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# TESTIMONY OF BRIAN WOLFMAN STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY REGARDING H.R. 1115, THE CLASS ACTION FAIRNESS ACT OF 2003

May 15, 2003

Chairman Sensenbrenner and members of the Committee: Thank you for the opportunity to appear today in opposition to H.R. 1115, the Class Action Fairness Act of 2003. Although Public Citizen supports the use of class actions and actively works to improve the class action process, this bill, despite its lofty title, would do nothing to further the goal of "fairness" in class actions. To the contrary, H.R. 1115 is an unwise and ill-considered incursion by the federal government on the jurisdiction of the state courts. It works a radical transformation of judicial authority between the state and federal judiciaries that is not justified by any "crisis" in state-court class action litigation. That is presumably why the official body of the federal courts — the Judicial Conference of the United States, headed by Chief Justice Rehnquist — and its state court counterpart — the Conference of State Supreme Court Justices — oppose this legislation.

Before explaining the basis for my conclusion that H.R. 1115 should not be enacted, I want to describe my experience in class action litigation. I am a staff attorney with Public Citizen Litigation Group, a non-profit, national public interest law firm founded in 1972, as the litigating arm of Public Citizen, a consumer advocacy organization with approximately 125,000 members. Although we do not bring many consumer class actions, we occasionally

file them for the purpose for which they are designed: to remedy wrongdoing in situations where bringing individual claims would be economically impossible. And at no time are class actions more important than they are now, when the country is experiencing a corporate pervasive crime wave. Consumers must have effective remedies to hold the free marketplace accountable or public trust in business will decline even further than it already has.

Because we value class actions as an important tool for justice, we have, for a number of years, combated abuses in the class action system. We have increasingly devoted resources to opposing what we believe are inappropriate or collusive class action settlements, and have become the nationwide leader in fighting class action abuse. Among the more than 30 nationwide class actions settlements on which we have worked, we have served as lead or co-counsel for objectors in many of the most important cases, including *Devlin v. Scardelletti* (Supreme Court case establishing absolute right of objectors to appeal approval of class settlements); *Bowling v. Pfizer* (Bjork-Shiley heart valve); *Amchem v. Windsor* (settlement of future asbestos personal-injury cases, also known as *Georgine*); *Wish v. Interneuron Pharmaceutical* (Redux diet drug); *Hanlon v. Chrysler Corp.* (Chrysler mini-vans); *In re Telectronics Pacing Systems, Inc.* (pacemaker leads); *Duhaime v. John Hancock Mut. Life Ins. Co.* (life insurance sales practices); *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.* (GM C/K Pickup Trucks); and *In re Ford Motor Co. Bronco II Prod. Liab. Litig.* (Ford Broncos). In these and other cases, we have objected to settlements that we thought grossly undervalued the plaintiffs' claims and/or we have opposed what we believed were the inflated fees of the plaintiffs' attorneys. In addition, we

have written articles on the problems we have encountered in class action settlements for law reviews and the press.[1]

The point of these introductory comments is that Public Citizen takes a back seat to no one in fighting improper class actions, to assure that injured consumers will be justly compensated, that class action attorneys' fees are sufficient (but not excessive), and that the class action tool is not weakened. In our judgment, H.R. 1115 will not aid injured consumers or combat collusion, but it will work a massive shift of power and cases to our overburdened federal courts at the expense of the state courts, the traditional forum for hearing disputes involving state law.

Part I below discusses H.R. 1115's principal vice — the unwarranted expansion of federal jurisdiction over state-law-based class actions contained in sections 4 and 5 of the bill. Part II discusses two other serious flaws in the bill's jurisdictional provisions. Part III addresses two aspects of H.R. 1115's non-jurisdictional provisions — its automatic appeal provision and its do-nothing provision regarding coupon settlements — which, though purportedly aimed at improving class action practice, actually undermine the interests of consumers. Finally, Part IV explains an alternative approach to the problems presented by nationwide and overlapping class actions. That approach would create federal jurisdiction

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[1] *See* Brian Wolfman & Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439 (1996); Brian Wolfman, *Foreword: The National Association of Consumer Advocates' Standards and Guidelines for Litigating and Settling Class Actions*, 176 F.R.D. 370 (1998); David C. Vladeck, *Trust the Judicial System to Do Its Job*, The Los Angeles Times, p. M5 (Apr. 30, 1995); Brian Wolfman, *Class actions for the injured classes*, The San Diego Union Leader, p. B-11 (Nov. 14, 1997).

only for those cases in which it is truly justified, leaving most state-law class actions in state court where they belong.

## I. The Enormous and Unjustified Expansion of Federal Jurisdiction.

**A.** Section 4 of H.R. 1115 allows proposed class actions to be filed in federal court if "any member of a class of plaintiffs is a citizen of a State different from any defendant...." Building on the language in section 4, section 5 of the bill permits removal from state court to federal court of any class action meeting this expanded criterion for filing class actions in federal court. Thus, as a practical matter, section 4, when combined with section 5's removal provision, would end most state-court involvement in consumer class actions. The bill provides that the federal court may not entertain class actions only in very limited circumstances: where a "substantial majority" of the proposed class **and** all of the primary defendants are citizens of a single state, **and** the claims asserted will be governed primarily by the laws of that state.[2]

As explained below, the bill would effectively eliminate state-court jurisdiction over class actions involving **only** in-state plaintiffs and **only** that state's law, as long as **any** primary defendant's principal place of business or state of incorporation is out of state, even where that defendant does substantial in-state business. As a result, the bill effects an enormous shift in class action cases from state to federal courts at a time when the federal

[2]The bill would also bar federal jurisdiction over class actions where the aggregate damages asserted by **all** class members do not exceed $2 million or in which there are fewer than 100 class members. This provision would have little or (more likely) no practical effect; no significant consumer class actions fall into this category.

courts are already overwhelmed.

Two hypotheticals illustrate the kind of cases that would be removed. Assume that over the past two years a regional life insurance company, with headquarters in Massachusetts and incorporated in Delaware, and with a sales force of agents employed by the company's New York affiliate, fleeced 20,000 of its New York customers, by charging premiums higher than those promised and not paying certain benefits. On average, each customer lost about $500. The company, the New York affiliate, and the sales agents particularly targeted senior citizens. The customers file a class action against the company, the New York affiliate, and the key agents who helped perpetrate the scheme in New York state court alleging solely violations of New York law. Under H.R. 1115, any of the defendants would have the option of removing this class action to federal court, even though there is little or no federal interest in resolving such a dispute because it does not involve federal law. Moreover, the New York courts have a strong interest in resolving the case, to assure that New York law is properly enforced. That interest is usurped by H.R. 1115. Indeed, this example shows that H.R. 1115 is, in reality, a "Defendants' Choice of Forum Act," since it allows the corporate defendants — not the plaintiffs — to select the court system they prefer.[3]

Similarly, suppose a class of Oklahoma property owners allege that they have been

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[3]Under current law, this case would remain in state court because the plaintiffs and many of the defendants are citizens of New York, and thus the diversity of citizenship necessary to establish federal jurisdiction under 28 U.S.C. 1332 does not exist. In addition, federal jurisdiction might also be lacking because each class member does not have the requisite $75,000 in controversy. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973).

unlawfully deprived of oil and gas royalties by an Oklahoma utility company (through its Oklahoma-based sales force), and by the Oklahoma firm's parent company, a Texas-based energy conglomerate, incorporated in Delaware. The property owners, who, on average have lost $5,000 each but stand to lose much more if the companies' practices are not stopped, file suit in state court under a Oklahoma consumer protection statute and Oklahoma common law. There is no reason why an Oklahoma state court should not handle this class action. Surely, most Oklahoma trial courts, and the Oklahoma appellate courts on review, will be more familiar with the state-law issues than would a federal court sitting in Oklahoma or the relevant federal appeals court headquartered in Denver, composed mostly of judges who have little or no background in Oklahoma law. And yet H.R. 1115 virtually assures that, regardless of the plaintiffs' wishes, this one-state controversy, involving only state law, will end up in federal court.

These hypotheticals demonstrate that H.R. 1115 dishonors the proper spheres of the states and the federal government in our federal system. The bill is a resounding vote of "no confidence" in our state courts. It is premised on a deep — and misplaced — distrust in state courts' ability to uphold the law. Our Constitution properly assumes that the states are fully capable of interpreting their own laws and handing out justice impartially.

**B.** Although this radical revision of the allocation of authority between the state and federal courts is enough in itself to warrant the rejection of H.R. 1115, it is the inefficiencies created by the bill that may pose the largest roadblock to justice for ordinary citizens. By channeling most state-law based class actions to the federal courts, H.R. 1115 will further

weaken the ability of litigants to obtain justice in our federal courts. As Chief Justice William H. Rehnquist has repeatedly explained in his annual report on the judiciary, the federal courts are already overburdened with cases that traditionally are dealt with in state courts, and the federal courts cannot bear any additional burden. *See, e.g.,* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 5-7 (Jan. 1, 1999). And the Chief Justice has particularly asked Congress to consider reducing, not expanding, federal diversity jurisdiction. *Id.* at 7.

Moreover, not only would H.R. 1115 increase the caseload of the federal courts, but it would do so with cases that are extremely complex and time consuming. Making matters even worse, these new federal cases involve solely issues of state law, with which state-court judges are intimately familiar, but federal judges generally are not.

The caseload burden imposed by H.R. 1115 would be reason enough to reject this legislation at any time, but the problem is particularly acute now, because the civil docket in some districts is severely backlogged. In short, H.R. 1115 promises that injured consumers will be put on "hold" in the overburdened federal courts, without any opportunity to litigate their cases in state courts where they properly belong.

**C.** The proponents of H.R. 1115 try to justify the bill on the ground that there is a class action "crisis" peculiar to the state courts. In general, the class action tool is a tremendous benefit to Americans. It is an important and powerful component of our civil justice system that can compensate ordinary citizens who, acting individually, would not have the means to challenge corporate and governmental wrongdoers. As noted at the

beginning of this testimony, Public Citizen recognizes that class action abuse threatens to sour the public on class actions and harm the very people that the class action tool is supposed to help. But it is wrong to think that abuse is limited to state courts. For instance, a federal appeals court approved the Chrysler minivan settlement — where the settlement did little more than restate Chrysler's prior promise to a federal regulator to fix the class members' defective door latches, with Chrysler agreeing to pay the lawyers five million dollars in fees.[4] Unfortunately, other serious abuses in settlement approval have occurred in federal trial and appellate courts.[5]

The state courts can play an important role in preventing abuse. When the corporate community began pushing the legislation that is now H.R. 1115, it relied on anecdotes from class actions in Alabama where, the argument went, the state courts had been certifying classes without following reasonable procedures. Responding to due process and forum-shopping concerns from corporate defendants, however, the Alabama Supreme Court has abolished the practice of certifying class actions before the defendant has an opportunity to

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[4]*Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

[5]S*ee, e.g., In re Mexico Money Transfer Litigation*, 267 F.3d 743 (7th Cir. 2001). Some of the most questionable coupon settlements have been approved by federal courts. *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 257 (N.D. Ga. 1993); *States of New York & Maryland v. Nintendo of Am.*, 775 F. Supp. 676, 682 (S.D.N.Y. 1991); *In re Cuisinart Food Processor Antitrust Litig.*, 1983 WL 153 (D. Conn. Oct. 24, 1983); *Ohio Public Interest Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1 (N.D. Ohio 1982); *see generally* "In Camera," 16 *Class Action Reports* 369, 485-87 nn.2-8 (July-Aug. 1993). For a full discussion of this issue, see Public Citizen, "Class Action Settlements: Federal Courts Are No Better than State Courts When It Comes to Protecting Consumers" (April 15, 2003), a copy of which is attached to this testimony.

answer the suit. The Alabama court made clear that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied.[6] State courts have been vigilant in other cases as well.[7] In sum, there is no crisis in the state courts.

**D.** There should be no mistaking why this bill's proponents want class actions moved to federal court. Businesses perceive an advantage in defending these cases in federal court. To quote from a recent law journal article written by two corporate class action defense lawyers: “As a general rule, defendants are better off in federal court ... there is generally a greater body of federal law precedent favorable to defendants.”[8]

Some of the advantages are obvious, such as the fact that federal judges often feel obliged to interpret state laws conservatively and reject novel claims. Others are more subtle. Currently, Public Citizen’s Congress Watch is compiling a comprehensive report on the class action suits settled by the industries lobbying for this bill. The report’s preliminary findings indicate that each of these industries, including insurance, tobacco, retail, automotive, and other giants, have fared much better in federal courts than state courts.

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[6]*See, e.g., Ex Parte State Mutual Ins. Co.*, 715 So.2d 207 (Ala. 1997); *Ex Parte American Bankers Life Assur. Co. of Fla.*, 715 So.2d 186 (Ala. 1997).

[7]*See, e.g., Bloyed v. General Motors*, 881 S.W.2d 422 (Tex. Ct. App. 1994), *aff'd and remanded,* 916 S.W.2d 949 (Tex. 1996). *See also* http://tm0.com/LAW/sbct.cgi?s=141867472&i=504100&m=1&d=2534849 (describing April 2002 holding of Florida state trial court rejecting class action settlement on ground that plaintiffs obtained little or no value, but plaintiffs’ counsel sought sizeable fee).

[8]Reid and Coutroulis, “Checkmate in Class Actions: Defensive Strategy in the Initial Moves,” *Litigation* (Winter 2002).

Much of the advantage comes from the federal courts' overly restrictive interpretation of certification rules. When that report is released later this month, copies will be provided to the Committee.

As evidence of the supposed state-court class action "crisis," the supporters of H.R. 1115 rely on a few examples of settlements in which the class members were cheated at the expense of their lawyers. Although abuses do occur in state **and** federal court, those abuses generally must be fought in the courts, and certainly not through ill-advised and sweeping responses like H.R. 1115. Moreover, the anecdotes are just that — anecdotes — and much more evidence showing a systematic pattern of abuse in the state (as opposed to federal) courts is required before Congress should consider enacting anything approaching the radical transformation in our state-federal balance contemplated by H.R. 1115.

In sum, H.R. 1115 should be rejected as unwise and unnecessary. It is an unfair attack on the integrity of the state courts and their ability to provide justice to their citizens, and it comes at a time when the federal courts are unable to handle the enormous increase in caseload that H.R. 1115 would produce.

**II. Other Serious Problems With Sections 4 and 5 of H.R. 1115.**

Although we believe that H.R. 1115 should be defeated, it should surely not be enacted in its current form. The following amendments would improve the bill.

Ë **Eliminating H.R. 1115's Federalization of State-Court Private Attorney General and Joinder Actions.** In one respect, H.R. 1115 is far more ambitious than most of its predecessors in stripping the state courts of their historical jurisdiction and their role

in protecting the rights of their own citizens. H.R. 1115 federalizes more than class actions: Under proposed 28 U.S.C. 1332(d)(9), this bill would also create federal jurisdiction for two additional categories of cases: (1) private attorney general actions brought by any organization or citizen; and (2) groups of cases in which 100 or more individuals seeking monetary relief seek to try **any** common legal or factual issue together. This provision is so extreme — and its potential effect so immense — that it deserves special consideration.[9]

Proposed section 1332(d)(9)(A) would define private attorney general actions as class actions and allow them to be removed to federal court if filed in state court. The provision is obviously aimed at actions under section 17200 of the California Business and Professions Code, which has proved an important tool for victims of unfair and deceptive business practices. In section 17200, the California Legislature has decided to provide legal standing for organizations and individuals to act as private attorneys general that is broader than the standing generally allowed in the federal courts. Apparently, the California Legislature has seen fit to allow private parties to combat corporate fraud and other malfeasance on the theory that the California Attorney General simply does not have the resources to do it all on his or her own. That policy choice, in our system of federalism, is California's prerogative,[10] at least before H.R. 1115. Proposed section 1332(d)(9)(A) would override that state policy choice and transfer California private attorney general actions to federal court,

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[9]This provision surfaced once before, in the 107th Congress in H.R. 2341. It did not appear in its predecessors, such as H.R. 1875, introduced in the 106th Congress.

[10]*City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 243 (1983) (state courts are free to have less restrictive standing requirements than those imposed by federal courts).

where they would be automatically deemed class actions and be subjected to federal Rule 23 certification criteria and federal standing requirements.

And that's not all. H.R. 1115's puny exclusions for federal jurisdiction — for instance, where the aggregate value of the claims is $2 million or less, or where the number of affected people is fewer than 100 — do **not** apply to its private attorney general action provision. And because we know that in a state as large and as transient as California, any private attorney general action seeking compensation for all victims of a corporation's in-state misconduct will involve some significant number of out-of-state victims, virtually all 17200 actions seeking monetary relief will be removable to federal court.[11]

H.R. 1115's federalization of individual joinder actions may be even worse than its treatment of private attorney general actions. Proposed 28 U.S.C. 1332(d)(9)(B) would define damages suits filed in state court by **individual** plaintiffs as class actions if, at any time, 100 or more plaintiffs sought to try **any** common legal or factual issue. Assume, for instance, that 250 plaintiffs in Kentucky filed suit seeking an injunction under Kentucky common law against a local chemical plant spewing toxic arsenic into the adjoining neighborhoods. The plant is run by a regional chemical manufacturer with plants not only in Kentucky, but also in Indiana and Illinois, where its corporate headquarters is located. The plaintiffs also seek damages for personal injuries and compensation for damages to

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[11]States other than California permit private attorney general actions under their deceptive acts and practices statutes. H.R. 1115 would federalize such actions as well. The focus here is on the California law because it has been an important tool for consumers and it is the obvious target of proposed 28 U.S.C. 1332(d)(9)(A).

homes and businesses in the vicinity of the plant. Some of the plaintiffs' claims are significant, but most, particularly those involving only property damage, are valued at between $10,000 and $30,000. For purposes of efficiency, and to enable them to afford the high costs of litigation, the plaintiffs move to join their cases for a determination on common factual issues (such as the frequency and toxicity of the emissions) and common legal questions (such as whether the state's regulatory emission standards govern the common-law duty of care). Each plaintiff plans to try his or her damages claim individually because those claims are based on issues that are not shared commonly by the 250 plaintiffs.

Under current law dating back to the creation of the federal courts (and, indeed, even under most of H.R. 1115's predecessors), these individual actions could only be tried in state court. But under H.R. 1115, these 250 cases could be removed to federal court, away from the trial and appellate courts with expertise in Kentucky law, perhaps many miles from the town in which the injuries arose and, if an appeal were ever filed, to a federal court of appeals sitting in Cincinnati.

But the affront to federalism is even greater. Under proposed 28 U.S.C. 1332(d)(9), the individual joinder actions described above "shall nevertheless be deemed a class action" for the purposes of federal jurisdiction, and are thus subject to the certification requirements of Federal Rule of Civil Procedure 23 after they are removed to federal court. However, unlike the bill's treatment of genuine class actions, these individual state-law cases are not dismissed without prejudice to re-filing in state court if Rule 23's requirements are not met; rather, they remain in limbo in federal court (presumably for adjudication on the merits,

although the bill does not say). *See* proposed 28 U.S.C. 1332(d)(9) (last sentence). This provision is unprecedented, because it would require the federal court to adjudicate dozens or even hundreds of garden-variety state tort claims on an individual basis — claims valued at far less than the $75,000 jurisdictional amount set by Congress for federal court diversity cases under 28 U.S.C. 1332(a).

Ë **Enacting A Meaningful Exclusion for Intrastate Class Actions.** The rationale of diversity jurisdiction when it was first enacted at the end of the 18th century was to avoid prejudice against out-of-state defendants. As the Chief Justice pointed out in his 1998 annual report, that rationale is not nearly so powerful in today's society. *See, e.g.,* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 7 (Jan. 1, 1999) (noting that in 1789, when the Judiciary Act was enacted, "there was reason to fear that out-of-state litigants might suffer prejudice at the hands of local state-court judges and juries, and there was legitimate concern about the quality of state courts. Conditions have changed drastically in two centuries.").

Under H.R. 1115, an in-state class of plaintiffs suing under their own state law can keep a state-law class action in state court **only** if the primary defendants are citizens of that state. (A corporation's citizenship is generally defined to include both the state in which it has its principal place of business and its state of incorporation). To be blunt, that makes little sense in a society in which large corporations have a significant business presence in many states. Surely, Disney should be required to defend a suit in state court in Florida, as well as in California, where it has its headquarters. Ford Motor Company should not be able

to remove a suit from state court in Kentucky, where it has a substantial manufacturing plant, as well as in Michigan (where it has its headquarters). Thus, at the very least, the portion of proposed 28 U.S.C. 1332(d)(3) — which purports to, but does not in reality, bar federal jurisdiction over certain intrastate class actions — should be amended. Under the amendment, the federal court would not have jurisdiction in class actions in which a substantial majority of the class members are citizens of a single state of which the primary defendants are also citizens "or in which the primary defendants have a substantial business presence," and the claims asserted will be governed primarily by the laws of that state.

## III. Other Provisions of H.R. 1115 Undermine Consumer Interests.

Ë **H.R. 1115's Automatic Appeal Provision Would Impose Grave Harm on Consumers.** Section 6 of H.R. 1115 provides an interlocutory appeal as of right to anyone adversely affected by a district court's decision to certify (or not to certify) a class action under Rule 23. Since 1998, Federal Rule of Civil Procedure 23(f) has allowed permissive interlocutory appeals of class certification decisions. Rule 23(f) is reserved for cases in which an erroneous decision threatens to impose serious harm on a litigant.[12] The courts of appeals are now in the process of setting standards governing the circumstances in which such permissive appeals should be allowed. Thus, section 6's drastic expansion of the federal appellate docket is unnecessary. In 2001, federal appellate case filings climbed to

[12] *E.g., Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000).

record levels, part of a decade-long trend.[13] In 2002, federal appellate filings set another record, although the rate of growth was smaller.[14] Section 6 of H.R. 1115 would add a new category of complex appeals to the already crowded appellate docket. More fundamentally, the proposal is directly contrary to Supreme Court precedent[15] and longstanding federal policy against piecemeal litigation that, with a few narrow exceptions, requires a "final decision" before an appeal may be taken.[16]

Let's be clear why this provision is in the bill: Corporate defendants want the right to appeal class certification immediately to delay the case and make sure that the merits (including any merits discovery) are not reached until years down the road. That delay, of course, undermines the plaintiffs' ability to press their cases to trial and to receive reasonable settlement offers. A federal civil appeal currently takes, on average, a year from filing to decision,[17] with some circuits having greater delays.[18] Of course, class actions are not "average" cases, because of their complexity and because the parties will generally request and receive oral argument, and so the appeals to which this provision would apply will take

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[13]*See* http://www.uscourts.gov/judbus2001/front/highlights.pdf (2001 caseload highlights: "Rising for the seventh consecutive year, appeals filings grew 5 percent to an all-time high of 57,464").

[14]*See* http://www.uscourts.gov/judbus2002/front/jdbusiness.pdf (2002 caseload highlights).

[15]*Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

[16]28 U.S.C. 1291; *Catlin v. United States*, 324 U.S. 229, 233-34 (1945).

[17]http://www.uscourts.gov/judbus2002/appendices/b04sep02.pdf.

[18]*Id.* (Sixth Circuit; Ninth Circuit).

considerably longer than average, as is the case for almost all the federal appeals in which Public Citizen is involved. If they lost on appeal, defendants could seek certiorari to the Supreme Court, which would rarely, if ever, succeed, but which would add 6 to 9 months to the delay.

Another aspect of this provision unmasks its improper purpose: Unless otherwise ordered because specific discovery is necessary to preserve evidence or prevent undue prejudice to a party, all proceedings in the district court are stayed during the pendency of the appeal. This automatic stay provision demonstrates that the bill seeks to take all pressure off the defendant for a long period of time after a district court certifies a class. Rule 23(f) — the permissive appeal provision discussed above — takes the opposite approach; it says that, unless otherwise ordered, proceedings in the district court will **not** be stayed during the pendency of an appeal.

In sum, this provision will be very harmful to plaintiffs with meritorious claims. It will increase the number of "sell out" settlements because no other kind of settlement will be offered until years of appellate proceedings have ended. It will overload the already overworked appellate courts. It has no relationship to the bill's supposed concerns about overlapping class actions in **state** court, and indeed it is hostile to one of the bill's stated purposes — to enable plaintiffs with meritorious claims to achieve justice. Even if H.R. 1115 were otherwise worth supporting — which it is not — the bill should be rejected based on section 6 alone.

Ë **The Bill Does Nothing to Address the Problem of Coupon Settlements.** Much

of the effort by corporate defendants, and some in Congress, to convince the public of the need for class action reform, is based on stories about coupon settlements, in which the class members obtain certificates for a few dollars off a future purchase of the defendant's product, and class counsel walks away with millions of dollars in fees. Although the rhetoric regarding coupon settlements sometimes outpaces the reality, coupon settlements are a real problem when the class member has no use for, does not want, or cannot afford the product, the coupon is difficult to obtain or use, or the settlement does not include a market maker who can sell the coupon on the class member's behalf to a third party who wishes to use it. In such cases, coupon settlements are nothing more than promotions of the defendants' products rather than anything of value to the consumer as redress for prior wrongdoing.

However, the corporate community's use of stories about coupon settlements to drive the class action debate drips with irony because, as the old saying goes, "It takes two to tango." The coupon settlement is **their** creation; defendants love coupon settlements in which the coupon will have little or no value. The settlement provides a modest marketing gimmick for the defendants' products, while ridding the defendants of potentially troublesome litigation for little more than the cost of attorney's fees. The little empirical evidence that exists demonstrates that most class members get nothing from coupon settlements because redemption rates are very low.[19] Such low rates can result from

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[19]*See, e.g., Buchet v. ITT Consumer Financial Corp.*, 845 F. Supp. 684, 695-96 (D. Minn. 1984) (minuscule coupon redemption rates), *amended*, 858 F. Supp. 944, 944-45 (D. Minn. 1984) (citing additional information to same effect); "In Camera," 16 *Class Action Reports* 369, 485-87 nn.2-8 (July-Aug. 1993) (survey of coupon settlements, showing that settling (continued...)

indifference, lack of proper notice, a lack of desire to use the coupon to purchase another one of the defendant's products that is the subject of the lawsuit, or, in cases involving big-ticket items, an inability to afford the defendant's product. That's why defendants are willing to pay class counsel in cold, hard cash to make the litigation go away.

So, what does H.R. 1115 do about the issue? Other than lip-service, **absolutely nothing.** Under proposed 28 U.S.C. 1714, a part of the so-called "consumer class action bill of rights," a coupon settlement may be approved only after a hearing and a written judicial finding that "the settlement is fair, reasonable, and adequate for class members." But all state and federal courts already hold settlement hearings (known as "fairness hearings"), and all state and federal courts approve settlements only after issuing a written finding that the settlement is "fair, adequate, and reasonable" — the universal settlement approval standard. Thus, every time a court approves a coupon settlement, it makes a finding that the settlement is fair, adequate, and reasonable. Section 1714 would add no additional "judicial scrutiny," contrary to what its title suggests.

There is a solution, however, but it is one that corporate defendants dread: Pay class counsel's fee based on a reasonable percentage of the coupons **actually** redeemed.

In some cases, class counsel have simply multiplied the number of certificates issued

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[19](...continued)
parties generally vastly overstate expected redemption rates and that, without transferability, settlement coupons are generally worthless); B. Meier, "Fistful of Coupons—Millions for Class Action Lawyers, Scrip for Plaintiffs," *New York Times*, pp. D1, D5 (May 26, 1995) (only one percent redemption rate where coupons could be used toward purchase of new vehicle).

by the certificate's face value and asked for a "reasonable" percentage of the resulting figure. In other cases, fees have been awarded as a percentage of the plaintiffs' expert's prediction regarding the level of coupon redemption,[20] predictions that, as noted above, are at odds with what is actually known about **actual** coupon redemption rates in consumer class actions. Either way, corporate defendants have gladly paid up.

Whatever one thinks of coupon settlements — and there are arguments against their use in any case — this value-based method of awarding fees will surely eliminate the worst settlements. With the prospect of a paltry fee, no longer would class counsel agree to a settlement in which coupons are non-transferable,[21] or in which the impediments to redemption are so great as to render the coupons valueless to most class members.[22] In fact, by tying counsel's fate to that of their clients, the typical coupon settlement would become a thing of the past, and only settlements in which the coupon has a cash redemption value or the settlement includes the participation of a secondary market-maker — in other words, a settlement that actually broadly benefits the class — would be worth counsel's efforts.[23]

## IV. An Alternative to H.R. 1115's Anti-Consumer, Overkill Approach.

As explained above, H.R. 1115 would provide federal jurisdiction for almost all state-

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[20] *In re Domestic Air Transp. Antitrust Litig*., 148 F.R.D. 297, 322 (N.D. Ga. 1993); *see General Motors*, 55 F.3d at 807-10.

[21] *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1805 (1996).

[22] *General Motors*, 55 F.3d at 808-10.

[23] *See* National Ass'n of Consumer Advocates—Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375, 382-84 (1998); *General Motors*, 55 F.3d at 809.

law class actions — even where only one class action has been filed, and the class members, who reside in one state, have sued in their own state courts for relief under that state's law. As I've said, that overkill approach is an affront to federalism, would overload the already crowded federal dockets with state-law cases, and simply makes no sense because it attacks a non-existent problem. Nevertheless, modest reform is appropriate. In recent years, critics have noted that problems arise when multiple class actions, involving many of the same class members suing the same defendants on the same or similar claims, are filed in different courts. Such overlapping class actions can be wasteful. Multiple counsel and multiple courts will be called upon to consider the same discovery issues, entertain the same motions (including class certification motions), and, in theory, try the same case (although such cases rarely are tried). Moreover, when some or all of the cases are filed in different state courts (or in state and federal courts), there is no mechanism for consolidating the actions.

Even more important, multiple class actions may, in some circumstances, hurt class members because their presence allows the defendant, in seeking settlement, to choose plaintiffs' counsel most willing to settle on terms favorable to it. This so-called reverse-auction phenomenon — in which the price of the plaintiffs' claims (though not class counsel's fee) are bid down, not up — is a serious concern in some cases.

Senator Leahy has proposed legislation that would allow most regional or national class actions — defined as cases in which significant numbers of class members reside in three or more states — to be filed in, or removed to, federal court. This legislation would have the effect of allowing the consolidation of multiple regional or national state-court class

actions, after removal, by the federal Judicial Panel on Multidistrict Litigation.[24] This is the approach preferred by the Judicial Conference of the United States, which opposes H.R. 1115. Under Senator Leahy's legislation — which is modeled on the Judicial Conference's concerns — a class action filed in state court would not be removable to federal court if a principal defendant were a citizen of the forum state. That result makes perfect sense since a defendant can hardly claim "prejudice" if it is sued in its home state.[25] Senator Leahy's proposal contains other genuine reforms — such as taking real aim against valueless coupon settlements by requiring fees to be calculated as percentage of actual coupon redemption and by banning settlements that waive class members' future legal rights. In sum, Public Citizen is prepared to support real reform that helps consumers and protects the legitimate interests of corporate defendants in efficiency and fairness. H.R. 1115 provides none of that.

* * *

In closing, I want to reiterate our opposition to this legislation. Since the founding of the Republic and the first Judiciary Act, it has been our shared national understanding that litigation of state-law questions would, in general, be the province of state courts. The enormous expansion of federal court power envisioned by H.R. 1115 is unwise because it tears a large hole in the fabric of federal-state relations and because it imposes a considerable burden on our already overworked federal court system. If there are genuine problems with

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[24] *See* 28 U.S.C. 1407.

[25] In this regard, Senator Leahy's proposal honors the traditional rule in diversity cases, which prohibits a defendant from removing a case if the defendant is a citizen of the forum state. *See* 28 U.S.C. 1441(b) (second sentence).

state-court class actions, Congress should work hand-in-hand with state courts and legislatures to resolve them, mindful of the vital state interests that are implicated when Congress proposes curtailing state-court jurisdiction. Senator Leahy's proposal is a good place to start. But under no circumstances should Congress adopt the heavy-handed approach embodied in H.R. 1115.

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

# Class Action Settlements: Federal Courts Are No Better than State Courts When It Comes to Protecting Consumers

A chief claim of the business lobby promoting federal class action legislation is that it will stop class action settlements that hurt consumers. While there are abuses in state court class actions, the premise that these abuses will disappear upon removal to the federal courts is flawed. Too often, proposed class action settlements in both state and federal courts are reviewed perfunctorily with little regard for consumers' interests. These abuses generally manifest themselves in two ways: the undervaluation of plaintiffs' claims and the overvaluation of plaintiffs' attorney's fees. Such arrangements often occur through collusion between the attorneys for the defendants and plaintiffs. However, nothing in proposed federal class action legislation addresses either of these issues. Allowing the removal of the majority of state-based class actions is definitely not the solution, as class action abuse occurs in the federal courts as well.

Consider the following results in the preliminary Federal Judicial Center study looking at class actions in two federal district courts:

- The rate of settlement approval was high. In the Eastern District of Pennsylvania, 34 out of 38 proposed class action settlements (89%) were approved without *any* changes. In the Northern District of California, 26 out of 30 (87%) class action settlements were approved without any changes. In the 28 cases throughout the four district courts where motions to certify and approve settlement were submitted simultaneously, 86% (24 of 28) of the settlements were approved without *any* changes.

- The median length of the fairness hearing on the class action settlement was short; 38 minutes in the Eastern District of Pennsylvania and 40 minutes in the Northern District of California.

- Attorneys fee requests were not generally scrutinized carefully. In the vast majority of cases, the court awarded the same amount as requested by the plaintiffs' attorneys. In the Eastern District of Pennsylvania and the Northern District of California, the court awarded the *exact* amount requested by the plaintiffs' attorneys in 83% of the cases.

As John C. Coffee, Jr. stated in his Columbia Law Review article, *Class Wars: The Dilemma of the Mass Tort Class Action*, these statistics demonstrate a pattern in the federal courts of "judicial passivity" regarding class action settlements. This "judicial passivity" can have a devastating impact on injured plaintiffs in federal class actions.

On the following pages are just a few examples where federal courts have approved class actions settlements that do little or nothing to help injured plaintiffs:

- In *In Re Domestic Air Trans. Antitrust Litig.*, plaintiffs filed a series of class actions alleging that a number of major airlines, including American, Continental, Delta, Northwest, TWA, United, and USAir engaged in the price fixing of passenger air transportation. The case was consolidated for pretrial matters in the Northern District of Georgia. The case settled and the District Court approved the settlement that provided plaintiffs with coupons worth between $10 and $200 for flights costing between $50 and $1,500. The plaintiffs' attorneys were awarded approximately $10 million in fees. While coupon, or "scrip" settlements like this one offering discounts on the defendant's product are popular, they often offer no greater discount than what would be available in volume purchases, cash sales, or using a particular credit card. In addition, restrictions are generally placed on the transferability of these coupons, making them even less likely to be used.

- In *Hanlon v. Chrysler Corp.*, plaintiffs filed a class action suit in federal court in San Francisco because the rear latch on Chrysler's minivan was defective and had a tendency to disengage. These latches had caused serious personal injuries to a number of plaintiffs. The case was settled on a nationwide basis; the settlement provided that Chrysler would offer class members a new improved latch if the owner presented the van to a dealer. While this sounds like an appropriate outcome, Chrysler had already previously agreed to replace the latches under an informal agreement with the National Highway Traffic Safety Administration (NHTSA). Moreover, at the time of settlement, the retrofit latch was not ready. So, class counsel apparently agreed to something it could not have properly assessed to determine its sufficiency and which the government had already obtained outside the litigation process. In addition, the agreement provided for up to $5 million in attorney's fees for the plaintiffs' counsel. The settlement was approved by the District Court in 1996 and upheld by the 9th Circuit Court of Appeals in 1998.

- In *In Re: Orthopedic Bone Screw Products Liability Litigation*, the U.S. District Court for the District of Pennsylvania approved a notice plan where the plaintiffs' attorneys only sent a full notice package to people who had already filed suit against AcroMed. Although defendant AcroMed possessed records of the physicians and hospitals to which it sold the defective screws, no effort was made to contact them or their patients. Class members who did not see the published notices in time to register were left out of the settlement, despite the fact that there was an efficient way to find them with the defendant's sales records. Those left out of the class were not allowed to file individual suits or recover anything for the injuries caused by the defendant's defective product.

  The same case contains another problematic ruling by a federal judge. Some plaintiffs allege claims against their surgeons on the ground that the surgeons should have warned of FDA refusal to approve the AcroMed bone screw implanted in their bodies. Plaintiffs also claim that surgeons and hospitals took stock from AcroMed and put those financial interests ahead of their patients in a clear conflict of interest. However, the settlement bars claims against the surgeons who implanted the screws and hospitals where the surgeries took place, despite the fact that those surgeons and hospitals were not parties to the settlement and the class received nothing in exchange for dropping their claims against those surgeons and hospitals. The settlement release goes so far as to bar claims against doctors who told their patients that the device was FDA approved when they knew it was not. AcroMed defends the release of

the surgeons and hospitals on the ground that it needs to maintain good relations with its customers to insure future profitability.

- In *Reynolds v. Beneficial National Bank* the Seventh Circuit Court of Appeals reversed a $25 million settlement of class action lawsuits over H&R Block's tax refund loan program after concluding that the federal district judge who approved the settlement did not provide the "beady-eyed scrutiny" required to ensure that the settlement was "fair, adequate, and reasonable, and not a product of collusion." The litigation arose out of refund anticipation loans (RALs) made jointly by Beneficial National Bank and H&R Block. When Block filed a refund request with the IRS for one of its customers, the refund normally arrived within a few weeks. But even a few weeks is too long for the neediest taxpayers, and so Beneficial through Block offered to lend the customer the amount of the refund for the period between the filing of the return and the receipt of the refund. The annual interest rate on such a loan often exceeded 100 percent. Block arranged the loan but Beneficial put up the money for it. Not disclosed to the customer was the fact that Beneficial paid Block a fee for arranging the loan and that Block also owned part of the loan.

  Beginning in 1990, more than 20 class actions were brought against the defendants on behalf of RAL borrowers. The suits charged a variety of statutory violations, but perhaps the most damaging charge was the claim that Block's customers were led to believe that Block was acting as their agent, when Block was in fact, without disclosure, engaged in self-dealing. Block's lawyers sought out one team of plaintiffs' attorneys who accepted a settlement that dismissed all the cases, and provided virtually no benefits to class members, but lavished high fees upon the less-than-aggressive lawyers. When the federal district judge approved the settlement, lawyers for other plaintiffs appealed.

  The appellate court found that the federal district judge failed to exercise the high degree of vigilance required in class actions; did not give the issue of the settlement's adequacy the care it deserved; relied on an unsworn report by an expert; substituted intuition for evidence; and encouraged the attorneys for the class to submit their application for attorneys fees under seal, even though there was no legal authority for such secrecy. In short, the federal judge abused his discretion in approving the settlement. The Court of Appeals set aside the settlement and the order approving attorney fees, and sent the case back to the District Court. In addition, the Court took the unusual step of ordering that a different judge be assigned to handle the case in the future.

- In the *Mexico Money Transfer Litigation*, plaintiffs filed a class action for treble damages against Western Union and MoneyGram. They claimed fraud because the advertised wire transfer fee they paid over the counter (typically $15) did not represent the full cost to customers. In practice the companies also collected and retained for themselves the difference between the retail currency exchange rate quoted to the customers and the wholesale (interbank) rate, the so-called FX spread which averaged about $25 per transaction. Class representatives estimated that defendants make as much as $300 million per year from the FX spread, and they sought treble this sum, over many years, as damages. The proposed recovery thus ran into the billions of dollars. The case settled was for much less and the settlement was challenged as being inadequate. This is one of many class

actions in which everyone other than the plaintiffs has been paid in cash. The attorneys got cash, the charitable organizations got cash, and the customers got coupons. The coupons had a face value of $400 million, but experts estimated that about half of the coupons would not be claimed, and only 20% to 30% of those claimed would be used, implying a net value of $40 million to $60 million.

- In *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, the Federal District Court in Philadelphia approved a settlement of a nationwide class action to obtain repair damages or retrofit of the 5-6 million side-saddle fuel tank GM Trucks. Class members were to receive a $1,000 coupon, good for 15 months, toward the purchase of a new GM Truck or minivan. The class included truck owners in all states except Texas. Class members could transfer the coupon to third parties, but then the coupon was worth only $500 and could not be used in conjunction with the ubiquitous GM rebates and credit deals. Other restrictions on the $500 coupon made it virtually worthless. The settling parties' expert himself conceded that 54% of the class members would get nothing at all from the settlement. Nevertheless, the district court awarded $9.5 million in attorney fees and $500,000 in expenses. Public Citizen and other groups objected to the settlement without success in the district court. They then appealed to the Court of Appeals where they were successful in overturning this settlement.

- *Kaiser v. Cigna Health Care Systems* was an attempt by Cigna to circumvent a massive lawsuit, involving all the major healthplans in the country, by offering a deal valued at between $50 million and $200 million to a group of Illinois-based lawyers who said they represented the doctors in an Illinois courtroom. The doctors' primary lawyers, presenting the case in Miami federal court in front of U.S. District Judge Federico Moreno, termed the deal woefully inadequate. They accused Cigna of corruption and collusion in trying to reach a settlement without approval by Moreno, who had previously been directed by a federal panel to deal with all the claims in the national case. Although Cigna could have attempted to push through its collusive settlement before one of several state-court judges presiding over similar cases, it instead found an Illinois federal judge, G. Patrick Murphy, to approve the settlement.

  The federal Judicial Panel on Multi-district Litigation overturned the settlement, ordering that the case be transferred to Judge Moreno. Moreno has presided over a consolidated class action against Cigna and several other health care providers for the past three years. The Miami lawsuit alleges that Cigna, Aetna, United Healthcare, Coventry Health Care, WellPoint Health Networks, Humana Health Plan, PacifiCare Health Systems and Anthem BlueCross BlueShield delayed or denied reimbursements for health services and rejected claims for medically necessary treatments as part of a racketeering conspiracy.

It is clear that there are abusive class action settlements in both state and federal court. To assume that removing the vast majority of state class actions to federal court will solve this problem is erroneous. Nothing in either of these bills takes this into account and they are not the way to solve anti-consumer abuses in the class action system.

April 15, 2003