statute of limitations is to be tolled to the extent provided under *federal* law -- it offers no specific

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³⁷For example, if certification had been denied by the federal court because a particular conflict among the class members made it impossible to meet the "adequate representation" requirement of Federal Rule of Civil Procedure 23(a)(4), the plaintiffs in the remanded action would likely be prohibited from narrowing the class in an effort to resolve that conflict.

protection against *state* statutes of limitations expiring. Even in those few cases where federal causes of action may be implicated, the bill's language is of no benefit with regard to a reconstituted class action because federal law only provides for tolling of statutes of limitations upon remand for *individual* actions, not *class* actions.³⁸

Consumers may 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 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 the bill fails to provide for any interlocutory appeal, it will be impossible for litigants to obtain any meaningful guidance from the federal appellate courts regarding these terms. The vagueness problems could be particularly acute for plaintiffs – if they guess incorrectly regarding the meaning of a particular phrase, their class action could be permanently preempted and barred by the statute of limitations. However, if a defendant guesses wrong and jurisdiction does not lie in the federal courts, the defendant will be no worse off they are under present law, and will have benefitted from the additional time delays caused by the failed removal motion.

The net result of these various changes, opponents assert, 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. This means it will be far more difficult for consumers to bring class actions in state court involving violations of health and safety laws and environmental harm.

Opponents also point to the adverse impact the legislation could have on the ability of injured persons to obtain redress for harms caused by the tobacco industry, the gun industry, and the managed care industry. All three of these industries are in the initial stages of being brought

³⁸Although the so-called *American Pipe* rule (See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)) tolls the statute of limitations for newly filed individual claims of putative members of a proposed class action that ultimately failed to secure certification in federal court, *American Pipe* does not permit tolling where, after a first denial of class certification, the members of the proposed class file a subsequent class action. See *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) ("In sum, we hold that the tolling doctrine enunciated in *American Pipe* does not apply to permit a plaintiff to file a subsequent class action following a definitive determination of the inappropriateness of class certification."); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) ("The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of the previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class."). See also *Robbin v. Flour Corporation*, 835 F.2d 213, 214 (9th Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994).

to justice pursuant to a series of state class action suits, which would become far more difficult, if not impossible, to bring under the legislation.

A. Tobacco

With regard to tobacco, the legislation would allow tobacco companies to remove state class actions involving state causes of action to federal court. In fact, since the major tobacco companies are principally domiciled in states where class actions are *not* being brought, “minimal diversity” as defined by this bill will always exist between the plaintiffs and the tobacco companies. The legislation, therefore, can be said to effectively grant the tobacco industry a free pass to federal court where it will be much more difficult for plaintiffs to prevail in class action cases.

Had this bill previously been enacted into law it would have threatened all of the key tobacco class action suits already brought or being considered. Among other things, the bill would have undermined classes of plaintiffs in *Engle v. R.J. Reynolds Tobacco Co.*,³⁹ a successful class action on behalf Florida citizens who have become wrongfully addicted to tobacco, and *Broin v. Phillip Morris*⁴⁰ which considered the claims of some 60,000 flight attendants harmed by second hand smoke. In addition, the bill would have impacted additional class actions filed on behalf of individuals currently pending in state courts for smoking related claims⁴¹ and could have affected additional state class actions being brought on behalf of multi-employer Health and Welfare funds, which provide medical care for approximately 30 million workers, retirees, and their families.⁴²

B. Gun Safety

Opponents also assert that the legislation benefits companies marketing gun products which are dangerous and defective and have no reasonable use as self defense. The victims of gun violence are beginning to sue gun manufacturers for their injuries. They are particularly interested in pursuing manufacturers whose guns are clearly ill-suited for hunting or self defense.

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³⁹672 So. 2d 39 (Fla. Dist. Ct. App. 3d 1996).

⁴⁰*Supra* note 10.

⁴¹A number of smaller class actions were filed subsequent to the Fifth Circuit’s failure to certify a nationwide class of smokers for addiction and other claims in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Additionally, other non-*Castano* class actions involving tobacco liability are also pending in state courts.

⁴²While defendants in many of these questions sought to remove the cases to federal court under federal question jurisdiction based on ERISA, the majority of federal courts rejected this claim, and have remanded the cases to state courts. In the districts which held for the defendants, plaintiffs have appealed the decision. Numerous additional health and welfare actions are expected to be filed in the future against the tobacco industry.

In addition, over 20 American cities have filed lawsuits against gun manufacturers to hold them accountable for the millions of dollars that the public sector must spend coping with the consequences of gun violence. At the same time, several of these lawsuits raise important class action issues. A state class action brought in Texas ultimately resulted in a \$31 million settlement against Remington.⁴³ A liability action is also pending in Illinois brought by the families of three young children who were killed by juveniles illegally carrying handguns alleged to be marketed to gang members, and the plaintiffs are trying to recast this case as a class action.⁴⁴

C. HMO's

Opponents also believe the bill would undermine a series of recent class action suits against health maintenance organizations resulting from their alleged fraud, overbilling and failure to provide coverage. Under current law, class action claims against managed care must often distinguish between ERISA and non-ERISA patients. Non-ERISA patients have a full range of remedies available to them under state law. On the other hand, ERISA patients have a very limited set of remedies – the cost of the benefit denied, which in most cases is woefully inadequate.

The current managed care reform debate in Congress includes the elimination of the ERISA preemption which would allow patients who receive their health care from their employer to hold their HMO accountable if it denies care. However, legislation such as H.R. 1875 would move in the opposite direction by enacting legislation which would deny more patients access to justice in state court.

3. Fails to Address Defendant and Other Abuses in Class Action Cases

Finally, rather than responding in an even-handed manner to the various concerns raised at the hearings by plaintiffs and defendants alike, opponents also assert the legislation solely benefits corporate defendants. Although the legislation has been modestly pared back from the initial extreme versions introduced and reported last Congress, it remains one-sided in its approach to the issue of class actions. For example, the legislation 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.

IV. H.R. 2260, THE "PAIN RELIEF PROMOTION ACT OF 1999"

⁴³See *Garza v. Sporting Goods Properties, Inc.*, 1996 U.S. Lexis 2009 (W.D. Tex. 1996) (class of shotgun owners sued the Remington Arms Company claiming that their shotguns barrels were insufficiently strong and susceptible to bursting during normal usage).

⁴⁴See *Young v. Bryco Arms*, No. 98106684 (Cook Co. Ill. Cir. Ct. 1998)

Introduction

H.R. 2260, the “Pain Relief Promotion Act of 1999,” attempts to accomplish three purposes: (1) to allow palliative care to be rendered under the Controlled Substances Act, “even if the use of such a substance may increase the risk of death”; (2) to remove the presumption that the Controlled Substances Act permits states to enact physician-assisted suicide laws such as Oregon’s “Death with Dignity Act”⁴⁵; and (3) to authorize federal funds for research and education about palliative care. Before delving into the policy considerations involved in this bill, a brief explanation of the Controlled Substances Act, the constitutional law and political background, and the State of Oregon “Death with Dignity Act” is necessary.

Controlled Substances Act

The Controlled Substances Act provides a uniform national standard for the control of potentially dangerous drugs and a system of enforcement and penalties. The CSA provides a broad prohibition against dispensing a controlled substance by preventing individuals from distributing a controlled substance; however, the CSA also provides mechanisms by which persons may be authorized to dispense controlled substances. *See* 21 U.S.C. 841(a). Because some controlled substances can help alleviate pain and treat illness or injury, physicians and pharmacists comprise one class of persons authorized to dispense those substances. Physicians and pharmacists may apply to the DEA for a license to administer them for “legitimate medical purposes.”⁴⁶

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⁴⁵ The bill accomplishes this second goal in two ways. The bill expressly provides that the Controlled Substances Act (the “CSA”) does not “authorize[] intentionally dispensing, distributing, or administering a controlled substance for the purpose of causing death or assisting another person in causing death.” The bill also allows the Attorney General to challenge a CSA registration “giv[ing] no force and effect to State law authorizing or permitting assisted suicide or euthanasia.”

⁴⁶ The majority will attempt to minimize the degree to which this bill would federalize medical practice. First, they will argue that current law requires physicians and pharmacists to apply for a federal license to dispense controlled substances and further mandates that medical professionals use those substances for “legitimate medical purposes.” The majority may also point out that federal law requires medical professionals to justify their use of controlled substances, if a particular prescription is challenged by the DEA, under threat of revocation of registration and even criminal penalties. Their argument, then, will be that federal law already restricts medical practices and that further defining the “legitimate medical purposes” of controlled substances to include palliative care but to exclude physician assisted-suicide is a natural extension of federal authority.

Constitutional Law Aspects, Political Background and H.R. 2260

The constitutional law governing physician-assisted suicide is still evolving. Two years ago, the United States Supreme Court announced in *Washington v. Glucksberg*⁴⁷ and *Vacco v. Quill*⁴⁸ that state prohibitions against assisting suicide do not violate the Due Process or Equal Protection clauses. In *Glucksberg* the Court observed that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”⁴⁹ While many states engaged in the debate have decided to prohibit assisting suicide,⁵⁰ Oregon is one of the states that has not.

In 1994, Oregon voters enacted, through ballot initiative, the “Death with Dignity Act”⁵¹ which is further described below. In October 1997, the Ninth Circuit Court of Appeals lifted an injunction against the law’s implementation, and in November 1997, the law withstood a repeal effort by a vote of 60%-40%.

Prior to the Oregon Act’s taking effect, the chairmen of the House and Senate Judiciary Committees wrote to Drug Enforcement Administration (“DEA”) Administrator Thomas Constantine seeking the DEA’s view as to whether delivering, distributing, dispensing, prescribing, or administering a controlled substance with the intent of assisting suicide would violate the Controlled Substances Act (“CSA”).⁵² On November 6, 1997, Administrator Constantine issued a letter to the Congressmen stating that “the activities that you described in your letter to us would be, in our opinion, a violation of the CSA.”⁵³

The Department of Justice then conducted a full review of the issue of whether the CSA authorizes adverse action against a physician who prescribes a controlled substance to assist in a suicide in compliance with Oregon law. On June 5, the Department of Justice issued its decision that “[t]here is no evidence that Congress, in the CSA, intended to displace the states as the primary regulators of the medical profession, or to override a state’s determination as to what

⁴⁷117 S. Ct. 2258 (1997); 1997 U.S. LEXIS 4039.

⁴⁸117 S. Ct. 2293 (1997); 1997 U.S. LEXIS 4038.

⁴⁹1997 U.S. LEXIS 4038 at *56.

⁵⁰For example, Virginia’s ban on assisted suicide, which would suspend or revoke the license of a physician who helps someone commit suicide and would subject anyone who helps a person kill himself to civil liability, took effect July 1, 1998.

⁵¹Or. Rev. Stat. §§ 127.800-127.995 (1997).

⁵²Controlled Substances Act, 21 U.S.C. §§ 801-971 (prohibits the use of certain narcotics and other dangerous drugs).

⁵³*Quoted in* Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice, to Senator Ron Wyden (June 5, 1998).

constitutes legitimate medical practice in the absence of a federal law prohibiting that practice.”⁵⁴ The Justice Department found that “there is no evidence that Congress, in the CSA, intended to assign DEA the novel role of resolving the ‘earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide’ simply because that procedure involves the use of controlled substances.”⁵⁵ Therefore, the Department of Justice would not pursue adverse actions against Oregon physicians who fully complied with the “Death with Dignity Act.”

In response to the Justice Department’s decision, Chairman Hyde has proposed H.R. 2260, the “Pain Relief Promotion Act of 1999.” This Act would alter the Controlled Substances Act to prohibit drugs from being used with the intent of causing death. In doing so, H.R. 2260 seeks to skirt a difficult line between permitting palliative care and restricting state ability to allow physician-assisted suicide. In essence, the bill seeks to allow medical professionals to dispense controlled substances to relieve pain, even if such prescriptions increase the risk of death; however, the bill also provides that attempts to use controlled substances to hasten death, even if in conformity with a state physician-assisted suicide law, is not permitted by the Controlled Substances Act. In addition, where a medical professional dispenses controlled substances in conformity with a state physician-assisted suicide law, that medical professional may have his or her DEA license revoked or receive federal criminal prosecution under the Controlled Substances Act.

The Oregon Death with Dignity Act

Oregon’s Death with Dignity Act permits physician-assisted suicide under careful standards and guidelines. It permits an adult, who is capable and a resident of Oregon, and who has been determined by the attending and a consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, to make a written request for medication for the purpose of ending his or her life. A terminal disease is defined as an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months.

The attending physician must determine that the patient has a terminal disease, is capable, and has made the request voluntarily. The attending physician must then inform the patient of his medical diagnosis, his prognosis, and must explain the risks associated with taking the medication to be prescribed, the probable result of taking the medication to be prescribed, and feasible alternatives. In addition, the attending physician must refer the patient to a consulting physician for medical confirmation of the diagnosis and for a determination that the patient is capable and acting voluntarily.

⁵⁴*Id.*

⁵⁵*Id.* (citation omitted).

The attending physician must also refer the patient for counseling if either physician believes the patient may be suffering from a psychiatric or psychological disorder, or depression causing impaired judgment. No life-ending medication can be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder, or depression causing impaired judgment.

The attending physician must request that the patient notify next of kin, but the patient is not required to do so. He must also inform the patient that the patient has an opportunity to rescind the request at any time and in any manner, and the physician must offer the patient an opportunity to rescind at the end of a fifteen day waiting period.

The attending physician must verify, immediately prior to writing the prescription, that the patient is making an informed decision, must fulfill certain medical record documentation requirements, and must ensure that all appropriate steps are carried out in accordance with the law.

The patient must submit a written request for medication, and the request must be witnessed by two individuals, one of whom is not a (i) relative, (ii) heir, or (iii) owner, operator or employee of a health care facility where the patient is receiving medical treatment or is a resident. The attending physician cannot be a witness. If the patient is a patient in a long term care facility, one of the witnesses must be an individual designated by the facility and having the qualifications specified by the Department of Human Resources by rule.

A suicide under the Act cannot affect a life, health, or accident insurance or annuity policy, nor can it affect a contract, will, or other agreement.

The Act does not authorize a physician or any other person to end a patient's life by lethal injection, mercy killing, or active euthanasia. Actions taken in accordance with the Act cannot constitute suicide, assisted suicide, mercy killing, or homicide under the law.

The Act creates liability for altering or forging a request for medication, concealing or destroying a rescission, or coercing or exerting undue influence on a patient to request life-ending medication or to destroy a rescission of such a request. The Act does not preclude further civil or criminal liability for damages resulting from other negligent conduct or intentional misconduct. The Act does, however, create immunity for actions taken in accordance with the Act.

Proponents' Arguments

The Federal Government Properly and Historically Regulates Dangerous Drugs and Narcotics

The federal government, under the CSA, prohibits the use of certain narcotics and other

dangerous drugs. An exception to this general prohibition permits the dispensing and distribution of certain controlled substances by properly registered physicians for legitimate medical purposes. Both Congress and the President have determined that the dispensing or distribution of controlled substances to assist suicide is not a legitimate medical purpose. Proponents argue that while suicide is an unfortunate and inevitable reality in any society, the government should not sanction or assist the act by permitting federal licensees to assist in the suicide of other citizens.

No Common Law Tradition for Assisting Suicide

Proponents note that in almost every State, and in nearly every western democracy, it is a crime to assist a suicide. As the Supreme Court pointed out in *Glucksberg*, “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”⁵⁶ Furthermore, assisting suicide was outlawed by statute in the United States as early as 1828. Although attitudes toward suicide may have changed over the past seven hundred years, and greater emphasis may now be placed on end-of-life decision-making, our laws have continued to prohibit assisting suicide. Therefore, proponents argue that it is perfectly consistent with our legal history and traditions for Congress to enact measures forbidding using federally-regulated drugs to assist a suicide.

All Lives are of Equal Value to Society

Proponents assert that, in a civil society, all lives are of equal value. The terminally ill, the disabled, and the elderly are equal in value to the young and the healthy. Thinking otherwise could lead to dangerous assessments of the value of people’s lives depending upon arbitrary factors such as intelligence, health, appearance, and genetic makeup. If all lives were not valued equally, eliminating the less valuable lives could be logically justified.

Federalism Concerns are Overstated

Proponents argue that concerns expressed about federalism and destroying the will of a State’s citizens are grossly overstated. If it were never proper for the federal government to override the popular will of a State, there might still be segregated schools in some of our States. Moreover, they argue that it is often acceptable for the federal government to do what is right, even when the issue at hand is largely a moral one, as it is with physician-assisted suicide.

Physician Assisted Suicide Disproportionately and Dangerously Affects the Poor and the Disabled

Proponents argue that in a regime which provides physician assisted suicide as a legal

⁵⁶1997 U.S. LEXIS 4039 at *15.

option, poor and disabled members of society will be disproportionately affected. Poor people may choose suicide rather than bearing the expense of treating a terminal illness and the pain of a protracted death. Or, more dangerously, HMOs, in an effort to cut costs, might require that doctors vigorously encourage physician assisted suicide to their poor terminally-ill patients. Also, proponents argue that once physician assisted suicide has been legalized and legitimized, we could be headed down the proverbial slippery slope toward eliminating disabled citizens

Opponents' Arguments

Federalism Concerns

Opponents argue that the bill raises serious federalism concerns because it inserts the federal government into what has traditionally been a local medical oversight process. One of the fundamental tenets of federalism is that the States are free to act as independent laboratories of practice and idea. In this case, after considerable debate, the people of the State of Oregon decided that terminally-ill people should have the ability to control the time and manner of their death, and the nation can now look to Oregon to see how well such a law functions. The "Death with Dignity Act" is currently supported by 65% of Oregon voters and 66% of Oregon physicians.⁵⁷ Opponents argue that this bill would override the will of the people of Oregon and their ideas of proper public policy and acceptable morality.

Furthermore, the bill runs counter to last term's unanimous Supreme Court decisions on physician aid-in-dying. In those cases, the Court authorized and encouraged the States to engage in meaningful debate and experimentation. According to opponents, however, this bill would end the debate.

Burden on Effective Treatment of Pain and Palliative Care

Opponents also argue that the expansion of DEA authority in the proposed bill might make doctors reluctant to prescribe drugs like morphine in doses necessary to relieve a patient's pain due to fears that those doses might not constitute a "legitimate medical purpose" in the DEA's judgment. Each patient is unique and responds differently to medicines used for pain management; therefore, the establishment of arbitrary national standards might hinder physicians in their treatment of patients who require larger-than-normal doses of pain killers. Those physicians who decide to prescribe unusually large, but necessary, doses would face administrative hassles, the threat of losing their DEA license, and the uncertainty and burden of a hearing.

Opponents argue that the bill may even have the unintended effect of increasing the

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⁵⁷See Oregon Death With Dignity Legal Defense and Education Center, *The Oregon Death With Dignity Act and The Drug Enforcement Administration*.

incidence of suicide because it will make palliative care less accessible. Even though the language of the bill suggests that physicians will not lose their licenses for administering controlled substances with the intent of reducing pain even when doing so would hasten death, the practical effect of the bill is that it will make physicians more reluctant to proscribe large doses of pain-killers because they do not want to face an administrative hearing. Therefore, opponents argue that some patients will be forced to live in agony, and many of these patients are likely to end their intolerable suffering by killing themselves.

Opponents also disagree with the assertion that the legislation has been revised to “fix” the problem relating to pain relief. Section 101 of the bill has been revised to state: “For purposes of this Act and any regulations to implement this Act, alleviating pain or discomfort in the usual course of professional practice is a legitimate medical purpose for the dispensing, distributing, or administering of a controlled substance that is consistent with public health and safety, even if the use of such a substance may increase the risk of death.” Opponents contend that this language is largely precatory, and operates more in the manner of a “finding” than actual operative language. If the legislation intends to exclude the dispensation of pain relief medication from the Act, it could easily do so by adding an affirmative defense along these lines.

Chilling Effect on Communications Between Physicians and Pharmacists

Since the bill forbids intentionally dispensing or distributing a controlled substance to cause, or assist in causing, the suicide or euthanasia of any individual, some opponents fear that the bill will dissuade physicians from sharing information with pharmacists about the patient’s therapy. That way, pharmacists will not know the reason the drug is being prescribed and will not be subject to liability. Therefore, the bill will decrease the communication among health care providers at the very time when the pharmacist could provide valuable insight on advancements in areas such as pain management therapy.

Politicization of Medical Standards

Opponents assert that this will politicize and federalize medical standards by providing federal penalties under the CSA. Under this bill, the Attorney General may ignore state laws that establish physician assisted suicide procedures, as well as state laws that provide that palliative care may be allowed in non-life-threatening situations. In effect, the federal government would come closer to establishing itself as a “national medical board.”

Oregon Statute has Adequate Procedural Safeguards

Opponents claim that Oregon’s “Death with Dignity Act” has been carefully constructed to prevent abuses. Concerns with Kevorkian-like suicides, where a patient consults with only one doctor before clandestinely ending her life with the physician’s assistance, are unjustified. Numerous procedural safeguards have been built into the Oregon Act. For example, two doctors must diagnose the patient as having a terminal disease and as being of sound mind. The

patient's request must be in writing and be witnessed by two disinterested people. And only terminally-ill patients are eligible, so people suffering from depression which causes impaired judgment or other mental and physical illnesses will not be able to end their lives with a physician's assistance. Furthermore, Oregon's law creates severe penalties for abuses under the Act.

Liberty

Opponents assert that liberty gives individuals the freedom to do with themselves as they wish. It protects the sovereignty of one's self over one's body. Nothing could be more fundamental to the notion of liberty than the ability of a person to control one's manner of death. According to opponents, this is not an argument for an absolute right to suicide. Rather, it is an argument that when the end of one's life is imminent, one should have the ability to decide how to die. Opponents ask: Why should a terminally-ill patient be forced to bear the pain, suffering, expense, and indignity of a slow, helpless death? Why should the family of a terminally-ill patient retain as their last memory the picture of their loved one writhing in pain, unable to control basic human functions? Instead, opponents argue that when the end is near, the citizens of Oregon have decided that a patient should have the right to end his suffering. Opponents believe that this bill negates the considered judgment of the people of Oregon by answering their questions for them and leaving them with no choice.

Administrative Difficulties

Opponents argue that the bill would establish a new and burdensome oversight mechanism whereby the DEA would be expected to police every prescription that is dispensed by every health care worker, distributor, and manufacturer in the country. It would replace centuries-old medical boards with a federal law enforcement mechanism to oversee the behavior of the medical community. Moreover, opponents argue that the DEA could only monitor such activities either by imposing vast new paperwork requirements on all regulated parties or through dramatic new oversight by law enforcement authorities through a network of health care workers reporting on each other, the likes of which would be unprecedented and fundamentally destructive to the proper functioning of the practice of medicine.

Supporters of the Bill are Inconsistent Regarding the Degree of Deference to be Given to State Referenda

A number of Republicans have previously expressed concerns regarding overturning the will of the people of a State as expressed through a referendum. For example, in Mr. Hyde's comments supporting H.R. 1252, the Judiciary Reform Act of 1998, he said that "[t]his bill recognizes that state referenda reflect, more than any other process, the one-person/one-vote

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⁵⁸144 Cong. Rec. H2246 (daily ed. April 23, 1998) (statement of Rep. Hyde).

system, and seeks to protect a fundamental part of our national foundation.”⁵⁸ Yet, a significant motivation behind the “Pain Relief Promotion Act of 1999” is to nullify an Oregon referendum permitting physician-assisted suicide. Opponents argue that suddenly some Republicans seem willing, if not eager, to destroy this “fundamental part of our national foundation.” Opponents contend that Republicans think that state referenda are wonderful ideas--institutions worth preserving--when they do things like eliminate affirmative action in California, but apparently, referenda lose their noble function when they authorize things with which the Republicans do not agree. Opponents cannot help thinking that Republicans are less committed to local decision-making and placing power in the hands of the people than to running the entire country from Washington and making intensely personal decisions for people according to Republican preferences.

Bill Will Not Put an End to Assisted Suicide

Opponents contend that one can oppose physician assisted suicide, yet still not support this bill. The bill may put a stop to legal practices of assisted suicide using controlled substances, but it will be unable to end the practice of assisted suicide itself. Many other means which are outside the reach of the federal government, from carbon dioxide to hangman’s noose, will still enable physicians and others to assist in a patient’s suicide. Therefore, it is easy for an opponent of physician assisted suicide to oppose this bill. Opponents say that all one has to do is ask whether the costs -- increasing the federal bureaucracy, interjecting the federal government into personal end-of-life decision-making, and authorizing the federal government to override traditional state regulation of the medical profession -- are worth incurring for the benefits received. But, as opponents argue, the benefits will not include an end to physician assisted suicide.

⁵⁸144 Cong. Rec. H2246 (daily ed. April 23, 1998) (statement of Rep. Hyde).