Order Code RL31859

CRS Report for Congress
Received through the CRS Web

Class Actions and Legislative Proposals in the 108th Congress: Class Action Fairness Acts of 2003 and 2004

Updated August 18, 2004

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Summary

The House has passed H.R. 1115 and the Senate Judiciary Committee has reported out S. 274 (both styled the Class Action Fairness Act of 2003). Each (1) creates a consumer class action bill of rights, and (2) allows the federal courts to try a greater number of large class action law suits (100 plaintiffs or more) arising out of state law where the parties come from diverse states. Current law requires that each plaintiff have suffered $75,000 in damages and that there be complete diversity before a state lawsuit may be filed in or removed to federal court, that is to say all of the plaintiffs must be citizens residing in different states than all of the defendants. The bills ease the complete diversity requirement and eliminate the requirement of individual damages of $75,000 as long as the damages suffered by the class as a whole is $5 million or more.

The consumer class action bill of rights in each proposal contains safeguards which provide for judicial scrutiny of coupon and other noncash settlements, protection against a proposed settlement that would result in a net loss to a class member, protection against discrimination based upon geographic location, and prohibition on a class representative receiving a greater share of the award.

S. 274/S. 1751 alone includes within its bill of rights explicit provisions for "plain English" settlement notices and settlement notifications for state and federal authorities. H.R. 1115 instead defers to the notice reforms recommended in the amendments to Rule 23 of the Federal Rules of Civil Procedure forwarded to Congress by the Supreme Court on March 27, 2003. H.R. 1115 alone permits pre-trial review of a lower federal court's grant or denial of class certification and makes its provisions retroactively applicable to suits filed before the date of enactment (but prior to class certification).

On October 21, 2003, Senator John Breaux introduced S. 1769 as an alternative bill which is considered to be much broader than S. 1751.

On December 15, 2003, Senator Dodd proposed Senate Amendment 2232 to S. 274, introduced in the Senate on January 20, 2004, by Senator Grassley. Most of these amendments are also incorporated into S. 2062 (the Class Action Fairness Act of 2004) which was introduced by Senator Grassley in the Senate on February 10, 2004.

On July 8, 2004, S. 2062 failed to get the 60 votes needed to proceed for further consideration which probably will aid the demise of the legislation for this legislative year.

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Background

In 2003, Class Action Fairness Acts were reintroduced in the House and Senate after previous legislation had died in the Congress.[1] Generally similar in content, each bill — H.R. 1115, and S. 274/S. 1751[2] — has three main sections: (1) an amendment to the federal diversity statute, 28 U.S.C. § 1332;[3] (2) a provision regarding removal;[4] and (3) a consumer class action "bill of rights."[5]

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[1] See CRS Report RL31506, *Class Actions and Proposed Reform in the 107th Congress: Class Action Fairness Act of 2002.* S. 274/S. 1751 and H.R. 1115 represent the fourth time class action legislation has been offered in Congress. In the 105th Congress, the Committee on the Judiciary marked-up and reported out the "Class Action Jurisdiction Act of 1999" (H.R. 3789) H.Rept. 105-402 (1998) (the bill was never considered by the full House) which was similar in most respects to H.R. 1115 and S. 274 in the 108th Congress. In the 106th Congress, the full House on September 23, 1999, passed the "Interstate Class Action Jurisdiction Act of 1999" (H.R. 1875) by a vote of 222-207, 145 *Cong.Rec.* H8595-595 (daily ed. Sept. 23, 1999). This bill was never voted on in the Senate although the Senate Judiciary Committee did report out a similar measure. S.Rept. 106-420 (2000). In the 107th Congress, H.R. 2341 passed the House on March 13, 2002, by a vote of 233-190, 148 *Cong.Rec.* H885-86 (daily ed. Mar. 13, 2002).

[2] S. 1751 is identical to S. 274 as reported out of the Senate Judiciary Committee with one exception concerning mass tort claims noted *infra* at n. 8.

[3] Diversity jurisdiction is the authority of federal courts to try cases arising out of state law when the parties are from different states. The federal jurisdiction section of each of the two bills amends Section 1332 to provide for federal jurisdiction in class actions where the aggregate amount in controversy of all individual claims exceeds $5 million and *any* member of the putative plaintiff class is a citizen of a state different from *any* defendant, in cases with less than one-third of the plaintiffs and the primary defendants come from the same state where the suit is filed. On the other hand, the Acts' expanded jurisdictional provisions would not apply to this section if two-thirds or more of the plaintiffs and the primary defendant come from the state where the suit is filed (or if the case involves less than $5 million, fewer than 100 class members, or state entities or officials as primary defendants). In between, in cases involving more than one-third but less than two-thirds of the plaintiffs and the primary defendant coming from the same state where the suit is filed, the federal courts would have discretion to try class actions after weighing five factors.

[4] The H.R. 1115 and S. 274 removal provisions allow any defendant or absent class member to remove a class action from state court to federal court if the minimal diversity and other requirements of Section 1332 are satisfied, regardless of whether a defendant is a citizen of

(continued...)

The Legislation

Section 1. Short Title (H.R. 1115 and S. 274/S. 1751).[6] The Act may be cited as the "Class Action Fairness Act of 2003." This section also states that it amends title 28 of the United States Code.

Section 2. Findings and Purposes of the Act. Both bills set out Congress' findings describing the: (1) circumstances in which class actions are valuable to our legal system; (2) abuses of the class action process that have harmed class members with legitimate claims and defendants that have acted responsibly, adversely affected interstate commerce, and undermined public respect for our judicial system; (3) the manner by which class members have been harmed by a number of actions taken by plaintiffs' lawyers, which provide little or no benefit to class members as a whole, including (i) plaintiffs' lawyers receiving large fees, while class members are left with coupons or other awards of little or no value, (ii) unjustified rewards made to certain plaintiffs at the expense of other class members, and (iii) confusing published notices that prevent class members from being able to fully understand and effectively exercise their rights; (4) abuses in class actions which 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 (i) keeping cases of national importance out of federal court, (ii) sometimes acting in ways that demonstrate bias against out-of-state defendants, and (iii) making judgments that impose their view of the law on other states and bind the rights of the residents of those states.

Section 3. Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. These sections would add seven (five in H.R. 1115) new sections to 28 U.S.C. which are intended to provide greater protections for class members. In particular, section 3 would add the following:

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[4] (...continued)
the state where the action was filed, and without the consent of other defendants or class members.

[5] The "bill of rights" portion of the proposed legislation requires a hearing and written findings before a court may approve any class settlement providing noncash benefits or requiring expenditure of funds in order to obtain the proposed benefits. Similarly, a court must make written findings in order to approve a settlement that obligates a class member to pay sums to class members in an amount that would result in a net loss to the class member. Further, the two bills prohibit approval of a settlement that pays class members higher amounts based solely on their economic proximity to the court or that pays a bounty to the class representatives (other than payment for reasonable time and cost).

H.R. 1115 and S. 274 provide that the Act's provisions apply to any civil action begun on or after the date of enactment of the Act. However, H.R. 1115 would also be retroactive to existing cases where a class has not been certified or when certification is entered on or after the date of enactment.

[6] S. 2062, 108th Cong., 2d Sess. (2004) (Class Action Fairness Act of 2004 was introduced by Senator Grassley in the Senate on Feb. 10, 2004).

- **Section 1711-Judicial scrutiny of coupon and other noncash settlements (Section 1712 in S. 274/S. 1751)**[7]

This provision is aimed at certain proposed settlements of class actions, in which the plaintiffs' lawyer and the defendant work out a settlement that provides class members with essentially valueless coupons while rewarding the lawyers with substantial attorneys' fees. To address this problem, this section provides that a judge "may approve a proposed settlement under which the class 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."

S. 2062 would require that attorneys fees be based either on (a) the proportionate value of the coupons actually redeemed by class members or (b) the hours actually billed in presenting the class action.

- **Section 1712-Protection against loss by class members (Section 1713 in S. 274/S. 1751)**

This provision provides that a judge may not approve a class action settlement in which the class member will be required to pay attorney's fees that would result in a net loss to the class members until after a hearing to determine whether the nonmonetary benefits to the class outweigh (or substantially outweigh in S. 274) the monetary loss, and if so making a written finding to that effect.

- **Section 1713-Protection against discrimination based on geographic location (Section 1714 in S. 274/S. 1751; deleted in S. 2062)**

This provision provides that a settlement may not award some class members a larger recovery than others solely because the favored members of the class are located closer to the courthouse in which the settlement is filed.

- **Section 1714-Prohibition on the payment of bounties (Section 1715 in Section in S. 274/S. 1751; deleted in S. 2062)**

This provision provides that a class action may not be settled on terms that award special and disproportionate bounties to the named class representative. A class representative will, however, be able to be compensated for his reasonable time or costs that were required to be expended in fulfilling his obligations as a class representative.

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[7] While there is no Consumer Class Action Bill of Rights section *per se* in S. 1769, it provides for contingent attorney fees to be based on the value of the coupon settlements. If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee to be paid to class counsel based on the recovery of the coupons shall be based on the value to class members of the coupons that are redeemed.

- **Section 1715-Class action definitions (Section 1711 in S. 274/S. 1751)**

(1) Class Action-The term is defined to include any civil action filed in federal district court under Rule 23 of the Federal Rules of Civil Procedure, as well as actions filed under similar rules in state court that have been removed to federal court.

(2) Class Counsel-The term is defined as "the persons who serve as the attorneys for the class members in a proposed or certified class action."

(3) Class Members-The term is defined as "the persons who fall within the definition of the proposed or certified class action."

(4) Plaintiff Class Action-The term is defined as "a class action in which class members are plaintiffs."

(5) Proposed Settlement-The term is defined as "an agreement that resolves claims in a class action, that is subject to court approval and that, if approved, would be binding on the class members."

- **Section 1716-Clearer and simpler settlement information (In S. 274/S. 1751 only; see Section 7 in H.R. 1115-Enactment of Judicial Conference Recommendations)**

This provision provides that class notices should present information in "plain English." The notices must be designed to attract the attention of class members by stating at the outset, in 18-point type, that the recipient is a plaintiff in a class action lawsuit and has legal rights that are affected by the settlement described in the notice. In addition, the notice must offer:

(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;
(D) detailed information about any proposed settlement, (i) including a description of the benefits for class members, (ii) the rights that class members will lose or waive through settlement, (iii) the obligations imposed on the defendant, and (iv) the amount of attorney's fee counsel will be seeking or, if not possible, a good faith estimate of such fee;
(E) any other material matter.[8]

S. 2062 would eliminate what was considered a complicated set of burdensome notice requirements for notice to potential class members and preserve the current federal law related to class notification.

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[8] H.R. 1115 as received in the Senate defers to the Supreme Court's recommendations relating to class action notification reform found in the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure which, in the absence of explicit Congressional action, become effective on December 1, 2003.

- **Section 1717. Notifications to appropriate federal and state officials (S. 274/S. 1751 only)**

This provision requires defendants to notify the appropriate state and federal official of the particulars of any class action settlement and delays the effective date of the settlement until 90 days after they have done so. The appropriate federal officials include the Attorney General and in the case of financial institutions the federal regulatory authorities. State officials entitled to notice include the authorities with regulatory jurisdiction over a defendant in any state in which any member of the class resides.

Section 4. Federal District Court Jurisdiction of Interstate Class Actions. Article III of the Constitution protects out-of-state litigants against the prejudice of local courts by allowing for federal diversity jurisdiction when the plaintiffs and defendants are citizens of different states. However, under current law, federal diversity jurisdiction for a class action does not exist unless every member of the class is a citizen of a different state from every defendant, and every member of the class is seeking damages in excess of $75,000.[9] This section in both bills would change the law by providing additional protection for out-of-state litigants by creating a minimal diversity rule for class actions and by determining satisfaction of the amount-in-controversy requirement by looking at the total amount of damages at stake.

Under the proposals, federal district courts receive original jurisdiction over any class action in which the amount in controversy, exclusive of interest costs, exceeds $5,000,000 and 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." This rule holds true if less than one-third of the plaintiffs and the primary defendants come from the state where the suit is filed; has no application if two-thirds or more of the plaintiffs and the primary defendants come from the state where the suit is filed; and applies at the discretion of the federal court if more than one-third but less than two-thirds of the plaintiffs and the primary defendants come from the state where the suit is filed.[10]

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[9] 28 U.S.C. § 1332. See also *Zahn v. International Paper Co.*,414 U.S. 291, 301 (1973)(The Supreme Court decided that in class actions based on diversity of citizenship, every single class member must satisfy the "matter [amount] in controversy" requirement of section 1332).

[10] S. 1751 would provide for the removal of class actions to federal court if less than one-third of the plaintiffs are from the same state as the primary defendant and the suit involves more than $5,000,000.00. S. 1769 substantially broadens the "two thirds/one-third" analysis to eliminate consideration of a defendant's state or residence in determining whether to remove an action to federal district court. Under S. 1769, there is no jurisdictional dollar amount and a class action could be removed to federal court if more than two-thirds of a putative class reside within the same state where the class action was filed, regardless of whether a defendant also resides in that state. Thus, S. 1769 would provide for the

(continued...)

In the exercise of their discretion, the federal courts must consider:[11]

— "Whether the claims asserted involve matters of national interstate interest"

— "Whether the claims asserted will be governed by laws other than those of the State in which the action was originally filed"

— "In the case of a class action originally filed in a State court, whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction"

— "Whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States"

— "Whether 1 or more class actions asserting the same or similar claims on behalf of the same or other persons have been or may be filed."

This section contains a similar class action definition as section 3, defining a class action as (A) any civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or a similar state statute or rule. It also deems to be class actions certain other types of civil actions: (1) an action seeking monetary relief on behalf of persons who are not parties to the action (unless the named plaintiff is the state attorney general); or (2) an action that asserts claims seeking monetary relief on behalf of 100 or more persons, in which the claims involve common questions of law or fact and are to be jointly tried.[12]

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[10] (...continued)
automatic removal of a class action in which fewer than one-third of the class members reside in the same state where the class action was filed, regardless of the citizenship of the defendant. If between one-third and two-thirds of the class members reside in the same state where the class action was filed, the courts would have the discretion to determine whether the case would be removed, regardless of the citizenship of the defendant.

[11] S. 2062 would expand the local class action exception further. It would provide for broader and greater judicial discretion by authorizing Federal courts to consider any "district nexus" between the forum where the action was brought and the class members, the alleged harm, or the defendants.

[12] The House bill deviates from the Senate version with regards to two kinds of lawsuits that are not class actions: (1) "private attorney general" cases brought by a named plaintiff other than a state attorney general and (2) non-class action cases involving 100 or more plaintiffs, known as "mass tort" cases. 149 Cong. Rec. at H5295. H.R. 1115 would impose the new class action rules on both cases. However, S. 274 but not S. 1751 exempts both from the amendments to Federal Rule of Civil Procedure 23. *Id.* S. 1769 would also exempt "mass tort" cases from the new rule. S. 2062 would impose the class action rules on "mass action" cases.

Again, in order that actions lacking national implications remain in state court, the minimal diversity rules does not apply in any action where "(A) two-thirds or more 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; (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."

Section 5. Removal of Interstate Class Actions to Federal District Court. This section would allow class action lawsuits to be removed from state court to federal court, either by a defendant or by any plaintiff who is not a named or representative class member.[13]

Section 6. Appeals of Class Action Certification Orders (H.R. 1115 only). This section provides that orders granting or denying class certification may be appealed if notice of appeal is filed within 10 days after entry of the order. It also provides that discovery shall be stayed during the pendency of the appeal unless the judge finds that specific discovery is necessary to preserve evidence or to prevent undue prejudice to a party.

Section 6. Report on Class Action Settlements (Section 6 in S. 274/S. 2062). This provision directs the Judicial Conference of the United States to report to the Judiciary Committees of the Senate and House of Representatives within 12 months of the enactment with recommendations on the best practices to further ensure fairness in class action settlements with regard to class members and attorneys' fees which should appropriately reflect the extent and success of the attorneys' efforts.

Section 7. Effective Date (Section 8 in H.R. 1115). This section provides that the legislation applies to any civil action commenced on or after the date of enactment. In the case of H.R. 1115 it also applies to civil actions filed but not certified as class actions prior to enactment. An amendment adopted by the House Judiciary Committee in reporting H.R. 1115 would apply the terms of the bill to some pending class action suits thereby causing them to be moved to federal courts thus changing the original language that would make the legislation effective only after the bill was signed by the President.

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[13] Under H.R. 1115, any defendant, named plaintiff or unnamed member of a plaintiff class may seek removal at any time. Under S. 1751, while any defendant or named plaintiff may seek removal before or after the entry of a class certification order, unnamed class members may not seek removal until a class certification order is entered. Under H.R. 1115 and S. 1751, class members would have 30 days after receiving notice of the action to file a notice of removal. Allowing unnamed class members to remove an action to federal district court, both bills offer class members the same flexibility as the defendants regarding removal.

S. 1769 would limit the ability of defendants to remove class actions to federal court to within 30 days after the filing of the complaint, and it would also establish a time period in which the structure of the plaintiff's class must be determined.

Section 7. Enactment of Judicial Conference Recommendations (H.R. 1115 and S. 2062). This section, deferring the proposed class action notification reforms, would put into effect the pending Federal Rule of Civil Procedure 23 amendments simultaneously with the enactment of the bill should the bill pass prior to December 1, 2003.

Section 8. Effective Date (H.R. 1115 only). This section provides that the provisions apply to: (1) civil actions commenced on or after the date of enactment of the bill, and (2) any civil action commenced before the date of enactment in which a class certification order is entered on or after the date of enactment. It further provides that in cases commenced before the date of enactment, the 30-day removal period would begin on the date on which the class certification order is entered by a state court.

Section 8. Rulemaking Authority of Supreme Court and Judicial Conference (S. 2062 only). This section provides the authority for the Judicial Conference and the Supreme Court to propose and prescribe the general rules of practice and procedure for the federal courts.

Section 9. Effective Date (S. 2062 only). This section provides that the legislation applies to any civil action commenced on or after the date of enactment.

Recent Legislative Action

On June 12, 2003, the House of Representatives passed H.R. 1115 by a vote of 253-170.[14] As amended on the floor of the House, the bill would allow class actions to be moved from state to federal court if fewer than one-third of the plaintiffs in a case are from the same state as the defendant, and the claims are at least $5,000,000 or more.[15] These amendments will broaden the category of class action cases that would remain in state courts in two ways:[16] (1) the amendment raises the aggregate amount in controversy required for federal court jurisdiction from $2,000,000 and to $5,000,000, and (2) it would allow federal courts to exercise their discretion to return intrastate class actions in which local law would apply after weighing five factors. This discretion would only apply when more than one-third and less than two-thirds of the plaintiffs and the primary defendants are citizens of the same state where the suit was filed. If less than one-third are citizens of the same state, the case would automatically be eligible for federal court jurisdiction under the new diversity Rule 23 of the Federal Rules of Civil Procedure in H.R. 1115. Similarly, if more than two-thirds and the primary defendants are citizens of the same state where the case is filed, it would not be subject to the new rules in the bill.

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[14] 149 Cong. Rec. H5307 (daily ed. June 12, 2003).

[15] *Id.* at H5294.

[16] These amendments by Representative F. James Sensenbrenner, Jr. are similar to those offered by Senator Dianne Feinstein and adopted by the Senate Judiciary Committee (see S. 274, Section 4).

On October 17, 2003, the Senate began the consideration of S. 274. Everything following the enacting clause was struck and the text of S. 1751[17] was inserted in lieu thereof and considered as original text for the purpose of amendment.[18]

On October 21, 2003, Senator John Breaux introduced S. 1769, "National Class Action Act of 2003," as an alternative bill which is considered to be much broader than S. 1751.[19]

On October 22, 2003, the Senate rejected, by one vote,[20] an attempt to limit debate on S. 1751 in the form of a cloture motion which in effect narrowed the chances for enactment of class action reform at this time.

On December 15, 2003, Senator Dodd proposed Senate Amendment 2232 to S. 274 which was introduced in the Senate on January 20, 2004,[21] by Senator Grassley. Similar language to that contained in Senate Amendment 2232 is also reflected in S. 2062 (the Class Action Fairness Act of 2004) which was introduced in the Senate on February 10, 2004 [22]and placed on the Senate Calendar on February 11, 2004.[23]

An attempt was made by the proponents of S. 2062 to move the bill on June 1, 2004, but it was withdrawn due to lack of support to end debate or for cloture which would have required 60 votes.[24]

On July 8, 2004, the proponents of S. 2062 again failed to get 60 votes needed to proceed for further consideration of the bill.[25] The vote was 44-43.[26] This latest action will probably aid the demise of the legislation for this legislative year.

Pro/Con

Although balanced by the enhanced class member protection features, the jurisdictional and removal components of H.R. 1115 and S. 274 are much like their antecedents in the 106th and107th Congresses. Proponents argue:

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[17] S. 274 was renumbered to S. 1751 (149 Cong. Rec. S12869 (daily ed. Oct. 20, 2003).

[18] 149 Cong. Rec. S12853 (daily ed. Oct. 17, 2003).

[19] 149 Cong. Rec. S12969 (daily ed. Oct. 21, 2003).

[20] The cloture motion failed 59-39. 149 Cong. Rec. S13007 (daily ed. Oct. 22, 2003).

[21] 150 Cong. Rec. S57 (daily ed. Jan. 20, 2004).

[22] 150 Cong. Rec. S792 (daily ed. Feb. 10, 2004).

[23] 150 Cong. Rec. S1014 (daily ed. Feb. 11, 2004).

[24] 150 Cong. Rec. S6249-50 (daily ed. May 21, 2004).

[25] *Id*. at S7818-19.

[26] *Id*. at 27819.

- Class action process has been manipulated in recent years;[27]
- U.S. companies have been flooded with labor and employment litigation, much of which has been entirely without merit;[28]
- Proposed changes in the law will increase sanctions against lawyers who bring frivolous claims to court.[29]

Opponents object that they:

- Would clog an already overburdened federal court system and slow the pace of certifying class action cases;[30]
- Are inconsistent with the principles of federalism;[31]
- Would make consumer and public interest litigation more difficult to bring, more expensive, and more burdensome.[32]

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[27] H.Rept. 108-144, at 8.

[28] *Id*. at 13-14.

[29] *Id.* at 8 and 46-47.

[30] H.Rept. 107-370, at 125-26 (Dissenting views of Reps. Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson-Lee, Waters, Meehan, Delahunt, and Baldwin).

[31] *Id.* at 126-29.

[32] *Id*. at 129-34. The legislation, they argue, would create numerous barriers to participating in class actions by permitting defendants to remove most state class action suits to federal court. The removal from state court to federal court would leave consumers shuttling back and forth between state and federal court because while a consumers' class could meet state law class certification requirements, it could fail to meet the class certification requirements set forth in federal law. The result, they contend, will be the federal courts' denial of class certification and dismissal of the case. See also, S.Rept. 106-420, at 51-60 (2003) (Minority views of Sens. Leahy, Kennedy, Biden, Feingold and Torricelli).