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Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions

*Lisa Litwiler**

I. INTRODUCTION

Class action litigation can be a useful tool to protect consumers from corporate misconduct, particularly where the individual claims are too small to be economically viable. However, class actions are subject to abuse by unscrupulous counsel, some of whom use the mechanism to enrich themselves at the expense of the clients they claim to represent. As one commentator has noted, “In many of these cases, the victimized consumers often receive pennies, or nearly-worthless coupons, while plaintiffs’ counsel receives millions in legal fees.”¹ Moreover, class actions are increasingly being filed over frivolous matters, often without the knowledge or consent of the proposed class members.² Indeed, although they were “[o]nce considered a tool of judicial economy . . . class actions are now often considered a means of defendant extortion.”³

The current procedures governing class actions are plagued by numerous problems and abuses that threaten to undermine the rights of both plaintiffs and defendants. One key reason for these problems is that most class actions, regardless of their nationwide scope, are adjudicated in state courts where the governing rules are applied inconsistently and, frequently, in a manner that contravenes basic fairness. The number of class

* Associate Professor of Law, Chapman University School of Law. The author wishes to thank Nikole Kingston and Kathleen Tagni, without whose research assistance this article would not have been possible. Any errors which remain are, of course, entirely my own.

¹ American Tort Reform Association, TORT REFORM REC., Dec. 31, 2003, at 44, http://www.atra.org/files.cgi/7668_Record12-03.pdf.

² For example, a lawsuit was recently filed in the Eastern District of Tennessee on behalf of the entire nation against Viacom International, Inc., CBS Broadcasting, Inc., MTV Network Enterprises, Inc., Janet Jackson, and Justin Timberlake over the incident which occurred during the Super Bowl half-time show broadcast on February 1, 2004. Lisa de Moraes, *Jackson’s Flash Has an Afterimage that Won’t Fade*, WASH. POST, Feb. 6, 2004, at C1. See also *Pop Notes*, WASH. POST, Feb. 11, 2004, at C5 (noting that the suit had been withdrawn by the plaintiff who had “made her point”).

³ American Tort Reform Association, *supra* note 1, at 44.

action suits brought against Fortune 500 companies increased dramatically between 1988 and 1998, and the vast majority of these actions were brought in state courts⁴ where there is often inadequate supervision over litigation procedures and proposed settlements.⁵

Furthermore, current law enables lawyers to manipulate procedural rules to bring multi-state class actions in certain state courts whose judges may be inclined to certify improper classes and approve fundamentally unfair settlements. As Congress has noted, “In this environment, consumers are the big losers: in too many cases, judges are readily approving class action settlements that offer little – if any – meaningful recovery to the class members, and simply enrich class counsel.”⁶ In many of these suits the client-attorney relationship is reversed. The class serves at the pleasure of the attorneys who have the last say as to where, when, and which suits are filed.⁷ Plaintiffs’ attorneys often manipulate the system—dropping plaintiffs and claims that may defeat the class status.⁸

Class actions have had an economic impact as well. The United States Chamber of Commerce has observed that:

Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices. In some cases, a company will be forced out of business because of expensive litigation.⁹

Attorneys seek to certify large classes to use as leverage against these corporate defendants, pushing them into settlements that result in relatively little recovery on the part of the plaintiffs.¹⁰ The Chamber of Commerce supports class action reform because it “would move large, multi-state class action lawsuits from state to federal court, preventing widespread

⁴ Victor E. Schwartz et al., *Fair Federal Forums Should Decide Interstate Class Actions*, 69 U.S. L. WK. 2115, 2115 & n.1 [hereinafter Schwartz, *Fair Federal Forums*] (noting that filings in federal courts grew 338% while filings in state courts grew by more than 1,000%). See also DEBORAH HENSLER ET AL., PRELIMINARY RESULTS OF THE RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

⁵ Schwartz, *Fair Federal Forums*, *supra* note 4, at 2117-18.

⁶ S. REP. NO. 108-123, at 6 (2003).

⁷ Schwartz, *Fair Federal Forums*, *supra* note 4, at 2116.

⁸ *Id.*

⁹ *Class Action Reform*, U.S. Chamber of Commerce, <http://www.uschamber.com/government/issues/reform/classaction.htm> (last updated Dec. 2003) [hereinafter *Class Action Reform*].

¹⁰ Schwartz, *Fair Federal Forums*, *supra* note 4, at 2116.

'venue shopping' by trial lawyers."¹¹

However, the federal class action system has not escaped criticism. Federal cases such as *Amchem Products, Inc. v. Windsor*¹² and *Ortiz v. Fibreboard Corp.*,¹³ involving the certification of settlement classes which the United States Supreme Court ultimately found to be unfair, have highlighted the need for reform. Attempting to address the problems raised by cases like these, the United States Judicial Council has adopted amendments to Rule 23 of the Federal Rules of Civil Procedure, and Congress is currently considering legislation that would significantly impact class actions. However, despite these changes, plaintiffs' attorneys remain free to venue shop in state courts. In fact, in light of the decisions in *Amchem* and *Fibreboard*, plaintiffs' lawyers "have further incentive to avoid federal court."¹⁴

This Article suggests that Congress should go further and place multi-state class actions within the exclusive jurisdiction of the federal judiciary. Adopting such a scheme would minimize the risk that corporate defendants would be subjected to multiple, often inconsistent, verdicts. It would likewise eliminate the anomalous result of the application of inconsistent choice-of-law decisions. Moreover, it would allow multiple suits to be consolidated under the auspices of the federal Multi-District Litigation Panel, which would ensure the orderly progression of suits and result in judicial economies. It would also lessen the frequency of improper certification and fundamentally unfair settlements.

Accordingly, Section Two of this Article begins by examining the *Amchem* decision, which led lawmakers to consider reforming class action procedure. Section Three tracks the changes in the newly amended Federal Rule of Civil Procedure 23 which governs class actions. Section Four examines the currently pending legislation that would federalize the majority of class actions, and Section Five concludes that multi-state class actions, like federal securities litigation, should be within the exclusive province of the federal courts.

¹¹ *Class Action Reform*, *supra* note 9.

¹² 521 U.S. 591 (1997).

¹³ 527 U.S. 815 (1999).

¹⁴ John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 SETON HALL L. REV. 698, 709 (2001).

II. A LOOK AT *AMCHEM*

Amchem Products, Inc. v. Windsor, the case that highlighted the need for reform in class action litigation, was a controversial case concerning a so-called “settlement class.”¹⁵ Settlement class cases are those in which the motion for class certification is brought contemporaneously with a proposed settlement. The issue in *Amchem* was the legitimacy of class settlements under the then applicable Rule 23.¹⁶ At the time *Amchem* was being litigated, asbestos-related litigation had become a crisis. Asbestos cases were clogging both state and federal court dockets and defendants were being sued repeatedly for the same or similar claims, often bankrupting corporations and usually gaining the plaintiff little recovery.¹⁷ Indeed, the Judicial Conference Ad Hoc Committee on Asbestos Litigation observed that the asbestos litigation was

a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.¹⁸

Ultimately, the Committee recommended that Congress create a national asbestos dispute resolution scheme.¹⁹ However, despite the Committee’s report, Congress failed to take any action to control the asbestos litigation. Thus, it fell to the federal courts to try to wrest control. As a result, a group of federal judges familiar with asbestos litigation urged the Judicial Panel on Multidistrict Litigation (“MDL Panel”) to consolidate all

¹⁵ 521 U.S. 591, 597 (1997).

¹⁶ *Id.* at 619.

¹⁷ *Id.* at 598.

¹⁸ *Id.* at 598-99 (quoting REPORT OF THE JUDICIAL CONF. AD HOC COMM. ON ASBESTOS LITIGATION 2-3 (Mar. 1991)).

¹⁹ *Amchem*, 521 U.S. at 598.

then-pending asbestos litigation into a single proceeding to be tried by the U.S. District Court for the Eastern District of Pennsylvania.²⁰ Once the cases were consolidated, each side formed steering committees and settlement negotiations commenced.²¹ The problem, however, was that the MDL Panel only had the authority to consolidate the cases already filed, and any settlement reached in the consolidated cases would not give the beleaguered defendants any repose as to future claims.²²

The solution devised by the steering committees was to certify a class for settlement purposes only.²³ This class was to have been comprised of “future claimants,” as opposed to the plaintiffs already before the court in the consolidated cases.²⁴ Counsel from the plaintiff’s steering committee purported to represent both the currently pending plaintiffs (the “inventory” plaintiffs) as well as future claimants.²⁵ When it appeared that the administrative scheme for binding future claimants was likely to bear fruit, defendants agreed to settle the cases of the inventory plaintiffs for more than \$200 million.²⁶

Acting in concert, the inventory plaintiffs and defendants jointly prepared and filed “a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.”²⁷ Thus, it was clear that this particular class action suit “was not intended to be litigated,” but rather was intended to bind absent potential plaintiffs.²⁸ The proposed class consisted of all people who had not yet filed an asbestos-related lawsuit against one of the participating defendants, but who had either (1) been exposed to asbestos or asbestos-containing products, or (2) had a spouse or family member so exposed.²⁹ The class was not further delineated into subclasses, but was represented by nine named plaintiffs who represented the class as a whole.³⁰

The settlement agreement proposed to settle all claims filed before January 15, 1993, and precluded nearly all class members from litigating against defendant companies after that date.³¹ The settlement proposal described four classes of compensable

²⁰ *Id.* at 598-99.

²¹ *Id.* at 599.

²² *Id.* at 599-600.

²³ *Id.* at 601-02.

²⁴ *Amchem*, 521 U.S. at 601.

²⁵ *Id.* at 600-01.

²⁶ *Id.* at 601.

²⁷ *Id.* at 601-02.

²⁸ *Id.* at 601, 603.

²⁹ *Amchem*, 521 U.S. at 602.

³⁰ *Id.* at 602-03.

³¹ *Id.* at 603.

diseases, along with the range of damages for each category.³² Certain exceptional medical claims might be separately compensated, but the number and dollar amounts of such claims were limited.³³ Furthermore, the scheduled payments were not adjusted for inflation.³⁴ The settlement agreement also discussed methods of determining compensation, dispute review procedures, and other claims limitations.³⁵ Class members were forever bound to the settlement, but defendants could “choose to withdraw from the settlement after ten years.”³⁶

The District Court conditionally certified the class despite objections. The objectors claimed the settlement was unfair as it applied to those who did not yet have compensable claims. Objections also arose as to the lack of compensation for certain types of claims, as well as to the perceived conflict of interest plaintiffs’ counsel would have in representing the various unnamed subclasses.³⁷ The Third Circuit Court of Appeals vacated the certification, holding that the requirements of Rule 23 had not been met.³⁸

The Supreme Court affirmed the appellate court decision.³⁹ It noted that “since the 1966 revision of Rule 23, class-action practice [had] become ever more ‘adventuresome’ as a means of coping with claims too numerous to secure their ‘just, speedy, and inexpensive determination’ if litigated separately.”⁴⁰ The Court further held that in a settlement-only class certification request, the court must protect absentees by giving heightened attention to the Rule specifications and by blocking overbroad class definitions.⁴¹ “Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”⁴²

The Court closed with a quote that is as applicable to this discussion as it was to the *Amchem* case: “[T]he rulemakers’ prescriptions for class actions may be endangered by ‘those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste.’”⁴³ Thus, although the

³² *Id.* at 603-04.

³³ *Id.* at 604.

³⁴ *Amchem*, 521 U.S. at 604.

³⁵ *Id.*

³⁶ *Id.* at 604-05.

³⁷ *Id.* at 605, 607-08.

³⁸ *Id.* at 608.

³⁹ *Amchem*, 521 U.S. at 629.

⁴⁰ *Id.* at 617-18 (quoting FED. R. CIV. P. 1).

⁴¹ *Id.* at 620.

⁴² *Id.*

⁴³ *Id.* at 629 (quoting C. WRIGHT, LAW OF FEDERAL COURTS 508 (5th ed. 1994))

Amchem settlement was a creative way to potentially solve what seemed an intractable problem, ultimately the wisdom of certifying a class of absent members, represented by counsel that had a conflict – and whom they had never met – proved to be a use of Rule 23 that was just too enthusiastic.⁴⁴ In response, Congress finally decided to act. It has approved changes to Rule 23⁴⁵ and is still considering the Class Action Fairness Act,⁴⁶ both of which are discussed in more detail below.

III. CHANGES TO RULE 23

Certain changes to Rule 23 of the Federal Rules of Civil Procedure and class action procedure became effective on December 1, 2003.⁴⁷ Primarily in response to the *Amchem* case discussed above, the changes to Rule 23 are a step towards curbing what has become a system highly susceptible to abuse. The following is a look at those changes and an explanation as to why these changes effectuate a system that can better serve the judiciary and the litigant alike. By clarifying class action procedure, the rulemakers attempted to improve what many have thought to be an unmanageable system.⁴⁸

In August 2001, the Advisory Committee on Civil Rules submitted its proposed Rule 23 amendments to the Judicial Conference.⁴⁹ After circulation to the bench and bar and two public hearings where over forty witnesses testified, the rules were recommended for approval.⁵⁰ Focusing “on class-action procedures rather than on substantive certification standards,” the amendments were a “balanced and neutral attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device.”⁵¹ Focusing on the “rapid changes” modern complex litigation had imposed on Rule 23 and the problems arising from such litigation, the Judicial Conference approved the rules with the hope of streamlining class action procedures.⁵² In doing so, the amendments focus on four areas of class action procedure: when certification decisions and notice must be made; how judges are to oversee class action settlements; the appointment of class

(internal bracketing omitted).

⁴⁴ *Amchem*, 521 U.S. at 629.

⁴⁵ See *infra* Appendix A.

⁴⁶ See *infra* Appendix B.

⁴⁷ FED. R. CIV. P. 23.

⁴⁸ REPORT OF THE JUDICIAL CONF. COMM. ON RULES OF PRACTICE AND PROCEDURE 13 (Sep. 2002), available at <http://www.uscourts.gov/rules/jc09-2002/Report.pdf>.

⁴⁹ *Id.* at 8.

⁵⁰ *Id.*

⁵¹ *Id.* at 8-9.

⁵² *Id.* at 8.

action counsel; and how counsel is to be compensated.⁵³

A. Certification Under the New Rule

One of the most significant changes to Rule 23 is the new criteria clarifying when and how class certification is to occur.⁵⁴ Before the new amendments, certification under Rule 23(c)(1) was to occur “as soon as practicable.”⁵⁵ Under the new amendments, certification is to take place “at an early practicable time.”⁵⁶ While the language has not been altered drastically, in changing its certification procedure, the advisory committee indicated that its purpose was to allow some deferment in certification in order that some discovery into the “merits” of the case may be conducted.⁵⁷ The purpose of this deferment and discovery is to allow both the parties and the presiding judge a chance to better understand the issues presented in the case and make certification decisions with as much pertinent information as possible.⁵⁸ The advisory committee acknowledges that some discovery will be necessary to aid the court in making its certification decision.⁵⁹ It makes clear that “certification discovery” is to be treated differently than the usual “merits discovery,” which normally takes place after certification has been resolved.⁶⁰ Because of this, the presiding judicial officer should closely supervise the certification discovery.⁶¹ The advisory committee also makes clear that, while some delay in the certification procedure may be necessary, the judge should “ensure that the certification decision is not unjustifiably delayed.”⁶²

The addition of Rule 23(c)(1)(B) provides clear guidance for what the judge must include in a certification order. A class action certification order “must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).”⁶³ After a certification order is entered, however, Rule 23(c)(1)(C) sets out new criteria for amending the original certification order. Prior to the December 2003 amendment, Rule 23(c)(1) allowed for the granting of conditional class certification and the amendment or alteration of any class certification order

⁵³ FED. R. CIV. P. 23(c),(e),(g),(h).

⁵⁴ FED. R. CIV. P. 23(c).

⁵⁵ FED. R. CIV. P. 23(c)(1) (repealed 2003).

⁵⁶ FED. R. CIV. P. 23(c)(1)(A).

⁵⁷ FED. R. CIV. P. 23(c)(1)(A) advisory committee’s note.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² FED. R. CIV. P. 23(c)(1)(A) advisory committee’s note.

⁶³ FED. R. CIV. P. 23(c)(1)(B).

until a decision on the merits was rendered.⁶⁴ Under the new rule, the court cannot conditionally grant its certification order but can alter or amend it any time before final judgment.⁶⁵ By eliminating the potential for conditional class certification, the advisory committee maintains that class certification should be refused until the necessary requirements have been met.⁶⁶

The advisory committee also attempted to shore up any ambiguity as to when amendment or alteration can take place. In particular, the advisory committee was concerned with bifurcated trials.⁶⁷ In that instance, a decision on the merits is rendered at the time of the liability verdict, but amendment or alteration of the class certification may be necessary in order to effectuate a smoother determination of damages.⁶⁸ The new amendment now allows for this type of alteration or amendment where the jury verdict makes it necessary.⁶⁹

In summary, the amendments discussed above clarify the certification process and provide for more judicial supervision and involvement. The amendments attempt to resolve some of the conflict seen throughout U.S. courts in terms of when and how to certify a class. Of particular interest is that courts can no longer grant conditional certification but must refuse certification until Rule 23's requirements are met.⁷⁰ While courts are still free to amend should issues or party positions change, the certification decision must now be one of the first conclusive decisions of the litigation. These new amendments allow for more flexibility by permitting some discovery prior to the certification decision but deny a court's ability to grant certification on a tentative basis.

B. Judicial Oversight of Class Action Settlements

Perhaps the most significant changes to Rule 23 are the amendments governing judicial review of class action settlements.⁷¹ The goal in amending the class action settlement rule was to "assure adequate representation of class members

⁶⁴ FED. R. CIV. P. 23(c)(1) (repealed 2003).

⁶⁵ FED. R. CIV. P. 23(c)(1)(C).

⁶⁶ FED. R. CIV. P. 23(c)(1)(C) advisory committee's note.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ FED. R. CIV. P. 23(c)(1)(C). An additional amendment to FED. R. CIV. P. 23(c)(2) gives the presiding court the authority to direct notice of certification or amendments in the certification order to 23(b)(1) and 23(b)(2) classes should it deem it necessary. FED. R. CIV. P. 23(c)(2)(A). The Committee cautions that the ordering of notice should be "exercised with care." FED. R. CIV. P. 23(c)(2)(A) advisory committee's note. Notice is already required for (b)(3) classes. FED. R. CIV. P. 23(c)(2)(B).

⁷⁰ See FED. R. CIV. P. 23(c)(1)(A).

⁷¹ FED. R. CIV. P. 23(e).

who have not participated in shaping the settlement.”⁷² Pursuant to the newly amended Rule 23(e)(1)(A), approval of the settlement of class actions or potential class action claims is only required if “the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.”⁷³ In other words, court approval of settlements is only necessary in cases where a class has been certified. In addition to resolving the ambiguity as to when settlement approval is required, amendments to Rule 23(e)(1)(B) now require notice of the settlement to those class members who would be bound by the settlement.⁷⁴ If the settlement is to bind more than the class representatives through either issue or claim preclusion, each of the class members affected must be notified.⁷⁵ If the settlement is only to bind class representatives individually, no notice is necessary.⁷⁶

Rule 23(e)(1)(C) requires that, when the settlement would bind class members, the court conduct a hearing and make specific findings as to whether the settlement is “fair, reasonable, and adequate.”⁷⁷ The “fair, reasonable and adequate” standard is a familiar standard that courts have consistently applied in the majority of class action settlements and which the advisory committee adopted for application to all settlement approval processes.⁷⁸ The court’s findings upon review are to “be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.”⁷⁹ In other words, the new settlement amendments are intended to not only protect the individual class member but to allow for a more accurate and understandable review process.

The new Rule 23 also addresses what parties must disclose to the court regarding their settlement agreements. Rule 23(e)(2) reinforces the basic requirement that the parties disclose all terms of settlement or compromise that need approval.⁸⁰ In addition, Rule 23(e)(2) requires the parties to disclose any other agreements made in connection with the settlement.⁸¹ According to the advisory committee notes, this amendment “aims instead at related undertakings that, although seemingly separate, may

⁷² FED. R. CIV. P. 23(e) advisory committee’s note.

⁷³ FED. R. CIV. P. 23(e)(1)(A) advisory committee’s note.

⁷⁴ FED. R. CIV. P. 23(e)(1)(B).

⁷⁵ FED. R. CIV. P. 23(e)(1)(B) advisory committee’s note.

⁷⁶ *Id.*

⁷⁷ FED. R. CIV. P. 23(e)(1)(C).

⁷⁸ JUDICIAL CONF. REPORT, *supra* note 48, at 13.

⁷⁹ FED. R. CIV. P. 23(e)(1)(C) advisory committee’s note.

⁸⁰ FED. R. CIV. P. 23(e)(2). *See also* FED. R. CIV. P. 23(e)(2) advisory committee’s note.

⁸¹ FED. R. CIV. P. 23(e)(2).

have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others.”⁸² Now, not only do the courts have the right to review all terms of the settlement agreement before them, they also have the right to require that any side agreements made in connection with the settlement be disclosed.

Perhaps one of the most discussed amendments to Rule 23, 23(e)(3) provides that the court has the discretion to order a second opt out opportunity if it deems necessary.⁸³ In its provision, the advisory committee explains that a second opt out opportunity can be ordered by the court in those instances when the class has already been certified and the class members’ first choice to opt out expired before notice of the settlement was received.⁸⁴ By allowing individual class members a choice whether to be bound by the settlement, the amendment provides “added assurance to the supervising court that a settlement is fair, reasonable, and adequate. It is just the sort of ‘structural assurance of fairness,’ mentioned in *Amchem Products Inc.*, that permits class actions in the first place.”⁸⁵ When combined with the individual class members’ right to object to a proposed settlement, the Rules have expanded protection of the individual class members, particularly in instances where he or she will be bound by the settlement.⁸⁶

By expanding the role of the judiciary in the settlement process, the revised Rule 23 now creates a more accurate and class member friendly process. Courts now play a prominent role in each step of the settlement process and are given the ability to better effectuate the process. Ambiguities that once thwarted the settlement process have been clarified. Most importantly, the role of the court, the expanded method of review, and the ability for class members to opt out in particular situations, allow a court to better ascertain if the settlement before it is truly “fair, reasonable, and adequate.”⁸⁷

C. A Brief Look at the Changes of Class Counsel Appointment and Compensation

Two other major amendments to Rule 23 deserve mention. Rule 23(g) codifies the common practices of courts in scrutinizing class action counsel. The rule builds on what courts have already

⁸² FED. R. CIV. P. 23(e)(2) advisory committee’s note.

⁸³ FED. R. CIV. P. 23(e)(3).

⁸⁴ FED. R. CIV. P. 23(e)(3) advisory committee’s note.

⁸⁵ JUDICIAL CONF. REPORT, *supra* note 48, at 15.

⁸⁶ See FED. R. CIV. P. 23(e)(4).

⁸⁷ FED. R. CIV. P. 23(e)(1)(C).

done and “fill[s] the gap by articulating the responsibility of class counsel and providing an appointment procedure.”⁸⁸ The new amendments provide courts with guidelines in appointing class counsel for both the certification and litigation stages of the class action.⁸⁹ In addition, the rule sets forth specific criteria for class counsel and even gives the court the power, should it feel necessary, to order disclosure of the proposed terms of an attorney fee award.⁹⁰ As with the two areas above, the Rule’s definition of how class counsel should be appointed provides better protection for all class members and contributes to the smooth progression of a class action suit.

In addition to new limitations on the appointment of counsel, Rule 23(h) provides new criteria regarding review of attorney fees. “[D]esigned to work in tandem with new subdivision (g),” this new subsection applies to civil actions where a class has already been certified.⁹¹ If the Court is authorized by law or party agreement to award attorney fees, this new subsection provides a format for how those awards are to be calculated and mandates that such awards be deemed reasonable by the court.⁹² By allowing the court to monitor the award of attorney fees, requiring class members be notified, and ordering a hearing on any objections to the award, this new amendment combines with its counterpart to protect the rights of class members and curb potential abuses of the class action process.

IV. THE CLASS ACTION FAIRNESS ACT

Despite the protections afforded by the new Rule 23, the current class action system is still susceptible to abuses by state and local courts, particularly in multi-state class action cases. Congress has found that “[o]ver the past decade, there have been abuses of the class action device that have (A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system.”⁹³ Abuses by state and local courts have kept “cases of national importance out of federal court,” sometimes demonstrated “bias against out-of-State defendants,” made judgments that imposed one state’s law on other States, and bound “the rights of the residents of those

⁸⁸ JUDICIAL CONF. REPORT, *supra* note 48, at 17.

⁸⁹ See FED. R. CIV. P. 23(g)(1)(A), (B).

⁹⁰ FED. R. CIV. P. 23(g)(1)(C).

⁹¹ FED. R. CIV. P. 23(h) advisory committee’s note.

⁹² *Id.*

⁹³ 150 CONG. REC. S57 (daily ed. Jan. 20, 2004) (reporting S.A. 2232, amendments to S. 274).

States.”⁹⁴

In response, Congress drafted The Class Action Fairness Act of 2003.⁹⁵ The Act is intended to:

(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.⁹⁶

Although some might argue that class actions should be abolished altogether, Congress found that they “are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties” aggregated into a single action.⁹⁷ Therefore, Congress has concluded that federal reform is the preferred solution over outright abolishment.

Although the fate of the proposed Act is uncertain at the time of this Article’s publication, recent actions indicate that the proposed legislation will probably pass.⁹⁸ The House version was introduced and passed as H.R. 1115,⁹⁹ and the Senate version was introduced as S. 274 and 1751.¹⁰⁰ S. 274 passed the Senate judiciary committee, but was stalled by filibuster when brought to the floor for a vote.¹⁰¹ A vote for cloture was taken October 22, 2003, but defeated 59-39, and the delay continued.¹⁰² However, on January 20, 2004, Senator Grassley (R-IA), the Bill’s original sponsor, proposed amendments designed to garner the votes necessary to end the debate and allow for a final vote.¹⁰³ Then,

⁹⁴ *Id.*

⁹⁵ See *infra* Appendix B.

⁹⁶ 150 CONG. REC. S57 (daily ed. Jan. 20, 2004) (reporting S.A. 2232, amendments to S. 274).

⁹⁷ *Id.*

⁹⁸ However, the proposed Act has been subject to heated debate. Compare 149 CONG. REC. S12,987 (daily ed. Oct. 22, 2003) (statement of Sen. Kennedy) (arguing that the Class Action Fairness Act is “a radical shift in Federal law” to support corporate interests), with 149 CONG. REC. S12,994 (daily ed. Oct. 22, 2003) (statement of Sen. Chambliss) (arguing that the Act promotes federalism by limiting state control over national policies).

⁹⁹ It passed on June 12, 2003 by a vote of 253-170. *Final Vote Results for Roll Call 272*, <http://clerk.house.gov/EVS/2003/roll272.xml> (June 12, 2003).

¹⁰⁰ Senate Bill 274 is the version that went forward, while Senate Bill 1751 died before it went to Committee. See 150 CONG. REC. S57 (daily ed. Jan. 20, 2004); 149 CONG. REC. S13,004 (daily ed. Oct. 22, 2003).

¹⁰¹ Ameet Sachdev, *Coupon Awards Reward Whom?*, CHI. TRIB., Feb. 29, 2004, Business, at 1.

¹⁰² U.S. Senate Roll Call Votes 108th Congress - 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00403 (Oct. 22, 2003).

¹⁰³ See 150 CONG. REC. S57 (daily ed. Jan. 20, 2004) (reporting SA 2232, amendments to S. 274).

on February 10, 2004, Senator Grassley reintroduced the bill as S. 2062, which was placed on the legislative calendar February 11, 2004.¹⁰⁴ After three attempts to pass this important legislation in the last five years, Congress may finally succeed in giving our class action system a much-needed overhaul.¹⁰⁵

One of the major concerns addressed by the Act is finding the right balance between respect for state autonomy, the plaintiff's right to choose the forum, and national desires for efficiency, consistency, and fairness.¹⁰⁶ Congress is concerned that by hearing certain class actions in state courts, cases of national importance are kept out of federal court. This allows for bias against out-of-state defendants and imposes one state's view of the law on other states and their residents. This contradicts the intent of the framers of the Constitution with respect to diversity jurisdiction.¹⁰⁷

Congress addressed these federalism concerns by redefining diversity jurisdiction and the parties' ability to remove to federal court, while maintaining reasonable limits on when they may do so. Under the proposed legislation, where the aggregated amount in controversy for all plaintiffs exceeds \$5,000,000,¹⁰⁸ most civil cases may be removed to federal court when (1) "any member of a class of plaintiffs is a citizen of a [state] different from any defendant," or (2) any plaintiff or defendant is from a foreign state and parties on the other side are citizens of a U.S. state.¹⁰⁹ Class actions that are excluded from this provision include those where (1) a primary defendant is a state, state official, or "other governmental entit[y] against whom the district court may be foreclosed from ordering relief," or (2) there are fewer than 100 plaintiffs.¹¹⁰ Claims involving securities or corporate governance are also excluded.¹¹¹ However, the Senate and House versions of the Bill differ on who may remove to federal court. Both agree that any defendant may remove,¹¹² but only the House version permits any plaintiff class member to

¹⁰⁴ See 150 CONG. REC. S953 (daily ed. Feb. 11, 2004); 150 CONG. REC. S1191 (daily ed. Feb. 11, 2004).

¹⁰⁵ See Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 510 (2000) [hereinafter Schwartz, *Federal Courts*].

¹⁰⁶ See 150 CONG. REC. S57 (daily ed. Jan. 20, 2004) (reporting S.A. 2232, proposed amendments to S. 274).

¹⁰⁷ *Id.*

¹⁰⁸ Excluding interest and costs.

¹⁰⁹ 150 CONG. REC. S58 (daily ed. Jan. 20, 2004).

¹¹⁰ *Id.*

¹¹¹ *Id.* at S59.

¹¹² *Id.*; H.R. 1115, 108th Cong. § 5 (2003).

remove, even without the consent of all class members.¹¹³

Once a motion for removal is made, the district court *may* decline to exercise diversity jurisdiction if it finds that, based on the totality of the circumstances, it should do so in the interests of justice.¹¹⁴ The court may refuse to exercise jurisdiction when “greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.”¹¹⁵ The court should also consider if: (1) “the claims asserted involve matters of national or interstate interest;” (2) “the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;” (3) the case was pleaded specifically to avoid federal jurisdiction; (4) the selected forum has a special connection between “the class members, the alleged harm, or the defendants;” (5) there are substantially more plaintiffs from the forum state compared to the number of plaintiffs from other states; and (6) other class actions asserting the same or similar claims have been filed in the three years preceding the action in question.¹¹⁶

Furthermore, a district court *must* decline jurisdiction in two instances: first, when more than two-thirds of all plaintiffs and the primary defendants “are citizens of the State in which the action was originally filed;” second, when more than two-thirds of all proposed plaintiffs are citizens of the state in which the action is filed and at least one primary defendant (one “from whom significant relief is sought . . . [and] whose alleged conduct forms a significant basis for the claims asserted”) is a citizen of the state in which the action was filed.¹¹⁷ In addition, “the principal injuries resulting from the alleged conduct or any related conduct of each defendant” must have occurred within the state where the action was filed, and no other class action asserting the same claim may have been filed against the defendant within the previous three years.¹¹⁸

These changes to diversity jurisdiction will result in a more efficient judicial system, both at the state and federal levels, benefiting consumers, defendants, and the public as a whole. It will ensure that plaintiffs with similar claims against national entities, regardless of where they live, will be treated fairly and

¹¹³ H.R. 1115, 108th Cong. § 5 (2003).

¹¹⁴ 150 CONG. REC. S58 (daily ed. Jan. 20, 2004).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

consistently. It also permits defendants to address class action claims once—saving them time and money and allowing them to get back to the business of stimulating the economy. The autonomy of each state and its citizens is respected by limiting the ability of other states to impose their laws in these areas.

Consumers are further protected by the Consumer Class Action Bill of Rights contained in Section 3 of this Act, which provides for judicial scrutiny of settlements involving coupons, develops an attorney fee structure designed to ensure real awards for plaintiffs, and requires notification to appropriate state and federal officials.¹¹⁹ Specifically, in any proposed settlement that involves awarding coupons to class members, the court may approve the settlement only after a hearing and only if it finds that the settlement is fair, reasonable, and adequate for class members.¹²⁰ The court also has the option of requiring that a portion of the value of any unclaimed coupons be donated to one or more charities chosen by the parties.¹²¹ Courts may only approve of settlements that require class members to pay attorney fees that result in a net loss “if the court makes a written finding that non-monetary benefits to the class member substantially outweigh the monetary loss.”¹²² The court may not approve a settlement that provides for greater payments to some class members solely because they are located closer to the court.¹²³

The Act also spells out how plaintiffs’ attorney fees are to be calculated. First, if the proposed settlement involves payment to class members by coupon, the portion of the attorney fees related to the coupon award will be based on the value of the redeemed coupons.¹²⁴ The court has the discretion to grant a motion for expert testimony to determine the value of the coupons to the class members.¹²⁵ Second, if any portion of the recovery of the coupons is not used to determine the attorney fees, the fees will be awarded “based upon the amount of time class counsel reasonably expended working on the action.”¹²⁶ This second method is also used for determining the fees for obtaining equitable relief, including an injunction, and requires approval by the court.¹²⁷ The statute permits the combination of the two

¹¹⁹ 150 CONG. REC. S57-58 (daily ed. Jan. 20, 2004).

¹²⁰ *Id.* at S57.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 150 CONG. REC. S57 (daily ed. Jan. 20, 2004).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

methods.¹²⁸

Within ten days of filing a proposed settlement, each participating defendant must provide notice to the appropriate state and federal officials.¹²⁹ The notice must include: (1) a copy of the complaint, materials filed with the complaint (except those available on the Internet), and any amended complaints; (2) “notice of any scheduled judicial hearing in the class action;” (3) any proposed or final notification to class members of their right to opt out or, if no such right exists, a statement that no right exists, and a proposed settlement; (4) “any proposed or final class action settlement;” (5) any contemporaneous settlement or agreement between the parties’ attorneys; (6) “any final judgment or notice of dismissal;” (7) the names and proportionate shares (or a reasonable estimate) of that State’s residents; and (8) any related judicial opinions.¹³⁰ A court may not give final approval of a settlement until at least 90 days after the last required notification.¹³¹ A class member may refuse to comply with or be bound by the settlement agreement if the class member can demonstrate that the defendants failed to notify the appropriate state and federal officials.¹³²

The sponsors designed the Act to protect consumers who they believed were “being taken for a ride by a renegade legal practice that often compensates them nominally—for example, with coupons—while their lawyers take home millions of dollars in fees.”¹³³ Indeed, “[t]he U.S. Chamber of Commerce Institute for Legal Reform has reported that every American consumer pays an annual ‘litigation tax,’ totaling in the hundreds of dollars, which comes in the form of higher prices for consumer products in order to offset the cost of ‘a litany of litigation.’”¹³⁴ Part of this cost is the result of some maneuvering by plaintiffs’ attorneys in naming defendants in such a way as to destroy diversity and ensure that the case is heard in the state court of their choice. Specifically, class action counsel will:

name local parties, such as retailers, wholesalers, and distributors, as co-defendants. The lawyers rarely intend to obtain a judgment against these local employers, who are dragged into the case simply to destroy diversity. This practice

¹²⁸ *Id.*

¹²⁹ 150 CONG. REC. S58 (daily ed. Jan. 20, 2004).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Schwartz, *Federal Courts*, *supra* note 105, at 483.

¹³⁴ Cher Gonzalez, *‘Plaintiff’s Bill of Rights’ Wouldn’t Just Help Businesses*, E. BAY BUS. TIMES, Nov. 15, 2002, available at <http://www.bizjournals.com/eastbay/stories/2002/11/18/editorial2.html>.

imposes legal costs on sellers. Ultimately, these costs are passed on to consumers in the form of tort taxes on the products and services they purchase.¹³⁵

Assuming that this legislation becomes law, such attempts at “gaming the system” will no longer hamper the federal courts’ ability to resolve meritorious, national class actions in a fair and just manner.

V. CONCLUSION

Taken together, the Rule changes now in effect and the Class Action Fairness Act, if passed, will work together to improve the way in which federal class actions will be litigated. For example, many class actions that have multi-state or national consequences are currently brought in state courts, where state rules may give trial judges substantial discretion with respect to whether to certify the class or approve the settlement. Moreover, it may be the case that local judges tend to engage in favoritism or are known to be “plaintiff – friendly.” The net result is that defendants’ due process rights may be violated when plaintiffs are permitted to litigate in a friendly forum. In addition, allowing class actions with national implications to be heard in state court sometimes permits state judges to set national policy in a manner that is essentially beyond review. Federal courts are better equipped to handle cases with national implications, and generally are more competent in certifying and managing these cases. Accordingly, allowing defendants (or unnamed plaintiffs) to remove seems sensible, and the above-described rule changes go far toward accomplishing that goal.

However, Congress should go a step further and bring multi-state class actions within the *exclusive* jurisdiction of the federal courts. Congress has the authority—it has already created areas of exclusive federal jurisdiction.¹³⁶ Federalizing class actions would ensure that proposed class actions would undergo sufficient scrutiny prior to certification.¹³⁷ It would also permit cases to be consolidated before a single court, thereby reducing the number of duplicative lawsuits. Lastly, federal courts are in a superior position to deal with complex class actions.¹³⁸

¹³⁵ Schwartz, *Federal Courts*, *supra* note 105, at 486.

¹³⁶ For example, federal courts have exclusive jurisdiction over matters sounding in bankruptcy, tax, maritime or admiralty law, securities litigation and copyright. 28 U.S.C. §§ 1333-34, 1338, 1346 (2003); 15 U.S.C. § 78aa (1999).

¹³⁷ State courts have, in the past, certified cases when class certification is inappropriate. *See, e.g.*, *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 441-42 (Fla. Dist. Ct. App. 2003) (reversing the trial court’s certification of a class of smokers and their survivors).

¹³⁸ *See* John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case*

More importantly, however, federalizing class actions would reduce the federalism concerns that arise when a state purports to render a decision in a multi-state class action.¹³⁹ As the Supreme Court noted in *Phillips Petroleum Co. v. Shutts*,¹⁴⁰ there are Constitutional limitations regarding the choice of the substantive law to be applied because the Full Faith and Credit Clause requires other states to recognize the judgment of the particular court.¹⁴¹ Federal courts will be less likely to automatically apply the forum state's law in cases in which some other choice of law would be more appropriate.

As a safeguard, in cases that are entirely local in character and the entire plaintiff class are residents of the forum state, state court would remain an option. However, in all other class actions that have, or purport to have, a national scope, the federal court should be the only alternative.

Out Of It . . . In State Court, 25 HARV. J.L. & PUB. POL'Y 143, 151-54 (2001).

¹³⁹ *Id.* at 153 (noting that "matters of interstate comity are more appropriately handled by federal judges appointed by the President and confirmed by the Senate"). See also 149 CONG. REC. S12,994 (daily ed. Oct. 22, 2003) (statement of Sen. Chambliss).

¹⁴⁰ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

¹⁴¹ *Id.* at 822-23.

APPENDIX A

Rule 23. Class Actions (current version)

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (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.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) 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

(B) 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; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; 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; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership

in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of

actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,

- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

- counsel's knowledge of the applicable law, and

- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs

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under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

APPENDIX B

The full text of the bill is as follows: **A BILL**

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

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

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) **SHORT TITLE-** This Act may be cited as the ‘Class Action Fairness Act of 2003’.

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

(c) **TABLE OF CONTENTS-** The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction for interstate class actions.

Sec. 5. Removal of interstate class actions to Federal district court.

Sec. 6. Report on class action settlements.

Sec. 7. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a) **FINDINGS-** Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

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(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES- The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL- Part V is amended by inserting after chapter 113 the following:

CHAPTER 114—CLASS ACTIONS

Sec.

1711. Definitions.

1712. Judicial scrutiny of coupon and other noncash settlements.

1713. Protection against loss by class members.

1714. Protection against discrimination based on geographic location.

1715. Prohibition on the payment of bounties.

1716. Clearer and simpler settlement information.

1717. Notifications to appropriate Federal and State officials.

Sec. 1711. Definitions

In this chapter:

(1) CLASS- The term 'class' means all of the class members in a class action.

(2) CLASS ACTION- The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

(3) CLASS COUNSEL- The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

(4) CLASS MEMBERS- The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(5) PLAINTIFF CLASS ACTION- The term 'plaintiff class action' means a class action in which class members are plaintiffs.

(6) PROPOSED SETTLEMENT- The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

Sec. 1712. Judicial scrutiny of coupon and other noncash settlements

The court may approve a proposed settlement under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.

Sec. 1713. Protection against loss by class members

The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that

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would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

Sec. 1714. Protection against discrimination based on geographic location

The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

Sec. 1715. Prohibition on the payment of bounties

(a) IN GENERAL- The court may not approve a proposed settlement that provides for the payment of a greater share of the award to a class representative serving on behalf of a class, on the basis of the formula for distribution to all other class members, than that awarded to the other class members.

(b) RULE OF CONSTRUCTION- The limitation in subsection (a) shall not be construed to prohibit a payment approved by the court for reasonable time or costs that a person was required to expend in fulfilling the obligations of that person as a class representative.

Sec. 1716. Clearer and simpler settlement information

(a) PLAIN ENGLISH REQUIREMENTS- Any court with jurisdiction over a plaintiff class action shall require that any written notice concerning a proposed settlement of the class action provided to the class through the mail or publication in printed media contain—

(1) at the beginning of such notice, a statement in 18-point or greater bold type, stating ‘LEGAL NOTICE: YOU ARE A PLAINTIFF IN A CLASS ACTION LAWSUIT AND YOUR LEGAL RIGHTS ARE AFFECTED BY THE SETTLEMENT DESCRIBED IN THIS NOTICE.’;

(2) a short summary written in plain, easily understood language, describing—

(A) the subject matter of the class action;

(B) the members of the class;

(C) the legal consequences of being a member of the class action;

(D) if the notice is informing class members of a proposed settlement agreement—

(i) the benefits that will accrue to the class due to the

settlement;

(ii) the rights that class members will lose or waive through the settlement;

(iii) obligations that will be imposed on the defendants by the settlement;

(iv) the dollar amount of any attorney's fee class counsel will be seeking, or if not possible, a good faith estimate of the dollar amount of any attorney's fee class counsel will be seeking; and

(v) an explanation of how any attorney's fee will be calculated and funded; and

(E) any other material matter.

(b) TABULAR FORMAT- Any court with jurisdiction over a plaintiff class action shall require that the information described in subsection (a)—

(1) be placed in a conspicuous and prominent location on the notice;

(2) contain clear and concise headings for each item of information; and

(3) provide a clear and concise form for stating each item of information required to be disclosed under each heading.

(c) TELEVISION OR RADIO NOTICE- Any notice provided through television or radio (including transmissions by cable or satellite) to inform the class members in a class action of the right of each member to be excluded from a class action or a proposed settlement, if such right exists, shall, in plain, easily understood language—

(1) describe the persons who may potentially become class members in the class action; and

(2) explain that the failure of a class member to exercise his or her right to be excluded from a class action will result in the person's inclusion in the class action.

Sec. 1717. Notifications to appropriate Federal and State officials

(a) DEFINITIONS-

(1) APPROPRIATE FEDERAL OFFICIAL- In this section, the term 'appropriate Federal official' means—

(A) the Attorney General of the United States; or

(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository

institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) APPROPRIATE STATE OFFICIAL- In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision

by that person, then the appropriate State official shall be the State attorney general.

(b) IN GENERAL- Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

(2) notice of any scheduled judicial hearing in the class action;

(3) any proposed or final notification to class members of—

(A)(i) the members' rights to request exclusion from the class action; or

(ii) if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

(c) DEPOSITORY INSTITUTIONS NOTIFICATION-

(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS- In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) STATE DEPOSITORY INSTITUTIONS- In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

(d) FINAL APPROVAL- An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED-

(1) IN GENERAL- A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

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(2) **LIMITATION-** A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

(3) **APPLICATION OF RIGHTS-** The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

(f) **RULE OF CONSTRUCTION-** Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.'

(b) **TECHNICAL AND CONFORMING AMENDMENT-** The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

1711.

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

(a) **APPLICATION OF FEDERAL DIVERSITY JURISDICTION-** Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

(d)(1) In this subsection—

(A) the term 'class' means all of the class members in a class action;

(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term 'class certification order' means an order issued by a court approving the treatment

of some or all aspects of a civil action as a class action; and

(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$2,000,000, exclusive of interest and costs, and is a

class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) Paragraph (2) shall not apply to any civil action in which—

(A)(i) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed; and

(ii) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed;

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

(C) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$2,000,000, exclusive of interest and costs.

(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the prerequisites of rule 23 of the Federal Rules of Civil Procedure.

(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction.

(C) In any action that is dismissed under this paragraph and is filed by any of the original named plaintiffs therein in the same State court venue in which the dismissed action was

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originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed under this paragraph that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed action was pending.

(7) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

(8) For purposes of this subsection and section 1453 of this title, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(9)(A) For purposes of this section and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) shall nevertheless be deemed a class action if—

(i) the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, and is not a State attorney general; or

(ii) monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact.

(B)(i) In any civil action described under subparagraph (A)(ii), the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims of individual class members.

(ii) Paragraphs (3) and (6) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to any civil action described under subparagraph (A)(i).

(iii) Paragraph (6) of this subsection, and subsections (b)(2) and (d) of section 1453 shall not apply to any civil action described under subparagraph (A)(ii).’

(b) CONFORMING AMENDMENTS-

(1) Section 1335(a)(1) is amended by inserting ‘(a) or (d)’ after ‘1332’.

(2) Section 1603(b)(3) is amended by striking ‘(d)’ and inserting ‘(e)’.

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

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

‘Sec. 1453. Removal of class actions

(a) DEFINITIONS- In this section, the terms ‘class’, ‘class action’, ‘class certification order’, and ‘class member’ shall have the meanings given such terms under section 1332(d)(1).

(b) IN GENERAL- A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

(1) by any defendant without the consent of all defendants;
or

(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

(c) WHEN REMOVABLE- This section shall apply to any class action before or after the entry of a class certification order in the action.

(d) PROCEDURE FOR REMOVAL- Section 1446 relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action.

(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS

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TO STATE COURTS- Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise.

(f) EXCEPTION- This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).’.

(b) REMOVAL LIMITATION- Section 1446(b) is amended in the second sentence by inserting ‘(a)’ after ‘section 1332’.

(c) TECHNICAL AND CONFORMING AMENDMENTS- The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

‘1453. Removal of class actions.’.

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL- Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT- The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that—

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) **AUTHORITY OF FEDERAL COURTS.** Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. EFFECTIVE DATE.

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